SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 12-120
District Docket No. IIIB-2010-0035E

IN THE MATTER OF	:
THOMAS KANE	:
AN ATTORNEY AT LAW	:

Decision

Argued: July 19, 2012

Decided: October 10, 2012

Cristal M. Holmes-Bowie appeared on behalf of the District IIIB Ethics Committee.

David H. Dugan, III appeared on behalf of respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter was before us on a recommendation for discipline (reprimand) filed by the District IIIB Ethics Committee (DEC). Respondent was charged with having violated RPC 3.4(g) (threatening to present criminal charges to obtain an improper advantage in a civil matter) and RPC 4.2 (improper communications with a party represented by counsel). In his

answer and, again, during his testimony before the DEC, respondent admitted almost all of the factual allegations of the complaint. We determine to impose a reprimand.

Respondent was admitted to the New Jersey bar in 2001. He has no prior discipline.

From February through July 2010, respondent acted pro se in a divorce proceeding filed by his then wife, Shannon Kelly Kane (Kelly).

Thomas Paradise, a law partner and general counsel for the Fox Rothschild law firm, filed the grievance in this matter, after respondent sent a series of emails to Kelly and to an attorney at the firm, Jennifer Millner, Esq., who represented Kelly in the divorce.

On February 19, 2010, the Honorable Mary C. Jacobson, then P.J.S.C., granted the judgment of divorce, and granted Kelly's "oral application for Fox Rothchild, L.L.C., to be relieved as counsel." Millner testified that, despite that order, she continued to advise Kelly:

> There were some outstanding issues with regard to child support which is further indicated in this order, we felt that although we understood she could no longer afford our fees, that it just wasn't morally right to abandon her at that point in time. So I spoke with one of the senior partners

> at the office as well as our chief financial officer in Philadelphia and I was granted permission to see at least the child support issue through. So we never filed a substitution of attorney with the Court.
>
> [T22-22 to T23-7.][1]

Respondent claimed to have been unclear about the exact status of the representation in the months that followed, when he sent a series of communications, including emails and a proposed settlement document to Kelly. That settlement document is at the heart of this matter.

Respondent's ethics problems arose in earnest on July 6, 2010, when he sent an email to Kelly and Millner, attaching a document titled "Confidential Settlement Communication." It was purportedly offered as a proposed settlement of all outstanding issues between the parties. The email stated that, if Kelly would agree to settle the matter, respondent would execute a confidentiality and non-defamation agreement to prevent him from "reporting the misconduct outlined in the attached complaint to any law enforcement agencies or bar disciplinary authorities."

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[1] "T" refers to the October 19, 2011 DEC hearing transcript.

The attached "confidential" document was an eighty-page draft civil RICO complaint. It alleged that Kelly, Millner, and Kelly's New York bankruptcy attorney, Salvatore LaMonica, had engaged in improper behavior, such as bankruptcy fraud, bankruptcy fraud conspiracy, prospective economic advantage conspiracy, perjury, federal and state RICO conspiracy, New Jersey RICO enterprise and conspiracy, defamation, and malicious prosecution. It also alleged ethics violations against the attorneys, including RPC 3.3(a)(2)(knowingly failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client).

The RICO complaint stemmed from Kelly's November 8, 2007 sworn testimony at the initial meeting of creditors in her New York bankruptcy, which was attended by Kelly, LaMonica, respondent and, perhaps, Millner.[2] The complaint also asserted that Kelly had made false statements in the matrimonial matter, with her attorney's approval.

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[2] Respondent believed that Millner was not present at the New York hearing.

At the ethics hearing, respondent testified that he had grown increasingly frustrated by Kelly's enormous settlement demands. For example, an early settlement panel had recommended an $80,000 asset settlement, but Kelly continued to hold out for $700,000, plus support in an amount that equaled 100% of respondent's take-home pay. Respondent characterized those demands as outrageous and inflammatory.

Having received no reply to his earlier email, on July 8, 2010 respondent sent a second email to Kelly and Millner, proposing settlement and indicating that he would not object to Fox Rothschild's application to withdraw, if the matter settled. He also cautioned that he could produce several more "filings" against them, which were "ready to go on short notice."

On July 8, 2010, at 6:26 p.m., Millner sent respondent a reply email, saying little more than to refer him to her new application to be relieved as counsel. Minutes later, at 6:35 p.m., respondent replied:

> Don't play games. I read your letter, and we both know that you are still counsel of record unless and until the Court says otherwise. I'm proposing a reasonable settlement of the child support issue. You still have an ethical duty to advise your client. Let's all do the right thing. You might be surprised by how far a little

> showing of good will (for the first time in four years) might go with me.
>
> [Ex.C-8.]

On July 9, 2010, at 9:43 a.m., Paradise sent a reply email to respondent, stating that he was general counsel at the Fox firm, that he now represented both Millner and Kelly, and that respondent should direct all future communications to him, not Millner or Kelly. That email read as follows:

> I am General Counsel to Fox Rothschild LLP. Ms. Millner has shared with me your emails in which you have threatened to file suit and a disciplinary complaint against her unless she and her client agree to your settlement demands. I will not comment at length about the impropriety or ethics issues attendant to such a tactic. I will however suggest that you review the ABA's Formal Ethics Opinion 94-383 and the guidance it offers regarding acts such as yours in this matter.
>
> Please recognize that no one is "playing games" in this matter. We are responding to your threats in a very serious manner and will continue to do so. You must appreciate that your threats, even if unfounded, have created a conflict of interest that precludes us from negotiating with you regarding the child support or any other issue. As you are aware, Ms. Millner has requested the Court's permission to withdraw from the case. Until the Court has ruled upon that motion, there will be no settlement discussions with you. During that time, and until further notice, ***please be advised that I am representing Ms. Millner***

> ***and all further communications should be directed to me and not Ms. Millner.***
>
> [Ex.C-9.]

Five minutes later, at 9:48 a.m., respondent sent an email to Kelly with a copy to Millner, in which he claimed that she and her attorneys had lied about him, "broken several laws and standards of professional conduct." He continued, in part:

> Starting today, you're going to find out what it's like to be on the other side. What you and Jennifer may not understand is that, until now, I've been holding back. The difference is that I don't have to lie in order to win this. I just have to shine a line [sic] on what you and your attorneys have done.
>
> That complaint is not the end of the work I've done to prepare for this fight, it's just the beginning. I have nearly a half-million dollars [sic] worth of work product sitting on my hard drive, ready to go at each step as this fight unfolds.
>
> That having been said, this fight will happen on my time schedule. If the complaint isn't filed today or tomorrow, don't think it's gone away. With God as my witness, I swear that this will not end until you are in jail for perjury and Jennifer and Sal are disbarred for suborning it.
>
> [Ex.C-10.]

According to respondent, the family court bifurcated the proceeding and did not rule on equitable distribution, because

both he and Kelly had filed a bankruptcy. Eventually, the New Jersey bankruptcy court handling respondent's bankruptcy took jurisdiction over the equitable distribution of the marital estate. There, respondent objected to the amount of Kelly's proof of claim in his bankruptcy and ultimately had it quashed, on appeal to the Third Circuit Court of Appeals. According to respondent, Kelly had also been found to have "improperly withheld knowledge about her own assets" in her New York bankruptcy.

Respondent admitted that he violated RPC 3.4(g) as to Kelly, by his comment, "with God as my witness, I swear that this will not end until you are in jail for perjury." He denied, through counsel, that his statements about potential ethics violations by the attorney defendants, Millner and LaMonica, violated the rule, because there was no threat of criminal charges. Rather, he had raised the specter of ethics allegations, which are not criminal in nature.

At the DEC hearing, Paradise testified about his involvement in the matter. He was concerned that respondent both sought to settle the matrimonial issues by potentially filing a RICO complaint against Millner and the law firm and, worse, that

he threatened to file an ethics grievance as leverage, if Kelly did not settle on his terms. Paradise stated:

> One of the issues that was raised is whether or not this threat of a RICO complaint being filed against us and against our client created a conflict of interest for us as a firm. The other issue was, and probably primary on my mind at that point, was that the threat of filing the complaint was linked to and conditioned with the request for a settlement on certain terms. And to me that struck me as an improper method of negotiation, that it basically put us in a position where we couldn't legitimately counsel our client as to whether or not to settle at that point because hanging over the settlement was this threat of a complaint against Fox Rothschild attorneys and there was also a threat of a disciplinary proceeding. And in my experience, I can't say for every jurisdiction, but I never will allow anyone within our firm and I will never engage in a settlement discussion that would be as a condition of not filing a disciplinary complaint. My standard response to that is if you believe that there is an ethical violation, file it. We will respond.
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> [T60-4 to 25.]

According to the ethics complaint, because of the conflict of interest, Millner made a second request, in late July 2010, to withdraw as Kelly's counsel, to which respondent countered that Fox Rothschild had already obtained a February 19, 2010 order, terminating the representation.

Respondent admitted that he had intended the RICO complaint to intimidate the recipients, because he saw Kelly and Millner as having used similar tactics against him, through outrageous demands. Respondent testified that the couple's marriage barely lasted twenty-four months, and, yet, the divorce proceedings dragged on for five years. He saw his July 2010 actions as finally starting to push back against them. He also explained why he called the complaint a "Confidential Settlement Communication;" it was supposed to convey that he had meritorious civil claims against them and that they should promptly settle the remaining divorce issues on his terms.

Count one of the ethics complaint alleged that respondent's use of the RICO complaint constituted a threat of criminal charges to gain an improper advantage in the matrimonial matter. The presenter argued that RICO complaints require citations to "predicate" criminal acts by the defendant and that the use of predicate acts constituted a threat of criminal charges to obtain an advantage in the matrimonial matter.

Respondent countered that the use of the predicate language was required by the civil RICO statute and that it did not constitute an effort to threaten criminal action or forward a claim of crimes by the defendants. In his brief to us,

respondent's counsel, too, argued that respondent's RICO complaint did not threaten criminal action:

> At the DEC hearing, the presenter argued that by threatening to file the civil RICO complaint which cited predicate criminal acts respondent was, in effect, threatening to file criminal charges in violation of RPC 3.4(g).
>
> The primary reported opinion on the point raised by the DEC presenter is Revson v. Cinque & Cinque, P.C., 221 F. 3d 71 (2d. Cir., 2000). There, a lawyer had threatened to file a civil RICO claim against his adversary, raising the question whether such a tactic violated New York's Disciplinary Rules. Those rules contained a provision identical to New Jersey's former DR 7-105, which the New Jersey Supreme Court carried over without change into RPC 3.4(g).
>
> The Second Circuit in Revson found no sanctionable conduct, holding that threatening to file a civil RICO claim is not a criminal threat even though the claim necessarily includes allegations of criminal misconduct. 221 F. 3d at 81.
>
> There is no New Jersey caselaw [sic] on this point. Given the high stature enjoyed by the U.S. Second Circuit and the fact that the Revson court was dealing with a disciplinary rule identical to New Jersey's RPC 3.4(g), this Board should adopt the Revson interpretation and hold that Exhibit C-3 did

> not constitute a violation of RPC 3.4(g) either as to [Kelly] or Ms. Millner.
>
> [Rb7-Rb8.][3]

After the July 2010 email exchange, respondent had no further direct communication with either Kelly or Millner. Nor did he file a RICO complaint against anyone involved in this matter. In fact, Paradise testified that he never heard from respondent again.

In mitigation, respondent urged that he had readily admitted his mistake and professed remorse for his actions.

Count two of the complaint charged respondent with having violated RPC 4.2 by sending the "Confidential Settlement Communication" to Kelly (a lawyer shall not communicate about the subject of the representation knowing the person is represented, unless the lawyer has the consent of the other lawyer). The complaint charged respondent with a second violation of RPC 4.2 for sending an email communication to Millner, after Paradise notified him not to deal directly with either Millner or Kelly.

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[3] "Rb" refers to respondent's counsel's June 8, 2012 brief to us.

Respondent conceded that he sent the confidential settlement communication to Kelly, knowing that she was represented in the divorce proceeding. Respondent countered, however, that the communication was proper. He admitted that he regularly "copied" Kelly on emails about the divorce matter.

Respondent denied the charge that neither Kelly nor Fox Rothschild had authorized him to communicate directly with Kelly. He asserted that, after the February 19, 2010 order, granting the Fox firm's motion to withdraw as counsel, "it became unclear whether she was still represented" by Millner and Fox Rothschild; moreover, Millner and her supervising attorney had encouraged direct communications between respondent and Kelly and thought that it made sense to involve the firm only when absolutely necessary.

Millner conceded that she never objected to respondent's communications with Kelly:

> I've always encouraged them to try to have noncontentious [sic] communications between them with regard to the child. And I've always said that the last thing a litigant wants to do is pay a lawyer to divide up stuff because there's never going to be a return on value for that. So with regard to the distribution of personal property, while I don't have any specific recollection, I am sure that I would have suggested to Shannon

> that she try to deal with Mr. Kane directly on that subject.
>
> [T51-7 to T52-19.]

Respondent provided another reason why it was appropriate for him to communicate directly with Kelly - she represented herself in her bankruptcy matter about the very same issues at hand in the settlement communication.

With regard to the charge related to Paradise' July 9, 2010, 9:43 a.m. email, directing respondent not to communicate with Kelly or Millner directly, respondent testified that he did not intend to defy Paradise' directive. Rather, he had not yet received it, when he sent his last email to Millner and Kelly. When questioned by his lawyer, respondent testified as follows:

> [RESPONDENT'S COUNSEL]:
>
> Q. I'm giving you copies now of C-10, 11 and 12. Are there any others that you need to see to complete this picture? How about nine. Let me give you nine as well.
>
> A. There is the e-mail from Shannon that I was responding to. I guess that's the -- I don't know if the e-mail that I was responding to in what is Exhibit C-10 is anywhere in the record, but I had received earlier that morning an e-mail from Shannon with Jennifer Millner's cc that was responding to the settlement offer and rejected it on diplomatic terms and that's what I was responding to in C-10 of 9:48. So just to be clear, I typed this.

Q. And "this" [is] what?

A. Everything on C-10.

Q. C-10?

A. Everything on C-10 was typed on my iPhone.

MR. BARKER: Prior to receiving the 9:43?

[A]: Correct, correct. And I don't know if as a general matter e-mail and iPhones -- I don't know what everybody's experience with those sorts of things are [sic]. You know, the iPhone has a small, little keyboard, a touch keyboard that I have to type like this (indicating). I can't do thumbs. I actually do hunt and peck with my pointer finger. And, well, sometimes in theory the way the phone works is that it pushes your e-mail to you in real time, particularly back then. It's actually been better with the newer models but, you know, that was an earlier model that I was using, and the AT&T connection isn't great, particularly if you're in a building, that type of thing. So a lot of times it doesn't push it to you in real time when you hit send on an e-mail, though as it's sending your e-mail up to the server it also cues the server at the same time to see if there's anything that you've received. And so Mr. Paradise's 9:43 e-mail wasn't pushed to me in real time. I was typing out C-10, the 9:48 e-mail, finished it, hit send, and then got the e-mail from Mr. Paradise at that point in time.

MR. BARKER: Was Mr. Paradise's 9:43 email sent to your @me.com address?

[A.]: Yes.

> MR. BARKER: Not your office address. So it only came through your iPhone, not your office computer?
>
> [A.]: Correct. Only came through on my iPhone, that's exactly right.
>
> [T105-6 to T107-6.]

According to respondent, once he received Paradise' email, he immediately replied that he had sent his email to Kelly and Millner before he had received Paradise' directive, and added that, "in the future, I will direct all of my correspondence to you."

The DEC found that respondent violated RPC 3.4(g), when he threatened Kelly with "with God as my witness, I swear that this will not end until you are in jail for perjury. . . .". The DEC dismissed the latter "threat" of disbarment actions against Milner and LaMonica, on the basis that a disciplinary action is not a criminal action.

The DEC was "troubled" by respondent's RICO complaint, but found that the RICO complaint did not constitute a violation of RPC 3.4(g), because it was "clearly civil in nature and as such, does not qualify."

The DEC dismissed the charged violation of RPC 4.2 with regard to Kelly, inasmuch as respondent had been regularly

emailing Kelly, with Millner's knowledge. Accordingly, the DEC found, respondent reasonably believed that his communications with Kelly were acceptable to Millner.

The DEC believed respondent's testimony about the timing of the "God as my witness" email, that is, that he did not see Paradise' 9:43 a.m. email until after he had sent his 9:48 a.m. email to Millner and Kelly. Thus, the DEC dismissed this RPC 4.2 charge.

The DEC recommended a reprimand, without citing case law in support of that recommendation.

The DEC concluded:

> Respondent is an experienced litigator of 10 years. He was clearly conscious of his ethical obligations and ignored them. He made the admitted threat not only to his estranged wife, but to two separate attorneys as well. He acknowledged to the panel that he prepared and attached the RICO complaint, which he testified took him a week to prepare, with the specific intent to intimidate his wife and counsel. He intentionally and willfully skirted the ethical line with his behavior. While the complaint may not be a technical violation of the Rule, it is clearly indicative of the Respondent's desire to flaunt both the spirit of the Rules of Professional Conduct, and his obligations as a practicing attorney. Such conduct should not be ignored

> or condoned and a sanction of reprimand is warranted.
>
> [HPR7.][4]

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent's conduct was unethical was fully supported by clear and convincing evidence.

Respondent represented himself in his emotionally-charged and drawn-out divorce proceeding. In July 2010, he engaged in an email exchange with his ex-wife, Kelly, and her attorney, Millner. He conceded the initial charge that his July 9, 2010 "God as my witness" email was improper. In it, respondent stated that he would not rest until Kelly was jailed for perjury. This was an obvious threat to present criminal charges in order to obtain an improper advantage in a civil matter, a violation of RPC 3.4(g) that respondent admitted.

He was charged with a second RPC 3.4(g) violation, rising from his RICO complaint, which the DEC dismissed. We agree with that dismissal. The RICO complaint did not constitute a threat to present criminal charges in order to obtain an improper

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[4] "HPR" refers to the hearing panel report.

advantage in a civil matter. Rather, it was a civil action to be filed in the federal district court. Although, as the presenter argued, it referred to "predicate" criminal acts, such as wire and bankruptcy fraud by the defendants (Kelly, Millner, and LaMonica), the complaint was clearly civil in nature and did not seek criminal sanctions. Respondent never threatened to forward the matter to prosecutors, as a criminal referral.

The only case law, cited by the parties is found in respondent's counsel's brief and, although it came from a sister jurisdiction, it is exculpatory and was unchallenged by the presenter. We, therefore, determine to dismiss this charge for lack of clear and convincing evidence of a violation of RPC 3.4(g).

Two aspects of respondent's actions resulted in separate charges that he violated RPC 4.2. This rule prohibits a lawyer from communicating about the subject of a representation knowing that the person is represented, unless the lawyer has the consent of his adversary. First, respondent was charged with having violated the rule for habitually sending emails to Kelly and Millner about the case, knowing that Kelly was represented by Millner. They included that series of July 2010 emails referred to above.

At the DEC hearing, however, it became clear, through Millner's and respondent's testimony, that Millner welcomed respondent's contacts with Kelly, so long as they were not contentious, on the premise that the parties could save legal fees by involving the lawyers only when absolutely necessary. Millner also admitted that she never told respondent to cease communicating with Kelly, in the fashion that had become a standard practice in the proceedings. In other words, respondent had Millner's not only tacit, but direct authority to communicate with Kelly. Therefore, the communications fell within the exemption in RPC 4.2, where Millner consented to the communications. We, therefore, dismiss this charge also.

Second, respondent was charged with a violation of RPC 4.2 for his July 9, 2010 9:48 a.m. "God as my witness" email to Millner and Kelly. Five minutes earlier, at 9:43 a.m., Paradise, acting as general counsel for Fox Rothschild, and as attorney for Millner and Kelly, had sent a clear directive that respondent was not to communicate with Millner or Kelly and was to send all future communications to him, not to Millner or Kelly.

Respondent testified convincingly on the issue that Paradise' email did not "hit" his iPhone, which he was using at

the time to compose and send his 9:48 a.m. email to Kelly and Millner, until right after he sent the 9:48 a.m. email to them. Like the DEC, we accept his explanation that he was unaware of Paradise' role as Millner's attorney and that he was prohibited from communicating further with them. We, thus, dismiss this charged violation of RPC 4.2 as well.

The sole remaining violation is that of RPC 3.4(g), stemming from respondent's threat not to rest until his ex-wife was jailed for alleged criminal wrongdoing in the bankruptcy and divorce proceedings.

Violations of RPC 3.4(g) have been met with discipline ranging from an admonition to a suspension, depending on the severity of the conduct. See, e.g., In the Matter of Jeffrey R. Grow, DRB 11-199 (March 26, 2012) (admonition for attorney who sent his client a letter in which he threatened to file criminal charges against her if she did not pay his legal fee; the attorney also failed to set forth the rate or basis of his fee in writing within a reasonable time (RPC 1.5)); In re Levow, 176 N.J. 505 (2003) (admonition for attorney who represented a client alleging medical malpractice and sent a letter to the client's doctor mentioning "criminal assault" and stating that the attorney had directed his client to contact "all relevant

and proper authorities"); In the Matter of Mitchell J. Kassoff, DRB 96-182 (1996) (admonition for attorney who, after being involved in a car accident, sent a letter to the other driver indicating his intent to file a criminal complaint against him for assault; the letter was sent the same day that the attorney received a letter from the other driver's insurance company denying his damage claim); In the Matter of Christopher Howard, DRB 95-215 (1995) (admonition for attorney who, during the representation of one shareholder of a corporation, sent a letter to another shareholder threatening to file a criminal complaint for unlawful conversion if he did not return the client's personal property); In re Hutchins, 177 N.J. 520 (2003) (reprimand for attorney who, in attempting to collect a debt on behalf of a client, told the debtor that he had no alternative but to recommend to his client that civil and criminal remedies be pursued); In re McDermott, 142 N.J. 634 (1995) (reprimand for attorney who filed criminal charges for theft of services against aclient and her parents after the client stopped payment on a check for legal fees); In re Dworkin, 16 N.J. 455 (1954) (one-year suspension for attorney who wrote a letter threatening criminal prosecution against an individual who forged an endorsement on a government check, unless the

individual paid the amount of the claim against him and the legal fee that the attorney ordinarily charged in a criminal matter "of this type;" the Court found that the attorney had resorted to "coercive tactics of threatening a criminal action to effect a civil settlement"); and In re Barrett, 88 N.J. 450 (1982) (three-year suspension for serious acts of misconduct that included the filing of a criminal complaint with the purpose of coercing a party into reaching a civil settlement).

The reprimand cases, Hutchins and McDermott, involved similar conduct to that of respondent. Hutchins told the debtor that criminal action was imminent, as he had no alternative but to file civil and criminal charges to collect the debt. McDermott went further, threatening to file criminal charges against his client (and her parents) for theft of services and then acting on that threat, by filing charges. Here, respondent sent an email with a threat to see that his ex-wife would be jailed for her alleged criminal conduct in her bankruptcy and divorce matters. Unlike McDermott, respondent never acted on the threat.

There are aggravating factors, however. Respondent suggested to Millner and LaMonica that, if they acceded to his settlement demands, he would agree not to file criminal charges

or ethics charges against them. Although respondent was not charged with an ethics infraction in this regard, such conduct is an unseemly corollary to those cases involving attorneys who interfere with ethics grievances against them, in an effort to have them dismissed. See, e.g., In re Levin, 193 N.J. 348 (2008) (admonition for attorney who contacted the grievant's son and convinced him to obtain his mother's withdrawal of her ethics grievance, going so far as recommending specific language for inclusion in the withdrawal letter); and In the Matter of R. Tyler Tomlinson, DRB 01-284 (November 2, 2001) (admonition for attorney who improperly conditioned the resolution of a collection case on the dismissal of an ethics grievance filed against the attorney by the client's parents).

The DEC recognized other aggravating factors, when recommending a reprimand. Specifically, the DEC found that respondent "was clearly conscious of his ethical obligations and ignored them." We agree that respondent must have known that his heavy-handled tactics violated the RPCs. Likewise, we agree with the DEC that, even though the RICO complaint did not violate the RPCs, it was "clearly indicative of [respondent's] desire to flaunt both the spirit of the Rules of Professional Conduct, and his obligations as a practicing attorney." Worded differently,

respondent was determined to apply as much pressure as possible on Kelly and Millner to achieve his ends, even suggesting that he had additional "filings" that were "ready to go on short notice," if they did not meet his demands - overly inflammatory language, in our view.

In mitigation, we considered that respondent acted in the heat of the moment, while representing himself in his highly contested divorce proceeding. In addition, respondent readily admitted his violation of RPC 3.4(g), seemed remorseful for his actions, and has not been disciplined, since his 2001 admission to the New Jersey bar.

Nevertheless, we determine that respondent's actions, viewed as a whole, are more serious than those of the attorneys who received admonitions. We conclude, therefore, that a reprimand is necessary to address his misbehavior.

Chair Pashman and Member Baugh voted for an admonition. Member Yamner recused himself. Member Clark did not participate.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and

actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

Disciplinary Review Board
Louis Pashman, Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Thomas Kane
Docket No. DRB 12-120

Argued: July 19, 2012

Decided: October 10, 2012

Disposition: Reprimand

Members	Disbar	Suspension	Reprimand	Admonition	Disqualified	Did not participate
Pashman				X		
Frost			X			
Baugh				X		
Clark						X
Doremus			X			
Gallipoli			X			
Wissinger			X			
Yamner					X	
Zmirich			X			
Total:			5	2	1	1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

August 17, 2018

Rule 8.4: Misconduct

Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

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

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Comment | Table of Contents | Next Rule

American Bar Association

/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct

August 16, 2018

Rule 4.1: Truthfulness in Statements to Others

Transactions With Persons Other Than Clients

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment | Table of Contents | Next Rule

Neutral
As of: August 17, 2018 12:55 AM Z

Dynamic 3D Geosolutions LLC v. Schlumberger Ltd. (Schlumberger N.V.)

United States Court of Appeals for the Federal Circuit

September 12, 2016, Decided

2015-1628, 2015-1629

Reporter
837 F.3d 1280 *; 2016 U.S. App. LEXIS 16645 **

DYNAMIC 3D GEOSOLUTIONS LLC, Plaintiff-Appellant ACACIA RESEARCH CORPORATION, ACACIA RESEARCH GROUP LLC, Nonparties-Appellants v. SCHLUMBERGER LIMITED (SCHLUMBERGER N.V.), SCHLUMBERGER HOLDINGS CORPORATION, SCHLUMBERGER TECHNOLOGY CORPORATION, Defendants-Appellees

Prior History: [1]** Appeals from the United States District Court for the Western District of Texas in No. 1:14-cv-00112-LY, Judge Lee Yeakel.

Dynamic 3D Geosolutions, LLC v. Schlumberger Ltd., 2015 U.S. Dist. LEXIS 67353 (W.D. Tex., Mar. 31, 2015)

Disposition: AFFIRMED.

Core Terms

patent, district court, confidential information, disclosure, disqualification, disqualified, attorneys, in-house, outside counsel, imputation, argues, communications, involvement, asserts, ethical, intellectual property, former client, contends, responds, conflicting interest, court's decision, recommendation, infringement, rebuttable, pleadings, lawyers, days, disadvantage, irrebuttable, licensing

Case Summary

Overview
HOLDINGS: [1]-District court below affirmed the sound principle of not suborning the disloyalty of attorneys. It was inappropriate to hire a senior attorney, one intimately knowledgeable concerning a particular product, its competitors, and its associated business strategies and intellectual property, into a position in which she not only participated in but in fact played a significant role in acquiring a patent used to accuse her former employer's product of patent infringement; [2]-There was a clear conflict of interest for the attorney, and principles underlying the ethical standards mandated extending the disqualification to plaintiff's other in-house attorneys; [3]-The district court did not err in concluding that the disqualification should extend to outside counsel's attorneys; [4]-The district court did not abuse its discretion in dismissing all pleaded claims without prejudice.

Outcome
The district court's decision was affirmed.

LexisNexis® Headnotes

Civil Procedure > Attorneys > Disqualification of Counsel

Legal Ethics > Client Relations

Civil Procedure > Appeals > Standards of Review

HN1[] Attorneys, Disqualification of Counsel

The court of appeals reviews a district court's disqualification and dismissal order under the law of the regional circuit in which the district court sits. Because motions to disqualify counsel are substantive motions affecting the rights of the parties, the court applies standards developed under federal law. Federal courts may adopt state or American Bar Association rules as their ethical standards, but whether and how these rules are to be applied are questions of federal law. Applying the law of the Fifth Circuit, the standard of review is for abuse of discretion, with the underlying factual findings reviewed for clear error and the interpretation of the relevant rules of attorney conduct reviewed de novo. The court also reviews the grant of a motion to dismiss without prejudice for abuse of discretion. The abuse of discretion standard applies in an appellate court's review of a district court's dismissal of a complaint as a result of ethical violations.

Legal Ethics > Client Relations > Conflicts of Interest

HN2[] Client Relations, Conflicts of Interest

Tex. Disciplinary R. Prof. Conduct 1.09(a), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Tex. State Bar R. art. X, sec. 9) provides that: (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client: (2) if the representation in reasonable probability will involve a violation of the rule regarding Confidentiality of Information; or (3) if it is the same or a substantially related matter.

Legal Ethics > Client Relations > Conflicts of Interest

HN3[] Client Relations, Conflicts of Interest

Tex. Disciplinary R. Prof. Conduct 1.09 cmt. 4, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Tex. State Bar R. art. X, sec. 9) notes that representation would be improper "if there were a reasonable probability that the subsequent representation would involve either an unauthorized disclosure of confidential information. or an improper use of such information to the disadvantage of the former client," and that "whether such a reasonable probability exists in any given case will be a question of fact." Comment 4B further elaborates that "substantially related" primarily involves situations where a lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage or for the advantage of the lawyer's current client or some other person. Case law has stated that an attorney's representation does not need to be "relevant" in the evidentiary sense to be "substantially related," but rather need only be akin to the present action in a way reasonable persons would understand as important to the issues involved.

Legal Ethics > Client Relations > Conflicts of Interest

HN4[] Client Relations, Conflicts of Interest

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the

former client.(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client.Model Rules of Prof'l Conduct R. 1.9 (1983).

Civil Procedure > Attorneys > Disqualification of Counsel

Legal Ethics > Client Relations > Conflicts of Interest

HN5[] Attorneys, Disqualification of Counsel

There are important societal rights implicated by attorney disqualification, such as the right of a party to counsel of its choice and an attorney's right to freely practice his or her profession. However, there is an overriding countervailing concern suffusing the ethical rules: a client's entitlement to an attorney's adherence to her duty of loyalty, encompassing a duty of confidentiality. Tex. Disciplinary R. Prof. Conduct 1.06 cmts. 1, 2, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Tex. State Bar R. art. X, sec. 9); Model Rules of Prof'l Conduct R. 1.9 cmts. 4, 7. According to case law, the obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that clients place in their attorneys. A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the clients in the same matter. This would undermine public confidence in the legal system as a means for adjudicating disputes. Accordingly, the obligation to protect a client's confidential information exists as part of the larger duty of loyalty owed to clients to maintain the integrity of the attorney-client relationship.

Legal Ethics > Client Relations > Conflicts of Interest

HN6[] Client Relations, Conflicts of Interest

Tex. Disciplinary R. Prof. Conduct 1.09(b), reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Tex. State Bar R. art. X, sec. 9) provides that "when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a)." Comment 5 to the Rule explains that this paragraph "extends paragraph (a)'s limitations on an individual lawyer's freedom to undertake a representation against that lawyer's former client to all other lawyers who are or become members of or associated with the firm in which that lawyer is practicing." The comment exemplifies the imputation rule as: "If a lawyer severs his or her association with a firm and that firm retains as a client a person whom the lawyer personally represented while with the firm, that lawyer's ability thereafter to undertake a representation against that client is governed by paragraph (a); and all other lawyers who are or become members of or associates with that lawyer's new firm are treated in the same manner by paragraph (b)."

Legal Ethics > Client Relations > Conflicts of Interest

HN7[] Client Relations, Conflicts of Interest

"(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless.(2) the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and (i) the disqualified lawyer is timely screened from any participation in the matter.; and (ii) written notice is promptly given to any affected former client." Model Rules of Prof'l Conduct R. 1.10. Rule 1.10 cmt. 2 emphasizes that each lawyer at a "firm" is "vicariously bound by the obligation of loyalty."

Legal Ethics > Client Relations > Conflicts of Interest

HN8 **Client Relations, Conflicts of Interest**

The ethical standards are clear that lawyers similarly associated have had conflicts imputed to them. Tex. Disciplinary R. Prof. Conduct 1.10, reprinted in Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Tex. State Bar R. art. X, sec. 9); Model Rules of Prof'l Conduct R. 1.9(b). Although the Fifth Circuit does not subscribe to the "taint" theory for imputing conflicts, it focuses on remaining "sensitive to preventing conflicts of interest" and "rigorously applies the relevant ethical standards.

Civil Procedure > Attorneys > Disqualification of Counsel

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

HN9 **Attorneys, Disqualification of Counsel**

The court disagrees that a balancing test is required under Fifth Circuit law. Although some situations present facts in which an analysis balances the competing interests of the parties in order to determine whether disqualification (of an attorney) would be too harsh a remedy, those situations are inherently fact-specific or presented in different procedural postures, e.g., in a petition for a writ of mandamus.

Counsel: MICHAEL JAMES COLLINS, Collins, Edmonds, Pogorzelski, Schlather & Tower PLLC, Houston, TX, argued for plaintiff-appellant. Also represented by JOHN J. EDMONDS, SHEA NEAL PALAVAN.

STEVEN MARK HANLE, Stradling Yocca Carlson & Rauth, P.C., Newport Beach, CA, argued for nonpartiesappellants. Also represented by MARC J. SCHNEIDER, TRAVIS PHILLIP BRENNAN.

MAXIMILIAN A. GRANT, Latham & Watkins LLP, Washington, DC, argued for defendants-appellees. Also represented by GABRIEL BELL, THOMAS J. HUMPHREY; TERRENCE J. CONNOLLY, New York, NY; ANN MARIE WAHLS, Chicago, IL.

Judges: Before LOURIE, WALLACH, and HUGHES, Circuit Judges. Opinion for the court filed by Circuit Judge LOURIE. Concurring opinion filed by Circuit Judge WALLACH.

Opinion by: LOURIE

Opinion

[*1282] LOURIE, *Circuit Judge*.

Dynamic 3D Geosolutions LLC ("Dynamic 3D"), along with Acacia Research Corporation and Acacia Research Group LLC (collectively, "Acacia"), appeal from the decision of the United States District Court for the Western District of Texas disqualifying counsel and dismissing its patent infringement complaint without prejudice. *Dynamic 3D Geosolutions LLC v. Schlumberger Ltd., No. A-14-CV-112-LY, 2015 U.S. Dist. LEXIS 67353, 2015 WL 4578681 (W.D. Tex. Mar. 31, 2015)* **[**2]** ("*Order*"). Because the district court did not err in disqualifying Dynamic 3D's counsel and in dismissing the complaint, we affirm.

BACKGROUND

In 2006, Schlumberger hired Charlotte Rutherford in a senior counsel position as Manager of Intellectual Property Enforcement, in licensing and litigation; promoted her to Director of Intellectual Property in 2009; and then promoted

her again to Deputy General Counsel for Intellectual Property. Her job duties included "developing and implementing the worldwide IP strategy," "protecting and preserving [Schlumberger's] IP assets including patents, trademarks and trade secrets," and "advis[ing] senior [Schlumberger] executives regarding risk issues relating to IP." Joint App. ("J.A.") 958. She was also responsible for the company's worldwide program for enforcing intellectual property, including litigation, and directed and supervised outside counsel on intellectual property legal matters. *Id.*

As part of her work at Schlumberger, Rutherford managed a copyright lawsuit involving Petrel, Schlumberger's software platform for three-dimensional visualization, mapping, and reservoir modeling of oil wells. **[**3]** She was also involved in a "Goldstar" project that evaluated further patentable aspects of Petrel and assessed the risk of lawsuits against it. One competitor's product analyzed during this project was Austin Geomodeling's RECON software. Austin Geomodeling filed a patent application in 2007 that eventually issued as U.S. Patent 7,986,319 ("the '319 patent") in 2011. RECON is supposedly the commercial embodiment of the '319 patent, which is directed to systems and methods of combining seismic and well log data into a real-time, interactive three-dimensional display.

In mid-2013, after seven years at Schlumberger, Rutherford left Schlumberger and soon thereafter began working as Senior Vice President and Associate General Counsel at Acacia Research Group LLC. Acacia Research Group LLC is a wholly-owned subsidiary of Acacia Research Corporation, the parent company of various patent-holding entities, including Dynamic 3D.

Shortly after joining Acacia, Rutherford twice met with the inventors of the '319 patent to discuss Acacia's acquisition of the patent and possible future litigation. J.A. 755-56, 760, 762. She also participated in a telephone call with the law firm of Collins, Edmonds, Pogorzelski, Schlather & Tower PLLC ("CEP") and one of her subordinates, **[**4]** Gary Fischman, regarding the '319 patent. J.A. 765. Schlumberger's Petrel product was discussed as a potential target of patent infringement litigation, at the meetings and in the call. *See, e.g.*, J.A. 759-761, 764, 766, 828-829, 831. Fischman and CEP then prepared a recommendation to Acacia's CEO to acquire the '319 patent and to sue Schlumberger and others, and Rutherford "approved" or "concurred" in that recommendation. J.A. 769-71, 774-77. Rutherford and Fischman also jointly made the decision to hire CEP as outside counsel. J.A. 784-85. Acacia subsequently retained CEP for all '319 patent-related litigation and acquired the patent. Dynamic **[*1283]** 3D was formed as a wholly-owned subsidiary of Acacia, and days later was assigned the '319 patent on December 9, 2013. *Order, 2015 U.S. Dist. LEXIS 67353, [WL] at *1*. Dynamic 3D, at least as of May 2014, had no employees.

In February 2014, Dynamic 3D filed several lawsuits, including one asserting that Schlumberger, in its use and sale of Petrel, infringed the '319 patent. The complaint alleges actual knowledge of the '319 patent by Schlumberger as early as the issuance of the patent in July 2011. The district court stayed the case except for limited claim construction discovery. Schlumberger raised Rutherford's potential conflict of interest to the court **[**5]** in April 2014. After a stay was lifted in August, Schlumberger filed a motion to disqualify Dynamic 3D's counsel. The district court granted Schlumberger's motion, disqualifying Rutherford, other in-house counsel for Acacia Research Corporation and its subsidiaries, and the CEP firm from representing Dynamic 3D in the instant case.

Relatedly, Schlumberger sued Rutherford in Texas state court in March 2014, presenting evidence that she retained copies of confidential and privileged information, including that relating to Petrel, for purposes of providing it to Acacia. The court dismissed all but the breach-of-contract claim for violating her confidentiality agreement, finding that the Texas anti-SLAPP statute protected Rutherford's *First Amendment* rights to petition and association, *viz.*, her "communication" of a "concurrence with the recommendation by outside counsel and in-house counsel to acquire the [']319 patent and to sue Schlumberger." J.A. 825, 828. The court sanctioned Schlumberger for bringing the suit, ordering payment of $600,000 in attorneys' fees and sanctions. Schlumberger challenged the decision to dismiss almost all of the claims, but the state appellate court dismissed that appeal for lack **[**6]** of jurisdiction over an interlocutory appeal. These issues are not before us in this appeal.

The district court in this case first found that Rutherford's work at Schlumberger was substantially related to her current work at Acacia. The court found that because the accused features of Petrel existed in the older versions

that Rutherford was exposed to, and because she was involved at Schlumberger in efforts to license Petrel to other companies, the evidence created an irrebuttable presumption that she acquired confidential information requiring her disqualification. *Order, 2015 U.S. Dist. LEXIS 67353, [WL] at *5*.

The district court then determined that the acquired knowledge should be imputed to all Acacia attorneys for purposes of participating in Dynamic 3D's suit against Schlumberger. The court noted that conflict rules for "firms" also apply to corporate legal departments, and that Dynamic 3D depended entirely on Acacia's legal department for its strategy and litigation conduct. *Order, 2015 U.S. Dist. LEXIS 67353, [WL] at *5-6*. The court was persuaded by evidence of Rutherford's involvement in acquiring the '319 patent, in deciding to sue Schlumberger, and in retaining CEP. *Order, 2015 U.S. Dist. LEXIS 67353, [WL] at *6*. The court found that Dynamic 3D failed to rebut the presumption of disclosure of Schlumberger's confidential **[**7]** information, and thus disqualified in-house counsel for Acacia Research Corporation and its subsidiaries. *Id.*

The district court lastly extended the disqualification to CEP, interpreting Fifth Circuit case law on disqualifying co-counsel as shifting the evidentiary burden to Dynamic 3D to prove non-disclosure after Schlumberger met its burden to create a rebuttable presumption of disclosure. *Order, 2015 U.S. Dist. LEXIS 67353, [WL] at *7*. The court found that the evidence showed multiple communications among Rutherford, Fischman, and CEP while preparing to file suit against Schlumberger. *Id.* As Fischman continued to not **[*1284]** only actively work with CEP in this case but also communicate information regarding the litigation to Rutherford, the court also disqualified CEP. *Id.*

Consequently, because the pleadings were drafted by counsel presumed to possess Schlumberger's confidential information, the district court dismissed all of Dynamic 3D's claims against Schlumberger without prejudice. *Id.*

Dynamic 3D and Acacia timely appealed from the district court's decision to this court. Shortly before the scheduled oral argument on August 3, 2016, Dynamic 3D and Acacia submitted a motion to dismiss the appeal, asserting that the case had been settled. **[**8]** *Dynamic 3D Geosolutions, LLC v. Schlumberger Ltd.*, No. 2015-1628, ECF No. 76 (Fed. Cir. Aug. 1, 2016). Schlumberger, however, opposed the motion. *Id.*, ECF No. 77. Acacia subsequently submitted the supposed settlement agreement to us under seal. The agreement appears to consist of hastily handwritten notes on two sheets of notebook paper along with a typed cover sheet containing minimal clarifying language and a signature page dated June 17, 2016. *Id.*, ECF No. 84 (Fed. Cir. Aug. 4, 2016). Although a settlement need not be effectuated by a formal document, upon review of the submission, we agree with Schlumberger that the appeal was not concluded by the agreement as submitted to this court and, based on the status of the appeal as of the date of oral argument, decline to terminate the appeal under *Federal Rule of Appellate Procedure 42(b)*. We have jurisdiction over this appeal pursuant to *28 U.S.C. § 1295(a)(1)*.

DISCUSSION

HN1[↑] We review a district court's disqualification and dismissal order under the law of the regional circuit in which the district court sits, here, the Fifth Circuit. *Atasi Corp. v. Seagate Tech., 847 F.2d 826, 829 (Fed. Cir. 1988)*. Because motions to disqualify counsel "are substantive motions affecting the rights of the parties," we apply standards developed under federal law. *In re Dresser Indus., Inc., 972 F.2d 540, 543 (5th Cir. 1992)*; *see also In re Am. Airlines, Inc., 972 F.2d 605, 609 (5th Cir. 1992)* ("Federal **[**9]** courts may adopt state or ABA rules as their ethical standards, but whether and how these rules are to be applied are questions of federal law."). Applying the law of the Fifth Circuit, the standard of review is for abuse of discretion, with the underlying factual findings reviewed for clear error and the interpretation of the relevant rules of attorney conduct reviewed *de novo*. *F.D.I.C. v. U.S. Fire Ins., 50 F.3d 1304, 1311 (5th Cir. 1995)*; *In re Am. Airlines, 972 F.2d at 609*. We also review the grant of a motion to dismiss without prejudice for abuse of discretion. *See United States ex rel. Holmes v. Northrop Grumman Corp., 642 F. App'x 373 (5th Cir. 2016)* (noting that "abuse of discretion standard applies in [an appellate court's] review of a district court's dismissal of a complaint as a result of ethical violations"); *cf. Marts v. Hines, 117 F.3d 1504, 1506 (5th Cir. 1997)* (en banc) (noting that "trial court's exercise of discretion" for dismissal without prejudice would be focus of appellate review).

Three applicable sets of rules govern the grant of the motion to disqualify counsel in this case: (1) the ABA Model Rules of Professional Conduct, the legal profession's national ethical rules; (2) the Texas Disciplinary Rules of Professional Conduct, the state-specific adaptation of the ABA Model Rules; and (3) the Local Rules for the Western District of Texas, which adopt the Texas Disciplinary Rules. **[**10]** *See, e.g.*, *In re ProEducation Int'l, Inc., 587 F.3d 296, 299 (5th Cir. 2009)*; *Nat'l Oilwell Varco LP v. Omron Oilfield & Marine, **[*1285]** Inc., 60 F. Supp. 3d 751, 758 (W.D. Tex. 2014)*.

I. Disqualification of Counsel

A. The Disqualification of Rutherford

HN2[↑] Texas Disciplinary *Rule 1.09(a)* provides that:

> (a) Without prior consent, a lawyer who *personally* has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
>
> . . .
>
> (2) if the representation *in reasonable probability* will involve a violation of [the rule regarding Confidentiality of Information]; or
>
> (3) if it is the same or a *substantially related* matter.

Tex. Disciplinary Rules of Prof'l Conduct ("Texas Disciplinary Rules") r. 1.09 (emphases added).

HN3[↑] Comment 4 to *Rule 1.09* notes that representation would be improper "if there were a reasonable probability that the subsequent representation would involve either an unauthorized disclosure of confidential information . . . or an improper use of such information to the disadvantage of the former client," and that "[w]hether such a reasonable probability exists in any given case will be a question of fact." *Id.* cmt. 4.

Comment 4B further elaborates that "'substantially related' primarily involves situations where a lawyer could have acquired confidential information concerning a prior client that could be used either to that **[**11]** prior client's disadvantage or for the advantage of the lawyer's current client or some other person." *Id.* cmt. 4B; *cf. In re Am. Airlines, 972 F.2d at 618-19* (noting that an attorney's representation "does not need to be 'relevant' in the evidentiary sense to be 'substantially related,'" but rather "need only be akin to the present action in a way reasonable persons would understand as important to the issues involved" (quoting *In re Corrugated Container Antitrust Litig., 659 F.2d 1341, 1346 (5th Cir. 1981)))*.

The corresponding ABA Model Rule similarly prohibits representation that presents a conflict of interest with a former client:

> ***HN4***[↑] (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a *substantially related* matter in which that person's interests are materially adverse to the interests of the former client . . . .
>
> . . .
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client . . . .

Model Rules of Prof'l Conduct ("ABA Model Rules") r. 1.9 (Am. Bar Ass'n 1983) (emphasis added).

Dynamic 3D argues that the district court clearly erred in finding **[**12]** that Rutherford's former representation was substantially related to her alleged representation in this case. Dynamic 3D characterizes her involvement in the acquisition of the '319 patent and enforcement against other parties as "limited," and denies any such involvement in the instant suit against Schlumberger. Dynamic 3D asserts that the court based its finding on descriptions of privileged documents rather than on a review of the actual documents, and ignored Rutherford's testimony that she was not directly involved in the **[*1286]** Goldstar projects. Thus, Dynamic 3D contends, the court failed to fully

analyze the facts or properly apply Fifth Circuit precedent. Dynamic 3D lastly argues that Schlumberger failed to establish that Rutherford played anything beyond a limited supervisory role, with some general exposure to earlier versions of Petrel in the copyright lawsuit.

Schlumberger responds that Fifth Circuit precedent imposes an irrebuttable presumption that relevant confidential information was acquired once prior and present representations are shown to have been substantially related. Schlumberger argues that the district court's factual finding that Rutherford's prior work is substantially related **[**13]** to this suit is based on Rutherford's personal representation of Schlumberger in litigation and licensing matters, including leading a team that evaluated intellectual property rights and risks relating to Petrel. Moreover, Schlumberger counters, the court correctly declined to credit self-serving testimony in light of the contrary evidence presented. Schlumberger notes that Rutherford admitted that she acted in a legal capacity for Acacia at the initial meetings concerning the '319 patent, and that the assessment of Petrel as being a possible litigation target was clearly related to her prior work. Schlumberger further points out that Rutherford would have had access to material sensitive information even in her more remote supervisory role during her previous employment.

We agree with Schlumberger that the district court did not clearly err in finding that Rutherford's work for Schlumberger, and for Acacia and Dynamic 3D, were substantially related. Rutherford occupied senior counsel, director, and deputy general counsel positions in a large company's intellectual property department. The record documents her involvement at Schlumberger in a project specifically evaluating a product later accused **[**14]** of infringement by Acacia, and the risks of such an infringement suit. Rutherford's representation at Schlumberger included efforts to license Petrel when the later-accused features of the product existed in the older versions with which Rutherford was involved. We will therefore not disturb the district court's finding that Rutherford's employment with Schlumberger was more than tangentially related to the issues in the present suit.

We recognize that ***HN5***[↑] there are important societal rights implicated by attorney disqualification, such as the right of a party to counsel of its choice and an attorney's right to freely practice his or her profession. However, there is an overriding countervailing concern suffusing the ethical rules: a client's entitlement to an attorney's adherence to her duty of loyalty, encompassing a duty of confidentiality. *See* *In re Am. Airlines, 972 F.2d at 616-20*; *Texas Disciplinary Rules r. 1.06* cmts. 1, 2; ABA Model Rules r. 1.9 cmts. 4, 7; *see also* *Brennan's Inc. v. Brennan's Restaurants, Inc., 590 F.2d 168, 172 (5th Cir. 1979)* ("The obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that clients place in their attorneys. A client would feel wronged if an opponent prevailed against him with the **[**15]** aid of an attorney who formerly represented the clients in the same matter. . . . [T]his would undermine public confidence in the legal system as a means for adjudicating disputes."). Accordingly, the obligation to protect a client's confidential information exists as part of the larger duty of loyalty owed to clients to maintain the integrity of the attorney-client relationship.

Rutherford herself admitted attending, as legal counsel for Acacia, meetings with the inventors of the '319 patent, other in-house **[*1287]** counsel, and outside counsel regarding the acquisition of the '319 patent, and admitted that Schlumberger's Petrel product was a topic of discussion at those meetings. Her admitted "communication," particularly the "concurrence with the recommendation by outside counsel and in-house counsel to acquire the ']319 patent and to sue Schlumberger," J.A. 825-28, would have entailed assessing the patent's value as a litigation tool against Schlumberger with knowledge of her former employer's confidential information. *See also* J.A. 3648, 3651-57 (privilege logs from Dynamic 3D and Acacia describing litigation-related communications that involved Rutherford). Even if we were to reweigh the evidence, which in our role as an **[**16]** appellate court would be inappropriate, Dynamic 3D's arguments that Rutherford was not involved in the current suit are thus way wide of the mark. Acacia itself admitted that it failed to screen her from the case, Oral Arg. at 4:48-5:30, and both Dynamic 3D and Acacia provided privilege logs evincing Rutherford's involvement in the present suit, J.A. 3648, 3651-52. Rutherford is therefore irrebuttably presumed to have possessed Schlumberger's relevant confidential information and was properly found to have been disqualified.

The district court affirmed the sound principle of not suborning the disloyalty of attorneys. It was inappropriate to hire a senior attorney, one intimately knowledgeable concerning a particular product, its competitors, and its

associated business strategies and intellectual property, into a position in which she not only participated in but in fact played a significant role in acquiring a patent used to accuse her former employer's product of patent infringement.

B. The Disqualification of Other In-House Counsel

HN6[↑] *Texas Disciplinary Rule 1.09(b)* provides that "when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client **[**17]** if any one of them practicing alone would be prohibited from doing so by *paragraph (a)*." *Texas Disciplinary Rules r. 1.09(b)*. Comment 5 explains that this paragraph "extends *paragraph (a)*'s limitations on an individual lawyer's freedom to undertake a representation against that lawyer's former client to all other lawyers who are or become members of or associated with the firm in which that lawyer is practicing." *Id.* cmt. 5. The comment exemplifies the imputation rule as: "[I]f a lawyer severs his or her association with a firm and that firm retains as a client a person whom the lawyer *personally* represented while with the firm, that lawyer's ability thereafter to undertake a representation against that client is governed by *paragraph (a)*; and all other lawyers who are or become members of or associates with that lawyer's new firm are treated in the same manner by *paragraph (b)*." *Id.* (emphasis added).

The corresponding ABA Model Rule similarly extends the prohibition to members of a lawyer's new "firm":

> ***HN7***[↑] (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless . . .
>
> (2) the prohibition is based upon Rule 1.9(a) or (b) and arises out **[**18]** of the disqualified lawyer's association with a prior firm, and
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> (i) the disqualified lawyer is timely screened from any participation in the matter . . . ; [and]
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> (ii) written notice is promptly given to any affected former client . . . .

[*1288] ABA Model Rules r. 1.10. Comment 2 emphasizes that each lawyer at a "firm" is "vicariously bound by the obligation of loyalty." *Id.* cmt. 2.

Dynamic 3D argues that any presumption of disclosure to Acacia's other in-house attorneys is questionable under Fifth Circuit law. If it exists, Dynamic 3D contends, that presumption was rebutted by uncontroverted evidence that there was no actual disclosure of confidential information from Rutherford to other Acacia attorneys. Dynamic 3D notes that Rutherford, Fischman, and Acacia's CEO all testified that Rutherford's involvement with the patent at Acacia was very limited, and unrelated to Schlumberger. Dynamic 3D also faults the district court for failing to balance the parties' interests as Dynamic 3D contends is required under Fifth Circuit law; no specific harm to Schlumberger was ever identified, compared with the time and resources spent by Dynamic 3D on preparing for and prosecuting this case.

Acacia similarly **[**19]** argues that Fifth Circuit law does not require a presumption of disclosure for in-house attorneys because that presumption should only be grounded in the duty of loyalty resulting from personal representation. Because none of Acacia's "licensing executives" have worked for Schlumberger and thus evidence no appearance of disloyalty, Acacia contends, there is no rationale for a presumption, and thus imputation should be analyzed as for co-counsel, *i.e.*, requiring actual disclosure. Acacia also asserts that the court's factually unsupported findings contradict sworn statements and corroborating evidence that Rutherford did not actually disclose Schlumberger's confidential information. Acacia further faults the court for shifting the burden of persuasion to Acacia. According to Acacia, Schlumberger never proved that Rutherford acquired confidential information; she was only presumed to have it. Moreover, Acacia argues, the disqualification unduly burdens its right to counsel; specifically, the decision effectively enjoins Acacia from ever asserting the patent against Schlumberger.

Schlumberger responds that under Fifth Circuit law on imputation to other in-house counsel, the analysis turns **[**20]** on whether the conflicted attorney's representation is personal. Schlumberger notes that the district court found that, rebuttable or not, Dynamic 3D failed to rebut the presumption of disclosure with any evidence that Acacia screened Rutherford from work she performed at Schlumberger with others by instructing her not to work on related matters. Schlumberger additionally responds that Texas law does not require actual disclosure, only a

genuine threat of disclosure. Schlumberger further argues that Rutherford's prior work made her privy to information relating to her later actions for Acacia, and thus her communications—in the form of approvals and concurrence with recommendations—tacitly disclosed her belief, based on Schlumberger's confidential information, that Dynamic 3D's claims had merit and that Schlumberger's defenses, including invalidity, were meritless.

Schlumberger also contends that a balancing of interests is not required when imputing a conflict to other inhouse counsel. Even if the court were to explicitly balance the parties' interests, Schlumberger argues that the prejudice to Schlumberger greatly outweighs the harm that Dynamic 3D inflicted on itself. The potential **[**21]** source of the conflict of interest was flagged early on in the case, but Acacia's attorneys continued to work on the suit and delayed the filing of Schlumberger's disqualification motion by opposing lifting the stay.

We agree with the district court that regardless whether the presumption was **[*1289]** irrebuttable or rebuttable, there was a presumption that was not rebutted. Dynamic 3D and Acacia failed to show that knowledge of Schlumberger's confidential information should not be imputed to Acacia's other in-house counsel. ***HN8***[⬆] The ethical standards are clear that lawyers similarly associated have had conflicts imputed to them. *See* *Texas Disciplinary Rules r. 1.10*; ABA Model Rules r. 1.9(b). Although the Fifth Circuit does not subscribe to the "taint" theory for imputing conflicts, it focuses on remaining "sensitive to preventing conflicts of interest" and "rigorously appl[ies] the relevant ethical standards." *See* *In re Am. Airlines, 972 F.2d at 611*. Acacia admitted at oral argument that there was no ethical screening wall or other objective measures implemented to prevent confidential information from being used, to disadvantage Schlumberger. Here, there was a clear conflict of interest for Rutherford, and the principles underlying the **[**22]** ethical standards mandate extending the disqualification to Acacia's other in-house attorneys.

Even without imputation, Fischman himself reported solely to Rutherford until *after* the potential conflict was raised to the court. In fact, all four Acacia employees in the Energy Group in Acacia's Houston office reported to Rutherford. In attending meetings and making decisions such as retaining CEP as outside counsel, Rutherford communicated to the other in-house counsel that she supported the litigation strategy and thereby disclosed confidential information to the other Acacia attorneys.

Moreover, ***HN9***[⬆] we disagree with Dynamic 3D and Acacia that a balancing test is required under Fifth Circuit law. Although some situations present facts in which an analysis balances the competing interests of the parties in order to determine whether disqualification would be too harsh a remedy, those situations are inherently fact-specific or presented in different procedural postures, *e.g.*, in a petition for a writ of mandamus. Even so, we find no error when the case was barely litigated before Dynamic 3D was on notice that Schlumberger identified the conflict. The complaint was filed in February; the case **[**23]** was stayed from April to August; the potential issue was brought to the court's attention in April during the stay; and the motion was filed days after the stay was lifted in August. Dynamic 3D and Rutherford should have known that their actions were inappropriate.

C. The Disqualification of CEP

Dynamic 3D lastly disputes the "double imputation" of the conflict of interest to CEP on the ground that only actual disclosure warrants the disqualification of outside counsel under Fifth Circuit law. Dynamic 3D argues that Rutherford is only presumed to have acquired relevant confidential information, and that there is no record evidence of any disclosure of such information to CEP or any substantive communications between Rutherford and CEP. Dynamic 3D faults the district court for failing to identify any specific disclosures actually made, and for ignoring Dynamic 3D's rebuttal evidence showing the absence of disclosures to CEP. Dynamic 3D further asserts that the decision to sue Schlumberger was made by Acacia's CEO alone, and that Rutherford's concurrence with that decision was not a communication substantive enough to constitute actual disclosure of confidential information. Dynamic 3D **[**24]** thus contends that the district court erred because Fifth Circuit law does not provide for a presumption of disclosure to co-counsel if there is no attorney-client relationship.

Schlumberger responds that the evidence supports the district court's findings **[*1290]** of substantive contacts and communications among Rutherford, Fischman, and CEP, which created a rebuttable presumption of disclosure. No such rebuttal was found by the court. Schlumberger contends that under the Texas Supreme Court's interpretation

of the Texas Disciplinary Rules, once Schlumberger showed sufficient contact or communication between Rutherford and CEP, the burden shifted to Dynamic 3D to show that there was no reasonable prospect that confidential information was disclosed, and no actual disclosure. Schlumberger further responds that even without a presumption of disclosure, there was actual disclosure to CEP by Rutherford's concurring in various recommendations. Given her knowledge of Petrel, Schlumberger asserts, her opinion carried weight and was not merely "a wink and a nod" to encourage Acacia's business and litigation decisions. *See* S.E.C. v. Rocklage, 470 F.3d 1 (1st Cir. 2006) (finding that "a wink and a nod" communicated confidential information constituting **[**25]** unlawful tipping).

We thus agree that the district court did not err in concluding that the disqualification should extend to CEP. Even beyond presumptions, there was sufficient evidence of Rutherford's involvement in the selection of CEP as outside counsel and in the litigation against Schlumberger to support a finding of communication by conduct.

Dynamic 3D and Acacia's arguments focus on presumptions and actual disclosure, ignoring the totality of the duty owed to clients. Here, Rutherford disregarded the duty of loyalty and communicated confidential information not only to other in-house counsel but also to outside counsel, and thus the district court did not clearly err in imputing the conflict of interest to outside counsel as well as to in-house counsel.

We accordingly find no error in the district court's conclusion that Rutherford, Acacia's other in-house counsel, and CEP were properly disqualified from representing Dynamic 3D in this case.

II. Dismissal Without Prejudice

Dynamic 3D argues that the district court lacked the legal authority to dismiss its case as a result of disqualifying its counsel. Dynamic 3D faults the district court for not specifying what "significant prejudice" **[**26]** to Schlumberger justified dismissal. Moreover, Dynamic 3D asserts, there was no record evidence of any actual disclosure and thus the case could not have been "tainted" from Rutherford's supposed breaches of confidence. The dismissal, Dynamic 3D avers, was overly harsh and constituted an abuse of discretion for not instead granting the company time to retain new counsel. Dynamic 3D distinguishes other cases that have been dismissed as a result of disqualified counsel as grounded in facts that the disqualified attorney was acting in some capacity as a party or that disclosure was clearly and specifically proven.

Schlumberger responds that the Fifth Circuit previously affirmed a district court's decision to dismiss a case without prejudice after disqualifying an attorney based on an irrebuttable presumption of using confidential information to a former client's disadvantage. In support of the district court's decision, Schlumberger cites various cases in the Second Circuit and one in the Western District of Louisiana that were similarly dismissed without prejudice based on the disqualification of counsel.

Based on the facts of this case, we find that the district court in its abbreviated **[**27]** analysis on this point did not abuse its discretion in dismissing all pleaded claims without prejudice. The court did not err in **[*1291]** finding that Dynamic 3D's pleadings were drafted by lawyers presumed to possess Schlumberger's confidential information and that the significant prejudice that Schlumberger would face, if the case were to continue, outweighed the harsh result of dismissal. We do not dispute the court's conclusion. All aspects of the case were contaminated by Rutherford's actions, from the purchase of the '319 patent, to preparation for suit against Schlumberger, to the actual filing of the suit.

The district court's decision is not without precedent In *Doe v. A Corp.*, the Fifth Circuit affirmed a district court's decision disqualifying counsel and dismissing part of the case without prejudice. 709 F.2d 1043, 1045, 1050-51 (5th Cir. 1983). Some district courts have granted a period of time for a party to retain new counsel after disqualification, which appears to be typically 45 days. *See, e.g.,* McIntosh v. State Farm Fire & Cas. Co., No. 1:06-cv-1080, 2008 U.S. Dist. LEXIS 27736, 2008 WL 941640, at *2 (S.D. Miss. Apr. 4, 2008) (granting 45 days to retain new counsel after attorney disqualification, after which failure to do so or to proceed *pro se* would make case "eligible for dismissal without prejudice"); **[**28]** *see also* Sumpter v. Hungerford, No. 12-717, 2013 U.S. Dist. LEXIS 71119, 2013 WL 2181296, at *11 (E.D. La. May 20, 2013) (ordering new counsel within 45 days after attorney disqualification). Others, however, have found that continuing a case after disqualification without dismissal would

greatly prejudice a party because "the case would be tried on a record developed primarily through the fruits of [the disqualified attorney]'s unethical labor." *United States ex rel. Holmes v. Northrop Grumman Corp., No. 1:13-cv-85, 2015 U.S. Dist. LEXIS 71804, 2015 WL 3504525 (S.D. Miss., June 3, 2015)*, *aff'd*, *642 F. App'x 373, 378 (5th Cir. 2016)*.

Dynamic 3D itself admits that, because of the disqualification of its attorneys, it would have to hire a new employee to manage the re-filing of the complaint, and retain new outside counsel. Dynamic 3D Br. 42-43. Not only would those actions likely take more than 45 days and effectively impact the district court's docket, but also the potential for prejudice would continue from the improper use of Schlumberger's confidential information in preparing the original pleadings. Based on the district court's reasoning, forcing Dynamic 3D to break new ground with a fresh complaint and clean docket rather than to continue drawing from a poisoned well was not an abuse of discretion.

We also note that Dynamic 3D did not expressly request leave to amend its pleadings or substitute counsel, *see* J.A. **[**29]** 1317-18; even if it had, the district court would have had the discretion to deny that request, *see Whitmire v. Victus Ltd., 212 F.3d 885, 887 (5th Cir. 2000)*. *See also United States ex rel. Willard v. Humana Health Plan of Tex., Inc., 336 F.3d 375, 387 (5th Cir. 2003)* (finding no abuse of discretion in denying leave to amend when not expressly requested from district court).

We therefore conclude that the district court did not abuse its discretion in dismissing all of the pleaded claims in Dynamic 3D's complaint without prejudice.

CONCLUSION

We have considered the remaining arguments and conclude that they are unpersuasive. For the foregoing reasons, we conclude that the district court did not err in disqualifying Dynamic 3D's counsel and in dismissing the complaint, and we therefore affirm the district court's decision.

AFFIRMED

COSTS

Costs to Schlumberger.

Concur by: WALLACH

Concur

[*1292] WALLACH, *Circuit Judge*, concurring.

I concur entirely with the majority's opinion, but write to briefly address the honor of our profession as attorneys. In the law, as in life, it is best if one's conduct is such that when accused of malefaction, the community responds as one that "Ms. or Mr. __ simply doesn't act that way." The standard is always aspirational for we are human, but if we do not strive to reach it, then perhaps we ought to consider that the game's not worth the candle. **[**30]**

Ms. Rutherford's conduct failed to meet minimal standards necessary to preserve public confidence in the legal system, and for that, she and others paid a price. That does not mean, however, that she should not, as a member of what is supposed to be an honorable profession, have held herself to a higher standard.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 481 **April 17, 2018**

A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error

Model Rule of Professional Conduct 1.4 requires a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. No similar obligation exists under the Model Rules to a former client where the lawyer discovers after the attorney-client relationship has ended that the lawyer made a material error in the former client's representation.

Introduction

Even the best lawyers may err in the course of clients' representations. If a lawyer errs and the error is material, the lawyer must inform a current client of the error.[1] Recognizing that errors

[1] A lawyer's duty to inform a current client of a material error has been variously explained or grounded. For malpractice and breach of fiduciary decisions, *see, e.g.*, Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 629 (8th Cir. 2009) (predicting Minnesota law and concluding that "the lawyer must know that there is a non-frivolous malpractice claim against him such that there is a substantial risk that [his] representation of the client would be materially and adversely affected by his own interest in avoiding malpractice liability" (internal quotation marks omitted)); Beal Bank, SSB v. Arter & Hadden, LLP, 167 P.3d 666, 673 (Cal. 2007) (stating that "attorneys have a fiduciary obligation to disclose material facts to their clients, an obligation that includes disclosure of acts of malpractice"); RFF Family P'ship, LP v. Burns & Levinson, LP, 991 N.E.2d 1066, 1076 (Mass. 2013) (discussing the fiduciary exception to the attorney-client privilege and stating that "a client is entitled to full and fair disclosure of facts that are relevant to the representation, including any bad news"); *In re* Tallon, 447 N.Y.S.2d 50, 51 (App. Div. 1982) ("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.").

For disciplinary decisions, *see, e.g.*, Fla. Bar v. Morse, 587 So. 2d 1120, 1120–21 (Fla. 1991) (suspending a lawyer who conspired with his partner to conceal the partner's malpractice from the client); *In re* Hoffman, 700 N.E.2d 1138, 1139 (Ind. 1998) (applying Rule 1.4(b)). *See also* Ill. State Bar Ass'n Mut. Ins. Co. v. Frank M. Greenfield & Assocs., P.C., 980 N.E.2d 1120, 1129 (Ill. App. Ct. 2012) (finding that a voluntary payments provision in a professional liability insurance policy was "against public policy, since it may operate to limit an attorney's disclosure [of his potential malpractice] to his clients").

For ethics opinions, *see, e.g.*, Cal. State Bar Comm. on Prof'l Responsibility & Conduct Op. 2009-178, 2009 WL 3270875, at *4 (2009) [hereinafter Cal. Eth. Op. 2009-178] ("A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation. . . . Where the lawyer believes that he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'" (citation omitted)); Colo. Bar Ass'n, Ethics Comm., Formal Op. 113, at 3 (2005) [hereinafter Colo. Op. 113] ("Whether a particular error gives rise to an ethical duty to disclose [under Rule 1.4] depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error."); Minn. Lawyers Prof'l Responsibility Bd. Op. 21, 2009 WL 8396588, at *1 (2009) (imposing a duty to disclose under Rule 1.4 where "the lawyer knows the lawyer's conduct may reasonably be the basis for a non-frivolous malpractice claim by a current client that materially affects the client's

occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

If a material error relates to a former client's representation and the lawyer does not discover the error until after the representation has been terminated, the lawyer has no obligation under the Model Rules to inform the former client of the error. To illustrate, assume that a lawyer prepared a contract for a client in 2015. The matter is concluded, the representation has ended, and the person for whom the contract was prepared is not a client of the lawyer or law firm in any other matter. In 2018, while using that agreement as a template to prepare an agreement for a different client, the lawyer discovers a material error in the agreement. On those facts, the Model Rules do not require the lawyer to inform the former client of the error. Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client. Indeed, many lawyers would likely choose to do so for those or other individual reasons. Those are, however, personal decisions for lawyers rather than obligations imposed under the Model Rules.

The Duty to Inform a Current Client of a Material Error

A lawyer's responsibility to communicate with a client is governed by Model Rule 1.4.[2] Several parts of Model Rule 1.4(a) potentially apply where a lawyer may have erred in the course of a current client's representation. For example, Model Rule 1.4(a)(1) requires a lawyer to promptly inform a client of any decision or circumstance with respect to which the client's informed consent may be required. Model Rule 1.4(a)(2) requires a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Model Rule 1.4(a)(3) obligates a lawyer to "keep a client reasonably informed about the status of a matter." Model Rule 1.4(a)(4), which obliges a lawyer to promptly comply with reasonable requests for information, may be implicated if the client asks about the lawyer's conduct or performance of the representation. In addition, Model Rule 1.4(b) requires a lawyer to "explain a

interests"); 2015 N.C. State Bar Formal Op. 4, 2015 WL 5927498, at *2 (2015) [hereinafter 2015 N.C. Eth. Op. 4] (applying Rule 1.4 to "material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim"; N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics Op. 684, 1998 WL 35985928, at *1 (1998) [hereinafter N.J. Eth. Op. 684] (discussing Rules 1.4 and 1.7(b) and requiring disclosure "when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted"); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Eth. Op. 734, 2000 WL 33347720, at *3 (2000) [hereinafter N.Y. Eth. Op. 734] (discussing the prior Code of Professional Responsibility and concluding that the inquirer had a duty to tell the client that it made "a significant error or omission that may give rise to a possible malpractice claim"); Sup. Ct. of Prof'l Ethics Comm. Op. 593, 2010 WL 1026287, at *1 (2010) [Tex. Eth. Op. 593] (opining that the lawyer must also terminate the representation and applying Texas Rules 1.15(d), 2.01, and 8.04(a)(3)). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. c (2000) (requiring disclosure where the conduct "gives the client a substantial malpractice claim against the lawyer").

[2] MODEL RULES OF PROF'L CONDUCT R. 1.4 (2018) ("Communication") [hereinafter MODEL RULES].

matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." More broadly, the "guiding principle" undergirding Model Rule 1.4 is that "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."[3] A lawyer may not withhold information from a client to serve the lawyer's own interests or convenience.[4]

Determining whether and when a lawyer must inform a client of an error can sometimes be difficult because errors exist along a continuum. An error may be sufficiently serious that it creates a conflict of interest between the lawyer and the client. Model Rule 1.7(a)(2) provides that a concurrent conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer." Where a lawyer's error creates a Rule 1.7(a)(2) conflict, the client needs to know this fact to make informed decisions regarding the representation, including whether to discharge the lawyer or to consent to the conflict of interest. At the other extreme, an error may be minor or easily correctable with no risk of harm or prejudice to the client.

Several state bars have addressed lawyers' duty to disclose errors to clients.[5] For example, in discussing the spectrum of errors that may arise in clients' representations, the North Carolina State Bar observed that "material errors that prejudice the client's rights or claims are at one end. These include errors that effectively undermine the achievement of the client's primary objective for the representation, such as failing to file the complaint before the statute of limitations runs."[6] At the other end of the spectrum are "nonsubstantive typographical errors" or "missing a deadline that causes nothing more than delay."[7] "Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client's interests."[8] With respect to the middle ground:

> Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error.[9]

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[3] *Id.* cmt. 5.
[4] *Id.* cmt. 7.
[5] *See supra* note 1 (listing authorities).
[6] 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *2.
[7] *Id.*
[8] *Id.*
[9] *Id.*

Another example is contained in the Colorado Bar Association's Ethics Committee in Formal Opinion 113, which discusses the spectrum of errors that may implicate a lawyers' duty of disclosure. In doing so, it identified errors ranging from those plainly requiring disclosure (a missed statute of limitations or a failure to file a timely appeal) to those "that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice."[10] Errors by lawyers between these two extremes must be analyzed individually. For example, disclosure is not required where the law on an issue is unsettled and a lawyer makes a tactical decision among "equally viable alternatives."[11] On the other hand, "potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute."[12] Ultimately, the Colorado Bar concluded that whether a particular error gives rise to an ethical obligation to disclose depends on whether the error is "material," which further "depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim."[13]

These opinions provide helpful guidance to lawyers, but they do not—just as we do not—purport to precisely define the scope of a lawyer's disclosure obligations. Still, the Committee believes that lawyers deserve more specific guidance in evaluating their duty to disclose errors to current clients than has previously been available.

In attempting to define the boundaries of this obligation under Model Rule 1.4, it is unreasonable to conclude that a lawyer must inform a current client of an error only if that error may support a colorable legal malpractice claim, because a lawyer's error may impair a client's representation even if the client will never be able to prove all of the elements of malpractice. At the same time, a lawyer should not necessarily be able to avoid disclosure of an error absent apparent harm to the client because the lawyer's error may be of such a nature that it would cause a reasonable client to lose confidence in the lawyer's ability to perform the representation competently, diligently, or loyally despite the absence of clear harm. Finally, client protection and the purposes of legal representation dictate that the standard for imposing an obligation to disclose must be objective.

With these considerations in mind, the Committee concludes that a lawyer must inform a current client of a material error committed by the lawyer in the representation. An error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.

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[10] Colo. Op. 113, *supra* note 1, at 3.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1, 3.

A lawyer must notify a current client of a material error promptly under the circumstances.[14] Whether notification is prompt will be a case- and fact-specific inquiry. Greater urgency is required where the client could be harmed by any delay in notification. The lawyer may consult with his or her law firm's general counsel, another lawyer, or the lawyer's professional liability insurer before informing the client of the material error.[15] Such consultation should also be prompt. When it is reasonable to do so, the lawyer may attempt to correct the error before informing the client. Whether it is reasonable for the lawyer to attempt to correct the error before informing the client will depend on the facts and should take into account the time needed to correct the error and the lawyer's obligation to keep the client reasonably informed about the status of the matter.

When a Current Client Becomes a Former Client

As indicated earlier, whether a lawyer must reveal a material error depends on whether the affected person or entity is a current or former client. Substantive law, rather than rules of professional conduct, controls whether an attorney-client relationship exists, or once established, whether it is ongoing or has been concluded.[16] Generally speaking, a current client becomes a former client (a) at the time specified by the lawyer for the conclusion of the representation, and acknowledged by the client, such as where the lawyer's engagement letter states that the representation will conclude upon the lawyer sending a final invoice, or the lawyer sends a disengagement letter upon the completion of the matter (and thereafter acts consistently with the letter);[17] (b) when the lawyer withdraws from the representation pursuant to Model Rule of Professional Conduct 1.16; (c) when the client terminates the representation;[18] or (d) when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the

[14] *See* N.J. Eth. Op. 684, *supra* note 1, 1998 WL 35985928, at *1 ("Clearly, RPC 1.4 requires prompt disclosure in the interest of allowing the client to make informed decisions. Disclosure should therefore occur when the attorney ascertains malpractice may have occurred, even though no damage may yet have resulted."); 2015 N.C. Eth. Op. 4, *supra* note 1, 2015 WL 5927498, at *4 ("The error should be disclosed to the client as soon as possible after the lawyer determines that disclosure of the error to the client is required."); Tex. Eth. Op. 593, *supra* note 1, 2010 WL 1026287, at *1 (requiring disclosure "as promptly as reasonably possible").

[15] *See* MODEL RULES R. 1.6(b)(4) (2018) (permitting a lawyer to reveal information related to a client's representation "to secure legal advice about the lawyer's compliance with these Rules").

[16] United States v. Williams, 720 F.3d 674, 686 (8th Cir. 2013); Rozmus v. West, 13 Vet. App. 386, 387 (U.S. App. Vet. Cl. 2000); *see also* MODEL RULES Scope cmt. 17 (2018) (explaining that "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists").

[17] *See* Artromick Int'l, Inc. v. Drustar Inc., 134 F.R.D. 226, 229 (S.D. Ohio 1991) (observing that "the simplest way for either the attorney or client to end the relationship is by expressly saying so"); *see also, e.g.*, Rusk v. Harstad, 393 P.3d 341, 344 (Utah Ct. App. 2017) (concluding that a would-be client could not have reasonably believed that the law firm represented him where the lawyer had clearly stated in multiple e-mails that the law firm would not represent him).

[18] A client may discharge a lawyer at any time for any reason, or for no reason. White Pearl Inversiones S.A. (Uruguay) v. Cemusa, Inc., 647 F.3d 684, 689 (7th Cir. 2011); Nabi v. Sells, 892 N.Y.S.2d 41, 43 (App. Div. 2009); MODEL RULES R. 1.16 cmt. 4; *see also* STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 77 (11th ed. 2018) ("Clients, it is said, may fire their lawyers for any reason or no reason.") (citations omitted).

relationship has ended.[19] If a lawyer represents a client in more than one matter, the client is a current client if any of those matters is active or open; in other words, the termination of representation in one or more matters does not transform a client into a former client if the lawyer still represents the client in other matters.

Absent express statements or overt acts by either party, an attorney-client relationship also may be terminated when it would be objectively unreasonable to continue to bind the parties to each other.[20] In such cases, the parties' reasonable expectations often hinge on the scope of the lawyer's representation.[21] In that regard, the court in *National Medical Care, Inc. v. Home Medical of America, Inc.*,[22] suggested that the scope of a lawyer's representation loosely falls into one of three categories: (1) the lawyer is retained as general counsel to handle all of the client's legal matters; (2) the lawyer is retained for all matters in a specific practice area; or (3) the lawyer is retained to represent the client in a discrete matter.[23]

For all three categories identified by the *National Medical Care* court, unless the client or lawyer terminates the representation, the attorney-client relationship continues as long as the lawyer is responsible for a pending matter.[24] With respect to categories one and two above, an attorney-client relationship continues even when the lawyer has no pending matter for the client because the parties reasonably expect that the lawyer will handle all matters for the client in the future as they arise.[25] In the third category, where a lawyer agrees to undertake a specific matter, the attorney-client relationship ends once the matter is concluded.[26]

Although not identified by the *National Medical Care* court, another type of client is what might be called an episodic client, meaning a client who engages the lawyer whenever the client requires legal representation, but whose legal needs are not constant or continuous. In many such

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[19] *See, e.g.*, Artromick Int'l, Inc., 134 F.R.D. at 230–31 (determining that a man was a former client because he refused to pay the lawyer's bill and then retained other lawyers to replace the first lawyer); Waterbury Garment Corp. v. Strata Prods., 554 F. Supp. 63, 66 (S.D.N.Y. 1982) (concluding that a person was a former client because the law firm represented him only in discrete transactions that had concluded and the person had subsequently retained different counsel).

[20] Artromick Int'l, Inc., 134 F.R.D. at 229.

[21] *Id.* at 229–30.

[22] No. 00-1225, 2002 WL 31068413 (Mass. Super. Ct. Sept. 12, 2002).

[23] *Id.* at *4.

[24] *Id.*; *see also* MODEL RULES R. 1.3 cmt. 4 (2018) (stating that unless the relationship is terminated under Model Rule 1.16, the lawyer "should carry through to conclusion all matters undertaken for a client").

[25] *See* Berry v. McFarland, 278 P.3d 407, 411 (Idaho 2012) (explaining that "[i]f the attorney agrees to handle any matters the client may have, the relationship continues until the attorney or client terminates the relationship"); *see also* MODEL RULES R. 1.3 cmt. 4 (2018) (advising that "[i]f a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal").

[26] Simpson v. James, 903 F.2d 372, 376 (5th Cir. 1990); Berry, 278 P.3d at 411; *see also* Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc., 687 F. Supp. 2d 381, 389–90 (S.D.N.Y. 2010) (noting that an attorney-client relationship is ordinarily terminated by the accomplishment of the purpose for which it was formed); Thayer v. Fuller & Henry Ltd., 503 F. Supp. 2d 887, 892 (N.D. Ohio 2007) (observing that an attorney-client relationship may terminate when the underlying action has concluded or when the attorney has exhausted all remedies and declined to provide additional legal services); MODEL RULES R. 1.16 cmt. 1 ("Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded.").

instances, the client reasonably expects that the professional relationship will span any intervals and that the lawyer will be available when the client next needs representation.[27] If so, the client should be considered a current client. In other instances, it is possible that the attorney-client relationship ended when the most recent matter concluded.[28] Whether an episodic client is a current or former client will thus depend on the facts of the case.

The Former Client Analysis Under the Model Rules

As explained above, a lawyer must inform a current client of a material error under Model Rule 1.4. Rule 1.4 imposes no similar duty to former clients.

Four of the five subparts in Model Rule 1.4(a) expressly refer to "the client" and the one that does not—Model Rule 1.4(a), governing lawyers' duty to respond to reasonable requests for information—is aimed at responding to requests from a current client. Model Rule 1.4(b) refers to "the client" when describing a lawyer's obligations. Nowhere does Model Rule 1.4 impose on lawyers a duty to communicate with former clients. The comments to Model Rule 1.4 are likewise focused on current clients and are silent with respect to communications with former clients. There is nothing in the legislative history of Model Rule 1.4 to suggest that the drafters meant the duties expressed there to apply to former clients.[29] Had the drafters of the Model Rules intended Rule 1.4 to apply to former clients, they presumably would have referred to former clients in the language of the rule or in the comments to the rule. They did neither despite knowing how to distinguish duties owed to current clients from duties owed to former clients when appropriate, as reflected in the Model Rules regulating conflicts of interest.[30]

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[27] *See, e.g.*, Parallel Iron, LLC v. Adobe Sys. Inc., C.A. No. 12-874-RGA, 2013 WL 789207, at *2–3 (D. Del. Mar. 4, 2013) (concluding that Adobe was a current client in July 2012 when the law firm was doing no work for it; the firm had served as patent counsel to Adobe intermittently between 2006 and February 2012, and had not made clear to Adobe that its representation was terminated); Jones v. Rabanco, Ltd., No. C03-3195P, 2006 WL 2237708, at *3 (W.D. Wash. Aug. 3, 2006) (reasoning that the law firm's inclusion as a contact under a contract, the law firm's work for the client after the contract was finalized, and the fact that the client matter was still open in the law firm's files all indicated an existing attorney-client relationship); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 78-79 (11th ed. 2018) ("Lawyers might believe that a client is no longer a client if they are doing no work for it at the moment and haven't for a while. . . . [A] firm may have done work for a client two or three times a year for the past five years, creating a reasonable client expectation that the professional relationship continues during the intervals and that the lawyer will be available the next time the client needs her.").

[28] *See, e.g.*, Calamar Enters., Inc. v. Blue Forest Land Grp., Inc., 222 F. Supp. 3d 257, 264–65 (W.D.N.Y. 2016) (rejecting the client's claim of an attorney-client relationship where the relationship between the law firm and the client had been dormant for three years; despite the fact that the attorney-client relationship had not been formally terminated, it ended when the purpose of the parties' retainer agreement had been completed).

[29] AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, 71–78 (Arthur H. Garwin ed., 2013).

[30] *Compare* MODEL RULES R. 1.7 (2018) (addressing current client conflicts of interest), *with* MODEL RULES R. 1.9 (2018) (governing former client conflicts of interest).

Because Model Rule 1.4 does not impose on lawyers a duty to communicate with former clients,[31] it is no basis for requiring lawyers to disclose material errors to former clients.

The California State Bar's Committee on Professional Responsibility and Conduct reached a similar conclusion with respect to California Rule of Professional Conduct 3-500, which states that "[a] member [of the State Bar of California] shall keep a client reasonably informed about significant developments relating to the employment or representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed." In concluding that a lawyer had no duty to keep a former client informed of significant developments in the representation, and specifically the former client's possible malpractice claim against the lawyer, the Committee focused on the fact that the lawyer and the former client had "terminated their attorney-client relationship" and on Rule 3-500's reference to a "client," meaning a current client.[32]

Finally, in terms of possible sources of an obligation to disclose material errors to former clients, Model Rule 1.16(d) provides in pertinent part that, upon termination of a representation, "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee[s] or expense[s] that has not been earned or incurred." This provision does not create a duty to inform former clients of material errors for at least two reasons. First, the wording of the rule demonstrates that the error would have to be discovered while the client was a current client, thereby pushing any duty to disclose back into the current client communication regime. Second, Model Rule 1.16(d) is by its terms limited to actions that may be taken upon termination of the representation or soon thereafter; it cannot reasonably be construed to apply to material errors discovered months or years after termination of the representation.

Conclusion

The Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer

[31] *See* Sup. Ct. of Ohio, Bd. of Comm'rs on Grievances & Discipline Adv. Op. 2010-2, 2010 WL 1541844, at *2 (2010) (explaining that Rule 1.4 "applies to ethical duties regarding communication *during a representation*" (emphasis added)); Va. State Bar Comm. on Legal Ethics Eth. Op. 1789, 2004 WL 436386, at *1 (2004) (stating that "*[d]uring the course of the representation*, an attorney's duty to provide information to his client is governed by Rule 1.4(a)") (emphasis added)).

[32] Cal. Eth. Op. 2009-178, *supra* note 1, 2009 WL 3270875, at *6.

must so inform the client promptly under the circumstances. Whether notification is prompt is a case- and fact-specific inquiry.

No similar duty of disclosure exists under the Model Rules where the lawyer discovers after the termination of the attorney-client relationship that the lawyer made a material error in the former client's representation.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK COMMITTEE ON PROFESSIONAL ETHICS

Formal Opinion 2017-3: Ethical Limitations on Seeking an Advantage for a Client in a Civil Dispute by Threatening Ancillary Non-Criminal Proceedings against an Adverse Party

TOPIC: Threatening ancillary non-criminal proceedings against an adverse party

DIGEST: Rule 3.4(e) the New York Rules of Professional Conduct (the "Rules") prohibits lawyers from threatening criminal charges solely to obtain an advantage in a civil matter, but does not apply to threats to instigate ancillary non-criminal proceedings against an adverse party, *e.g.*, where a lawyer, on behalf of a client, threatens to report an adverse party's misconduct to an administrative or regulatory agency unless the adverse party agrees to the client's settlement demand. The inapplicability of Rule 3.4(e) to threats to instigate ancillary non-criminal proceedings, however, does not mean that lawyers are free to make such threats with impunity. Such threats may violate criminal laws against extortion, and, if so, they will likely violate Rules 8.4(b) and Rule 3.4(a)(6). Where such threats do not violate criminal law, they may nonetheless violate Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice. Whether such a threat violates Rule 8.4(d) will generally depend on whether the threat concerns matters extraneous to the parties' dispute or, conversely, would serve as an alternative means of vindicating the same alleged claim of right or of obtaining redress for the same alleged wrong. Additionally, if such a threat is made without a sufficient basis in fact and law, it may violate, *inter alia*, Rule 4.1 or Rule 8.4(c).

RULES: 3.1, 3.4(a), 3.4(e), 4.1, 4.4(a), 8.4(b), 8.4(c), 8.4(d)

QUESTION: What ethical constraints apply to a lawyer seeking to obtain an advantage for his client in a civil dispute by threatening to instigate an ancillary non-criminal proceeding against the adverse party?

OPINION:

I. Rule 3.4(e) Does Not Prohibit Threats to Instigate Non-Criminal Proceedings

Rule 3.4(e) provides: "A lawyer shall not . . . present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." Rule 3.4(e) is the same as its predecessor, New York Disciplinary Rule ("DR") 7-105(A). New York DR 7-105(A) was the same as DR 7-105(A) of the Model Code of Professional Responsibility of the American Bar Association ("ABA").

In 1983, the ABA Commission on Evaluation of Professional Standards decided to eliminate DR 7-105(A). The Commission's reasoning, as described in Formal Opinion 92-363 (July 6, 1992) of the ABA Standing Committee on Ethics and Professional Responsibility, was that DR 7-105 was both redundant and overbroad. The rule was redundant in that it prohibited extortionate conduct that violated criminal law and was therefore barred by other ethical rules. At the same time, the rule was overbroad because it prevented lawyers from threatening

prosecution in legitimate furtherance of a client's interests. As ABA Formal Op. 92-363 explained:

> Model Rule 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." If a lawyer's conduct is extortionate or compounds a crime under the criminal law of a given jurisdiction, that conduct also violates Rule 8.4(b). It is beyond the scope of the Committee's jurisdiction to define extortionate conduct, but we note that the Model Penal Code does not criminalize threats of prosecution where the "property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was *honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services*." . . . .
>
> [A] general prohibition on threats of prosecution . . . would be overbroad, excessively restricting a lawyer from carrying out his or her responsibility to "zealously" assert the client's position under the adversary system. . . . Such a limitation on the lawyer's duty to the client is not justified when the criminal charges are well founded in fact and law, stem from the same matter as the civil claim, and are used to gain legitimate relief for the client. When the criminal charges are well founded in fact and law, their use by a lawyer does not result in the subversion of the criminal justice system that DR 7-105 sought to prevent.

ABA Formal Op. 92-363 (italics in original; underlining added).[1]

ABA Formal Op. 92-363 identified other provisions of the ABA Model Rules, in addition to Model Rule 8.4(b), as sufficient to prevent improper threats of criminal prosecution in the absence of the blanket prohibition in DR 7-105(A): Model Rules 3.1 (assertion of frivolous claims); 4.1 (truthfulness in statements to others); 4.4 (conduct with no substantial purpose other than to embarrass, delay or burden a third person); 8.4(d) (conduct prejudicial to administration of justice); and 8.4(e) (stating or implying ability to improperly influence government agency or official).

Despite the ABA's decision to eliminate the prohibition against threats of criminal prosecution, New York, as well as a number of other jurisdictions, retained it.[2] New York Rule

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[1] The ethical duty to represent a client zealously within the bounds of the law, contained in the New York Lawyer's Code of Professional Responsibility, was replaced effective April 1, 2009 by provisions of the current Rules that call for diligence in carrying out the client's objectives. *See, e.g.*, Rules 1.1(c)(1), 1.2(a) and 1.3.

[2] *See, e.g.*, Ala. R. Prof. Cond. 3.10; Conn. R. Prof. Cond. 3.4(7); Ga. R. Prof. Cond. 3.4(h); Haw. R. Prof. Cond. 3.4(i); Idaho R. Prof. Cond. 4.4(a)(4); La. R. Prof. Cond. 8.4(g); N.J. R. Prof. Cond. 3.4(g); S.C. R. Prof. Cond. 4.5; Tenn. R. Prof. Cond. 4.4(a)(2); Vt. R. Prof. Cond. 4.5. Other states explicitly prohibit lawyers from threatening criminal, disciplinary or

3.4(e), like its predecessor DR 7-105(A), is silent as to non-criminal charges. For this reason, the New York State Bar Association ("NYSBA") Committee on Professional Ethics declined to extend DR 7-105(A) to threats to file non-criminal complaints with regulatory agencies. NYSBA Ethics Op. 772 (Nov. 14, 2003).

Opinion 772 considered a scenario in which a lawyer represented a stock brokerage customer whose funds had been misappropriated by the broker. The question was whether the lawyer, having sued or made a demand on the broker for return of the funds, would violate DR 7-105(A) if he thereafter threatened to (i) file a complaint against the broker with a criminal prosecutor or (ii) file a complaint against the broker with a self-regulatory body such as the New York Stock Exchange ("NYSE"). Opinion 772 explained that threatening to file the criminal complaint would violate DR 7-105(A) if the lawyer's sole purpose in doing so was to obtain the return of the client's funds, as that would be an advantage in the civil matter against the broker.[3] However, threatening to file a non-criminal complaint with the NYSE would not violate DR 7-105(A), even if the lawyer's sole purpose was to obtain an advantage in the form of return of the funds, because the language of the rule referred only to criminal charges. Opinion 722 thus concluded that "the threatened . . . filing of complaints with . . . administrative agencies or disciplinary authorities lies outside the scope of DR 7-105(A)."

Recently, in considering whether a lawyer may threaten to file a disciplinary complaint against another lawyer, this Committee similarly concluded that such a threat would not violate Rule 3.4(e) because that rule, by its terms, applies only to threats of criminal charges. NYCBA Formal Op. 2015-5 (June 26, 2015). We reasoned that "the plain language of Rule 3.4(e) should govern," and "declin[ed] to extend the rule by analogy to threats of disciplinary action against attorneys." *Id*. We also observed that "it may be *appropriate to threaten disciplinary action in order to induce the other lawyer to remedy the harm caused by his misconduct, such as returning improperly withheld client funds* or correcting a false statement made to the court." *Id.* § IV (emphasis added).

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administrative action. *See, e.g.*, Cal. R. Prof. Cond. 5-100 (A); Colo. R. Prof. Cond. 4.5; Me. R. Prof. Cond. 3.1(b).

[3] Because DR 7-105(A) prohibited threats of criminal charges made "solely" to obtain an advantage in a civil matter, Opinion 772 reasoned that such threats would be permissible only if return of the client's funds were not the sole purpose of the threat:

> As long as one purpose of the client in filing such a complaint with a Prosecutor is to have the Broker prosecuted, convicted, or punished, then such a complaint would not offend the letter or spirit of DR 7-105(A). . . . [A]s long as the client's motivation includes that purpose, DR 7-105(A) would not be violated even if the filing of such a complaint resulted in the Broker returning the client's funds and even if the client also intended that result, because the lawyer would not have filed such a complaint "solely" to obtain the return of the client's funds.

However, as discussed in §V below, where a threatened ancillary proceeding seeks the same relief as the underlying civil claim, it may be consistent with, rather than prejudicial to, the administration of justice.

In Opinion 2015-5, we acknowledged but expressly declined to follow the contrary decision of the Nassau County Bar Association Committee on Professional Ethics in Opinion 1998-12 (Oct. 28, 1998). There, a lawyer had information indicating that opposing counsel had made a misrepresentation to the court. Opinion 1998-12 concluded that the lawyer could communicate with opposing counsel about the necessity of correcting the misrepresentation, but that "an actual threat to file a [disciplinary] grievance if [opposing counsel] would not offer a better settlement would . . . violate DR 7-105." In reaching this conclusion, Opinion 1998-12 explained that "[t]hreatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges," citing *People v. Harper*, 75 N.Y.2d 313 (1990). However, *People v. Harper* did not involve a threat to file a disciplinary grievance; rather, it referred to DR 7-105 for the proposition that "it is improper to use the threat of criminal prosecution as a means of extracting money in a civil suit." *Id*. at 320.[4]

In concluding that Rule 3.4(e) does not apply to threatened disciplinary charges, our Opinion 2015-5 cautioned that this "does not mean . . . that lawyers are free to threaten disciplinary charges with impunity," because "other ethical rules impose limits on such threats." *Id*. We emphasized that Opinion 2015-5 should not be interpreted as an "unfettered license to threaten . . . adversaries with disciplinary violations." *Id*. "Given the opportunities for abuse, . . . the right to threaten a disciplinary grievance is subject to important limitations" such as those in Rules 3.1 (non-meritorious claims and contentions), 3.4(a)(6) (knowing engagement in illegal conduct), 4.1 (truthfulness in statements to others), 4.4(a) (conduct with no substantial purpose other than to cause embarrassment or harm), 8.4(b) (illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness), 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), 8.4(d) (conduct prejudicial to administration of justice) and 8.4(h) (conduct adversely reflecting on fitness as lawyer). *See also* ABA Formal Op. 94-383 (July 5, 1994) (Model Rules do not prohibit threat to file disciplinary charges to obtain advantage in civil case, but such threats are constrained by Model Rules 3.1, 4.1, 4.4, 8.4(b) and 8.4(d)).

In light of NYSBA Opinion 772 and NYCBA Opinion 2015-5, we conclude that Rule 3.4(e) does not prohibit a lawyer from seeking to obtain an advantage for his client in a civil matter by threatening to instigate an ancillary non-criminal proceeding against an adverse party.[5] We therefore turn to the principal ethical rules that constrain such threats, discussed below.[6]

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[4] Like this Committee's Opinion 2015-5, NYSBA Opinion 772 declined to follow Nassau County Opinion 1998-12. *See* NYSBA Ethics Op. 772 at §I.C & n.4.

[5] We use the term "threat" as it was used in NYCBA Formal Op. 2015-5, to mean a "statement saying you will be harmed if you do not do what someone wants you to do." Merriam-Webster Dictionary, at https://www.merriam-webster.com/dictionary/threat. For purposes of this Opinion, we assume that the threat in question is explicit and unambiguous. NYSBA Ethics Op. 772 discusses when a lawyer's statement to an adverse party is sufficiently explicit and unambiguous to constitute a threat to present criminal charges, concluding that "there is no universal standard" for making this determination, which "requires the examination of both the content and context" of the lawyer's statement. *See also* NYCBA Formal Op. 2015-5 ("In our view, merely advising another lawyer that his conduct violates a disciplinary rule or could subject them to disciplinary action does not constitute a 'threat' unless it is accompanied

II. Threats in Violation of Law

Whether a particular threat constitutes criminal extortion is a substantive legal issue outside the purview of this Committee. For our purposes, it is sufficient to note that under certain circumstances, threats to instigate non-criminal proceedings in order to obtain an advantage in a civil matter may violate laws against extortion or other criminal statutes, just as certain threats to file disciplinary or criminal charges may violate such laws. *See* NYCBA Formal Op. 2015-5 (discussing N.Y. Penal Code §115.05); Rule 3.4 Cmt. [5] (use of threats in negotiation may constitute crime of extortion). A threat that constitutes criminal extortion or a similar offense will likely violate Rule 3.4(a)(6), which provides that "[a] lawyer shall not . . . engage in . . . illegal conduct," and Rule 8.4(b), which provides that "[a] lawyer. . . shall not . . . engage in . . . illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer." Such a threat may also violate Rule 8.4(h), which provides that "[a] lawyer. . . shall not . . . engage in any . . . conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer."

III. Threats Without Sufficient Basis in Law and Fact

In some circumstances, a lawyer will be subject to discipline for threatening an ancillary non-criminal proceeding that the lawyer knows is legally or factually baseless. Such knowingly baseless threats, including a definitively stated threat to instigate a proceeding that the lawyer does not in fact intend to instigate, may violate Rule 4.1or Rule 8.4(c). Rule 4.1 provides that "[i]n the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person," while Rule 8.4(c) provides that "[a] lawyer . . . shall not . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *See* District of Columbia Ethics Op. 339 (April 2007) (threat to report debtor to criminal authorities if debt is not paid may be impermissibly misleading if a selective and inaccurate reference is made to the applicable law). [7]

This is not to say that all legally or factually unsupported threats are impermissibly misleading. Especially in the course of negotiations with another lawyer, a threat may not rise to the level of an express or implied assertion of fact or law or of the lawyer's intended future conduct. *See* Rule 4.1, cmt. [2] ("Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiations, certain types of statements ordinarily are not taken as statements of fact."). But if a lawyer makes a threat that is baseless either because the lawyer has unequivocally stated an intention

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by a statement that you intend to file disciplinary charges unless the other lawyer complies with a particular demand.").

[6] Our discussion of these rules assumes that the adverse party against whom the threat is made is not the lawyer's present or former client, as that scenario would involve additional concerns such as confidentiality under Rule 1.6 and duties to former clients under Rule 1.9.

[7] Baseless threats of legal action may also violate criminal law. *See, e.g.*, *State v. Hynes*, 978 A.2d 264 (N.H. 2009) (upholding a criminal conviction for extortion where a lawyer, acting on his own behalf, sought compensation by baselessly threatening to sue a business for discriminatory pricing).

that does not exist or because the threatened proceeding would lack a sufficient legal or factual basis under Rule 3.1, [8] it may be knowingly false or misleading to seek an advantage by making such a threat. This is especially so if the lawyer is making the threat to a non-lawyer who might reasonably be expected to rely to his detriment on the lawyer's express or implied assertion that there is a legitimate basis for the threat.

IV. Threats for No Substantial Purpose Other Than Harassment or Harm

Rule 4.4(a) provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass or harm a third person." Rule 3.1(b)(2) similarly provides that a lawyer's conduct is "frivolous" for purposes of Rule 3.1 if it "serves merely to harass or maliciously injure another." There could be circumstances where a threat to instigate a non-criminal proceeding against an adverse party is largely or entirely the result of a client's desire to embarrass, harm, harass or maliciously injure an adverse party, in which event these rules would be implicated. In most cases, however, a substantial purpose of the threat will be to gain advantage in the underlying civil dispute by causing the adverse party to settle or drop his claims. Where that is so, the threat would not appear to "serve[] merely to harass or maliciously injure another" or "have no substantial purpose" other than to cause embarrassment or harm.

V. Threats Prejudicial to Administration of Justice

A threat that is adequately grounded in law and fact, has a substantial purpose other than harassment or harm, and is not extortionate under criminal law may nonetheless violate Rule 8.4(d), which provides: "A lawyer . . . shall not . . . engage in conduct that is prejudicial to the administration of justice." Rule 8.4(d), which addresses conduct that may or may not be addressed by other ethical rules, seeks to prevent substantial harm to the justice system:

> The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, *whether or not it violates another ethics rule*, that results in *substantial harm to the justice system* comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding. . . . The conduct must be *seriously inconsistent with a lawyer's responsibility as an officer of the court*."

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[8] Rule 3.1(a) provides: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous." Under Rule 3.1(b)(1), a lawyer's conduct is "frivolous" if the lawyer "knowingly advances a claim . . . that is unwarranted under existing law," unless there is a good faith argument for changing existing law. Rule 3.1(b)(3) similarly provides that a lawyer's conduct is "frivolous" for purposes of Rule 3.1 if the lawyer "knowingly asserts material factual statements that are false."

Rule 8.4 Cmt. [3] (emphasis added).[9]

Clearly, a baseless threat may be prejudicial to the administration of justice where it would tend to undermine the truth-seeking process or otherwise distort the adjudicative proceeding. *See, e.g.*, NYCBA Formal Op. 2015-5 (opining that a threat to file disciplinary charges against opposing counsel, if not supported by a good faith belief that opposing counsel is engaged in unethical conduct, would violate Rule 8.4(d)); *In re Smith*, 848 P.2d 612 (Or. 1993) (finding that it was prejudicial to the administration of justice for a lawyer to baselessly threaten to sue a doctor if the doctor did not render a helpful expert opinion).[10]

The question, then, is whether a threat that does have a sufficient basis may nonetheless violate Rule 8.4(d). Two ABA opinions, ABA Formal Op. 92-363 (July 6, 1992) and ABA Formal Op. 94-383 (July 5, 1994), recognize that it may be improper to threaten to take otherwise lawful action, such as filing criminal or disciplinary charges for which there is an adequate legal and factual basis, in order to pressure an opposing party to settle a civil case on favorable terms. These opinions suggest that the propriety of such a threat turns on whether the threatened proceeding provides an alternative means of vindicating the rights at issue in the civil case or whether the lawyer is threatening unrelated harm in order to obtain leverage or a bargaining chip for settlement.

For example, ABA Formal Opinion 92-363, which concerned threats to instigate criminal proceedings, emphasized that if the criminal offense was unrelated to the underlying civil matter, threats would tend to prejudice the administration of justice by distorting the parties' negotiations:

> A relatedness requirement . . . tends to ensure that negotiations will be focused on the true value of the civil claim, which presumably includes any criminal liability arising from the same facts or transaction, and *discourages exploitation of extraneous matters that have nothing to do with evaluating that claim*. Introducing into civil negotiations an unrelated criminal issue solely to gain leverage in settling a civil claim *furthers no legitimate interest of the justice system, and tends to prejudice its administration.*

ABA Formal Op. 92-363 (July 6, 1992) (emphasis added). *See also* Roy D. Simon & Nicole Hyland, *Simon's New York Rules of Professional Conduct Annotated* (2016 ed.) at 1159 (purpose

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[9] The fact that Rule 3.4(e) addresses threats of ancillary proceedings to gain advantage in a civil matter, and does not prohibit such threats so long as the threatened proceedings are non-criminal, does not preclude the application of Rule 8.4(d), which has repeatedly been found to govern conduct also governed by more specific rules. *See*, *e.g.*, NYSBA Ethics Op. 1069 (2015) (analyzing conflict of interest in representation of immigrant child in part through 8.4(d)); NYSBA Ethics Op. 945 (2012) (analyzing disclosure of client wrongdoing in part through Rule 8.4(d)); NYSBA Ethics Op. 856 (2011) (analyzing limitations on scope of representation in part through 8.4(d)).

[10] The *Smith* decision is discussed in Noah Jon Kores, "The Ethics of Threatening," 43 *Litigation* no. 3 (Spring 2017).

of civil justice system is to enable private parties to resolve disputes peaceably by presenting facts to neutral tribunal and negotiating in good faith; threat of criminal charges may give one party excessive settlement leverage, enabling him to coerce unfair settlement and deter other party from pursuing meritorious claims or defenses, which would "frustrate the purpose of the civil justice system").

We agree that threatened ancillary proceedings – whether criminal or non-criminal – generally will not prejudice the administration of justice when they concern the same subject matter as the underlying civil dispute and would serve as an alternative means of vindicating the same alleged claim of right or of obtaining redress for the same alleged wrong. A typical scenario would be one where a plaintiff who brings a civil suit to recover damages threatens to enlist the aid of an administrative agency in the recovery of those damages. For example, as in NYSBA Opinion 772, an investor suing a stockbroker for misappropriated funds may threaten the stockbroker with an NYSE proceeding asserting the same misappropriation. Similarly, a consumer suing a contractor for shoddy work may threaten to report his claim to the Attorney General's Bureau of Consumer Frauds & Protection, a civil bureau that helps consumers obtain restitution. In such cases, where the threatened proceedings seek the same relief as the underlying civil claim, there is no "exploitation of extraneous matters that have nothing to do with evaluating that claim" and no resulting prejudice to the administration of justice of the kind contemplated by ABA Formal Opinion 92-363.

In contrast, if the subject matter of the threatened proceeding and the underlying civil dispute are unrelated, the threat is likelier, in our view, to prejudice the administration of justice, because it will be extortionate in nature, whether or not it rises to the level of extortion under criminal law. This is illustrated in North Carolina Formal Ethics Opinion 2005-3 (July 24, 2005), which concluded that a lawyer may not threaten to report an opposing party or witness to immigration officials to gain an advantage in civil settlement negotiations. There, defense counsel learned during discovery that the plaintiff (and some of plaintiff's witnesses) might be in the country illegally, but the plaintiff's immigration status was "entirely unrelated" to the civil suit. The issue before the North Carolina Ethics Committee "involve[d] the threat, not of criminal prosecution, but of disclosure to immigration authorities." *Id.*[11] In any event, there was no rule prohibiting threats of criminal prosecution to gain advantage in a civil matter, as North Carolina had previously eliminated that rule. Consequently, the permissibility of defense counsel's threat to report to immigration authorities turned on whether that would be prejudicial to the administration of justice under Rule 8.4(d) or violate other rules.

The North Carolina Ethics Committee reasoned that even where a threat to report a party or a witness to immigration authorities to gain leverage in a civil matter does not constitute

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[11] Although entering the United States without authorization may be a crime, we understand that being present here without authorization, such as when a person overstays the visa that allowed him to enter the country, is not. *See, e.g.*, Issue Brief, Criminalizing Undocumented Immigrants, ACLU Immigrants' Rights Project (Feb. 2010), https://www.aclu.org/other/issue-brief-criminalizing-undocumented-immigrants. Consequently, a threat to report an adverse party to immigration authorities would not necessarily be a threat to instigate criminal proceedings, and thus would not necessarily fall within Rule 3.4(e).

criminal extortion, the "exploitation of information unrelated to the client's legitimate interest in resolving the lawsuit raises some of the same concerns as threatening to pursue the criminal prosecution of the opposing party for an unrelated crime," including prejudice to the administration of justice. *Id*. Citing, *inter alia*, ABA Formal Op. 92-363 and Rule 8.4(d), the Ethics Committee concluded:

> There is no valid basis for distinguishing between threats to report unrelated criminal conduct and threats to report immigration status to the authorities: the *same exploitation of extraneous matters and abuse of the justice system may occur*. . . . The threat to expose a party's undocumented immigration status *serves no other purpose than to gain leverage* in the settlement negotiations for a civil dispute and *furthers no legitimate interest of our adjudicative system*. Therefore, a lawyer may not use the threat of reporting an opposing party or a witness to immigration officials in settlement negotiations on behalf of a client in a civil matter.

(Emphasis added.)[12]

As noted above, Comment [3] to Rule 8.4 explains that the prohibition on conduct prejudicial to the administration of justice is intended to address conduct that "results in substantial harm to the justice system" – harm that is "comparable to," for example, the harm caused by "paying a witness to be unavailable." In North Carolina Opinion 2005-3, defense counsel's threat to report plaintiff and some of his witnesses to immigration authorities may not appear as egregious as paying a witness to be unavailable. Yet it could cause comparable harm, by using matters extraneous to the substantive and procedural merits of the case to derail the fair adjudication of plaintiff's claims and deprive him of his day in court. It may be rare for a threat against an adverse party to cause such substantial harm to the justice system, but given the potential for broad pretrial discovery to turn up unrelated information that could be deployed against an adverse party, it is appropriate to clarify that such threats may violate Rule 8.4(d).

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[12] In discussing whether the use of threats of criminal charges in negotiation constitutes the crime of extortion, Comment [5] to Rule 3.4 similarly illustrates the distinction between threats that are related to the underlying civil matter and those that are not:

> [N]ot all threats are improper. For example, if a lawyer represents a client who has been criminally harmed by a third person (for example, a theft of property), the lawyer's threat to report the crime does not constitute extortion when *honestly claimed in an effort to obtain restitution or indemnification for the harm done*. But extortion is committed if the threat involves *conduct of the third person unrelated to the criminal harm (for example, a threat to report tax evasion by the third person that is unrelated to the civil dispute)*.

Rule 3.4 Cmt. [5] (emphasis added).

VI. Conclusion

Rule 3.4(e) does not prohibit a lawyer from threatening non-criminal proceedings against an adverse party to obtain an advantage in a civil matter, but this does not mean that that there are no ethical constraints on such threats. Such threats may violate criminal laws against extortion, and if so they will likely violate Rules 8.4(b) and 3.4(a)(6). Where such threats do not violate criminal law, they may nonetheless violate Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice. Whether such a threat is prejudicial to the administration of justice will generally depend on whether the threat concerns matters extraneous to the parties' dispute. Additionally, a threat made without a sufficient basis in fact and law would violate, *inter alia*, Rule 3.1, and if it included a false statement of fact or law would also violate, *inter alia*, Rule 4.1.

August 17, 2018

Rule 5.6: Restrictions on Rights to Practice

Law Firms And Associations

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

Comment | Table of Contents | Next Rule

August 16, 2018

Rule 4.4: Respect for Rights of Third Persons

Transactions With Persons Other Than Clients

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden 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 or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment | Table of Contents | Next Rule

American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_4_respect_for_rights_of_third_persons

August 16, 2018

Rule 4.3: Dealing with Unrepresented Person

Transactions With Persons Other Than Clients

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment | Table of Contents | Next Rule

American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_4_3_dealing_with_unrepresented_person

August 16, 2018

Rule 4.2: Communication with Person Represented by Counsel

Transactions With Persons Other Than Clients

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.

Comment | Table of Contents | Next Rule

August 16, 2018

Rule 1.14: Client with Diminished Capacity

Client-Lawyer Relationship

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Comment | Table of Contents | Next Rule

August 16, 2018

Rule 1.6: Confidentiality of Information

Client-Lawyer Relationship

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed

information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment | Table of Contents | Next Rule

August 16, 2018

Rule 1.13: Organization as Client

Client-Lawyer Relationship

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment | Table of Contents | Next Rule

American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_13_organization_as_client

August 16, 2018

Rule 1.7: Conflict of Interest: Current Clients

Client-Lawyer Relationship

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer 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.

Comment | Table of Contents | Next Rule

August 16, 2018

Rule 1.4: Communications

Client-Lawyer Relationship

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment | Table of Contents | Next Rule

August 16, 2018

Rule 1.3: Diligence

Client-Lawyer Relationship

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment | Table of Contents | Next Rule

American Bar Association |
/content/aba-cms-dotorg/en/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_3_diligence

August 16, 2018

Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer

Client-Lawyer Relationship

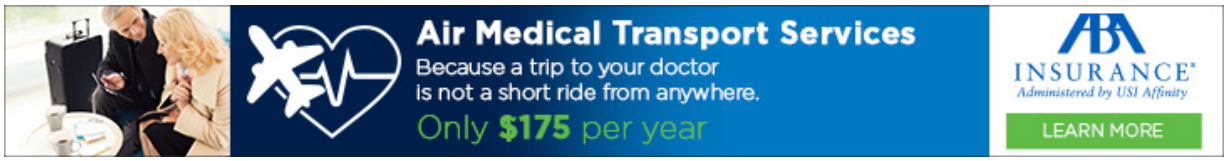
(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) 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.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Comment | Table of Contents | Next Rule



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