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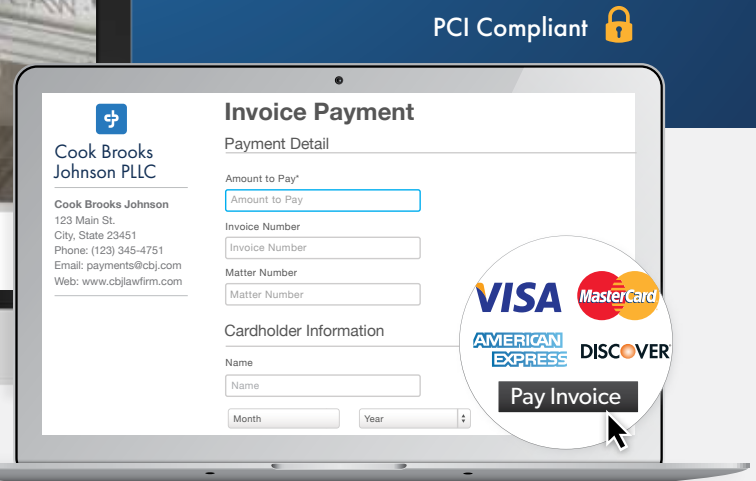
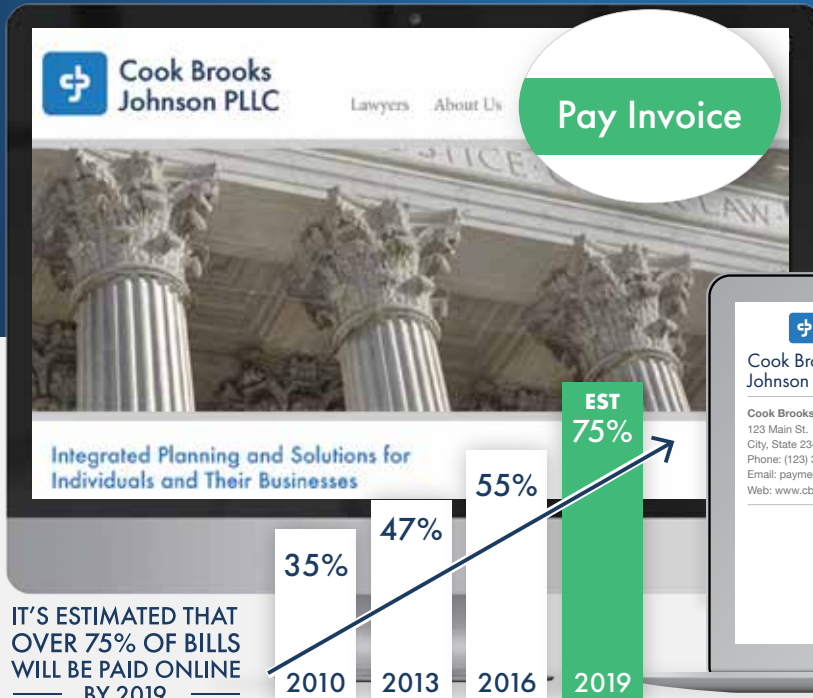


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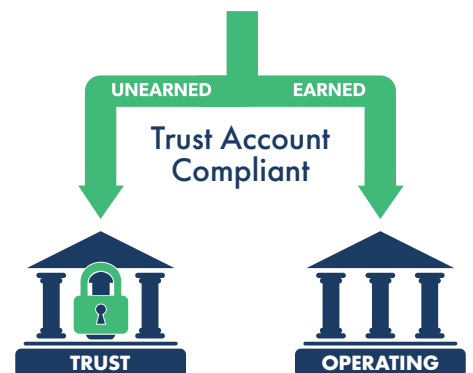


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Conflicts of Use; Conflicts of Representation

By Kenneth A. Vogel

Below is a real-life small law firm ethics conflict of interest dilemma.

Thomas is a local land owner. He owns a small urban apartment complex situated on one-half acre in a residentially zoned area. The complex contains eight two-story duplex bungalows, for a total of 16 units. The small, non-descript houses nonetheless enjoy historic protection because they form a part of the historic fabric of the neighborhood, not for their elegance but simply because they were built 90 years ago. The driveway from the bungalows leads out onto a side-street feeder road, which connects to a main commercial boulevard just one-half a block away.





Adjacent to Thomas's property is a 1-½ acre parcel of land facing the main commercial street. The neighboring property owner is MMCO, a major office building developer. What appears to be a large, surface parking lot is not really one lot at all. It is an assemblage of contiguous parcels. To the surveyor, Thomas's neighbor has multiple pieces of vacant land.

Different parcels of MMCO's property have different zoning from one another. The parcels which face the main commercial street are zoned for retail or office use. The lot immediately adjacent to Thomas's land is zoned for surface or underground parking. Assuming that a developer wishes to build something on the main street – a retail strip center or a small office building, for example the parking would be behind that shopping center which abuts Thomas's land. That provides a buffer between the commercial development and the residential neighborhood behind it. The local zoning ordinance permits construction of up to 50,000 sq. ft. on the assemblage as a matter of right. By meeting a few administrative hurdles, it can go up to 60,000 sq. ft. A transitional strip is part of the city's master plan.

Thomas receives a notice of a proposed re-zoning next door. MMCO proposes to build a 300,000 sq. ft. office building on the now vacant parking lot. The proposed site plan is for a 200 foot high office building to face the major street. MMCO also proposes a 70-foot-tall parking structure on the zero lot-line running the full length of MMCO's property line contiguous Thomas's property. The parking structure will be located just 3 feet from the bedroom windows of the bungalows. The office building tower will put the bungalows

in perpetual shade. The parking garage entrance is immediately next to our client's driveway. The garage will hold over 1,000 cars. This will, Thomas contends, clog the side street and make access to his property difficult.

Thomas believes that this new proposed construction will destroy the property value of his bungalows. After all, he reasons, who wants to live in an apartment with a parking garage just three feet from your bedroom window? An existing traffic light from the side street onto the main road already causes traffic to back up on the side street, blocking the bungalow's driveway. Imagine trying to get in and out of your driveway through the stacking of entering and exiting the parking garage!

Thomas hires the small law firm of Able and Baker (A&B). He wants to find out his rights on opposing MMCO's re-zoning application. A&B is a small, well known boutique law firm specializing in zoning. The partner handling Thomas's matter is Mr. Baker. Thomas signs an engagement letter and pays A&B a retainer of \$10,000. Mr. Baker files a written protest letter against the project with the zoning board. The letter, a part of the public record, clearly states that A&B represents Thomas. As the zoning applicant, MMCO has knowledge of A&B's letter opposing its re-zoning request. Also, MMCO referenced A&B's letter in its side conversations with Thomas.

A senior executive at MMCO then calls the Able and Baker law firm. He speaks with Mr. Able. MMCO tells Mr. Able that it wants to hire A&B to represent them on various zoning projects throughout the city. MMCO's senior executive does not tell Able about the zoning project in which Mr.

Baker submitted the opposition to MMCO's project. A general telephone discussion between Mr. Able and prospective client MMCO occurs. Mr. Able tells MMCO that he needs to do a conflict check before A&B can agree to represent MMCO. Mr. Able thereafter sent a retainer letter to MMCO and discloses to them (after the initial telephone call from MMCO) that the firm also represents Thomas on a different matter, namely the opposition against MMCO on Thomas's parcel. A&B did not request a disclosure and conflict waiver letter from Thomas because MMCO told Able that based on the disclosure, they did not want A&B to represent them on any legal matter. MMCO never made a payment on A&B's retainer agreement.

MMCO then sends a letter from its outside counsel to A&B stating that the phone conversation between MMCO and A&B constitutes legal representation. It alleges that in the telephone call MMCO gave confidential information about their general case, business strategies and mentioned the specific project at issue during the call. A&B never billed MMCO, never received any money from MMCO and never performed any legal work on MMCO's behalf. Nor did MMCO have any further conversations with Able about that or any other matter. MMCO's lawyer contends that an attorney client relationship between exists between A&B and MMCO. He demands that law firm A&B withdraw from further representing Thomas. MMCO claims that A&B cannot ethically continue to represent Thomas on any matter adverse to MMCO, including the zoning dispute where Baker had already filed public objections. Given A&B's zoning specialty and MMCO's expansion plans, this demand would

permanently remove A&B from representing any other client at any time where A&B might oppose MMCO, not just the project in question.

A&B disagrees. It says that the law firm never undertook representation of MMCO in any matter. A&B denies receiving or disclosing any confidential information from MMCO. Nonetheless, A&B is fearful of a fight with MMCO. Perhaps it comes to the conclusion that keeping Thomas as a client isn't worth the risk? A&B accedes to MMCO's demands and withdraws from representing Thomas as his attorney. Creating a Chinese wall isn't an option for a small law firm like A&B. The threat by MMCO could cause A&B to trigger a claim under its professional malpractice insurance, which has a deductible of \$15,000. The insurance deductible is more than Thomas's fee.

- A&B does not thereafter represent MMCO on this or any other project.
- Has MMCO done anything wrong in contacting A&B?
- Has A&B law firm done anything wrong in withdrawing from representing Thomas?
- The author posted this scenario on the MD State Bar Association Listserv.

Among the replies:

R.S., Esq. from Baltimore writes "Sounds like dirty pool to me."

M.G., Esq., a Bethesda attorney states "This is actually a tactic that I have seen used before. It is likely a deliberate attempt to prevent clients from having the experienced counsel of their choice in the fight against the big company. When the written protest was filed, no doubt a copy was

sent to the company, who then sent it to their attorney. Depending on what the ethics rules say, the big company attorney who contacted A&B may be in some disciplinary trouble, as he knew that the client was represented by A&B.

"In addition to disciplinary trouble there is a possible claim for interference with the contract between the client and A&B. If you can come up with some decent damages, you might file it against both the attorney and the company. An interesting case for punitive damages possibly."

A.W., Esq. from Rockville writes, "Depends on the state's attorney ethics code. Many states have changed their codes so that a conversation concerning potential employment does not create a conflict against another party. The purpose was to defeat common strategies such as

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a husband talking to every divorce attorney in a small town from conflicting them all out of representing the wife in a divorce.

"If it was the in house attorney who called the law firm, and it can be proven he knew of the prior representation, I would make the following two arguments:

"1) By talking to the attorney of the represented opposing party, he knowingly waived confidentiality, and therefore no subsequent conflict.

"2) His behavior was designed to interfere with opposing parties representation, and that is unethical.

"But I like # 1. He knew he was talking to opposing counsel. He had no expectation of confidentiality. If he didn't actually know, someone in his legal department likely knew, and therefore he is presumed to have known.

"Also, the two partners can "wall" themselves off from each other on this matter, but there can be no representation of the company until the case is over. This is a good reminder that a conflict check should be done before even talking to a potential client."

The American Bar Association Newsletter, April 2016 edition, published an article entitled "The once and future client" for its "Eye On Ethics" column. The article cites ABA Model Rule 1.18; Formal Opinion 90-358.

ABA Model Rule 1.18 Duties to Prospective Client, adopted by the ABA in 2002 pursuant to the ABA Ethics 2000 Commission's (E2k) recommendation has been adopted by many jurisdictions. The ABA Center for Professional Responsibility's Policy Implementation Committee's website provides an approach to the prospective client issue.

The ABA Standing Committee on Ethics and Professional Responsibility has also issued an ethics opinion on this topic. *See*, Formal Opinion 90-358 *Protection of Information Imparted by Prospective Client* (1990).

Under Model Rule 1.18(a), anyone who consults a lawyer about possibly entering a lawyer-client relationship becomes a prospective client.

Prospective clients gain entitlement to the protection of client confidentiality to the same extent as a former client. While the lawyer owes the prospective client the same duties of confidentiality as would apply to a former client under Model Rule 1.9 *Duties to Former Client*, the lawyer's duty of loyalty is not as restrictive; Model Rule 1.18(c) uses a different standard to for the purposes of determining disqualification than does Model Rule 1.9, stating that when the information received could be *significantly harmful* (see discussion below), to the prospective client, the lawyer may not "represent a client with interests materially adverse to those of a prospective client in the same or substantially related matter." The *Restatement (Third) of the Law Governing Lawyers* § 15(2) (2000) takes a similar approach.

What is "Significantly Harmful" Information Under A.B.A. Model Rule 1.18?

Under Model Rule 1.18, if the prospective client is determined to have revealed information that "could be significantly harmful" then the lawyer and his firm will be prohibited from representing an adverse party in the same or related matter. Just what exactly is significantly harmful information is of course a factual question that will depend upon the particulars of each case. See N.Y. City Formal Ethics Op. 2006-2 (2006).

Whether information could be "significantly harmful" to a prospective client would depend, of course, on the relevant facts and circumstances of the particular situation.

The following are examples of case law and state bar ethics opinions

that have addressed whether certain information that has been disclosed by a prospective client could be construed as significantly harmful in subsequent litigation.

- In *Sturdivant v. Sturdivant*, 241 S.W.3d 740 (Ark. 2006) a law firm was disqualified from representing a former wife in change-of-custody proceeding, when her husband already consulted with the firm and disclosed "everything he knew and his concerns about the children and his former wife."
- In *Mayers v. Stone Castle Partners, LLC*, 1 N.Y.S.3d 58, 2015 N.Y. Slip Op. 00295 (2015) the court held that disqualification was not warranted because the confidential information divulged in the consultation did not have the potential to be

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significantly harmful in litigation. The Montana Supreme Court in (*In re Perry*, Mont., 293 P.3d 170 (2013)) found that three phone conversations years earlier from the wife did not convey substantially harmful information to the husband's law firm and so the firm may continue to represent the husband."

- *Compare Cascades Branding Innovation LLC v. Walgreen Co*, Not Reported in F.Supp.2d, 2012 WL 1570774 (N.D.Ill.) (2012) wherein a law firm was disqualified from representing the opponent of the prospective client company's wholly owned subsidiary in a different patent infringement action. In this case, "playbook information" – an organization's policies and standard approach to litigation that the firm learned from the prospective client was part of the confidential information obtained, and ultimately formed the basis for the disqualification."
- The State Bar of Wisconsin analyzed the types of information that could be significantly harmful to the prospective client in Opinion EF-10-03 (1210). In the Opinion, the committee stated that "Information may be significantly harmful if it is sensitive or has long-term significance in the matter, for example, if it concerns motives, litigation strategies, or potential weaknesses. Information that could substantially affect settlement proposals or trial strategy could also be significantly harmful."

The Consultation Must Have Been Made in Good Faith

The last sentence of Comment [2] to Model Rule 1.18 states "a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client", thus drawing a line against individuals who consult with the lawyer for the sole purpose of having them disqualified from representing adverse parties against them in the future." Case law and ethics opinions have addressed this issue. See e.g., *Matthews v. United States*, Not Reported in F.Supp.2d, 2010 WL 503038 D.Guam, (2010) (caller did not become a prospective client simply because the lawyer let him keep talking "out of courtesy.") See also State Bar of Virginia Ethics Op. 1794 (2004) (no duty of confidentiality owed to person who posed as prospective client and shared confidences with lawyer to create conflict of interest) and Illinois State Bar Association Opinion 12-18 (2012) (lawyer may not counsel a client to consult other lawyers in the community as a stratagem to disqualify them from representing the client's opponent.)

Beauty Contests

Sometimes, when individuals who are looking for a lawyer to represent them in a particular matter, they will consult with several firms in an effort to determine who is the best fit. These types of consultations have been referred to as "beauty contests", and some state bar ethics opinions have analyzed the prospective client conflicts/confidentiality issues implicated in this context. See, e.g., the Association of the Bar of the City of New York Opinion 2013-1

(2013). (Stating that a law firm that participated in, but did not win, a "beauty contest" could represent an adverse party if it did not give any confidential information during the beauty contest. If confidential information did pass between them, then the client must give informed written consent and the law firm must implement effective screening procedures as described by Model Rule 1.18(d)(2)).

Informed Consent and Screening to Avoid Disqualification

In the event that a lawyer has received disqualifying information, subpart (d) of Model Rule 1.18 states the lawyer may proceed with the representation if both the client and the prospective client give their informed consent in writing. In the absence of such consent, it also states that other lawyers in the firm may proceed with the adverse representation as long as the affected lawyer has taken measures to limit his exposure to more potentially disqualifying information than was reasonably necessary to determine whether to proceed with the representation and is "screened from any participation in the matter and is apportioned no part of the fee therefrom...". The firm must also notify the prospective client. See N.Y. City Formal Ethics Op. 2006-2 (2006) (endorsing Model Rule approach and authorizing screening to rebut presumption that other lawyers in firm gained knowledge of prospective client's "confidences and secrets"); N.C. Ethics Op. 2003-8 (2003) (second representation may not proceed unless former prospective client notified and firm promptly implements screening procedures,



MATTHEW M. BRYANT**
Direct: 240.553.1185
mbryant@jgllaw.com



DAVID M. BULITT*
Direct: 240.399.7888
dbulitt@jgllaw.com



JOSEPH M. CREED*
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but not necessary to obtain former prospective client's consent; second consultation itself can suffice to trigger screening and notice requirements if firm already became aware of potential conflict).

For further information on Model Rule 1.18, see the annotations to the rule in the eighth edition of the ABA Annotated Model Rules of Professional Conduct (2015). See also the chapter entitled, "Prospective Clients" (last updated in 2011) as it appears at page 31:151 of the ABA/BNA Lawyers' Manual on Professional Conduct and chapter 18 Duties to Prospective Clients as it appears at page 716 of the 2014-15 edition of Rotunda and Dzienkowski's Lawyer's Deskbook on Professional Responsibility.

The Maryland Attorneys' Rules of Professional Conduct are found in the newly enacted Maryland Rules of Procedure, Title §19-300. They are similar to, but not identical to, the ABA Model Rules.

Maryland Rule §19-301.18 (1.18). Duties to Prospective Client

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule §19-301.9 (1.9) would permit with respect to information of a former client.

(c) A lawyer subject to section (b)

of this Rule shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in section (d) of this Rule. If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in section (d) of this Rule.

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

As the reader now knows, Able and Baker withdrew from representing the client. Does A&B have any liability to its now former client? A&B wrote a letter to the zoning administrator on Thomas's behalf. Thomas paid its fee. A&B did not refund any earned legal fees to its now former client. Should it have? Thomas was harmed in that he then had to get replacement counsel. Is the inability to get counsel of one's choice a harm from which damages flow? Was the tactic of MMCO a tortious interference with Thomas's attorney-client relationship? While Thomas was able to find competent replacement counsel, one with a higher stature, his new counsel does not have the same cordial relation-

ship with the city planners, a main reason that Thomas hired Baker.

Green Mail

Property law does not appear to provide a nuisance remedy. A right to sunlight, views or fresh air unobstructed by neighboring properties is not a common law right. There is no local or state statute which creates such a right. If MMCO is successful in re-zoning its property, and if MMCO overcomes any administrative appeals and court suits, it can build its building without compensating Thomas. Thomas's actions will delay MMCO, but if Thomas loses, MMCO will develop its office building. On the other hand, if Thomas wins, MMCO's project is defeated.

MMCO views any payment to Thomas as "Green Mail." Green Mail refers to a practice by which a corporation pays money to an aggressor in order to stop an act of aggression. Thomas's view is the opposite. His position is that MMCO can build what it wants to the maximum amount of the current zoning, namely 50 to 60,000 sq. ft. It is the plan for the 300,000 sq. ft. office tower that harms Thomas. Thomas believes that he should therefore be compensated.

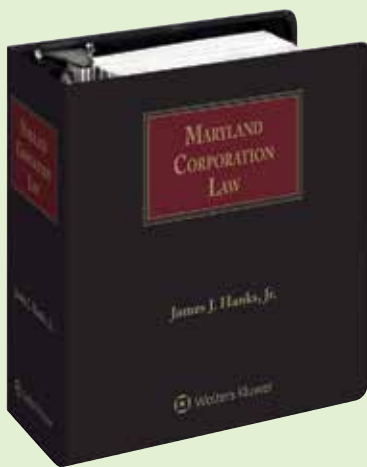
The Next Attorney

A&B completed Phase I of its representation of Thomas at the point that MMCO demanded its withdrawal. A&B sent a disclosure letter to Thomas stating that it would like to represent Thomas for Phase II of the fight. The disclosure letter reported that A&B never performed any legal services for MMCO and had no communications with MMCO since the earlier conversation. Thomas replied

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that he wished A&B to continue working for him. Shortly thereafter, based on escalating threats from MMCO, A&B informed Thomas that it would no longer represent him.

Thomas then hires another small law firm, C&D, to take over representing him. C&D is another well-known firm which successfully represented homeowners' associations and community activist groups in the city. It has stopped other projects dead in the water.

C&D has to spend time getting up to speed and reviewing A&B's work. That cost Thomas money. C&D's hourly rates exceed A&B's. Might A&B be liable for the difference in the hourly rates between its rate and C&D's higher rates? Or for the additional time? Is it even possible to say that A&B would have worked more efficiently or been more effective than C&D, thereby spending less time and costing the client money than C&D? Are lawyers fungible?

The parties attempted to reach a settlement. The case did not settle. Under the proposed terms of the settlement, Thomas would have stopped opposing MMCO's re-zoning application. MMCO would have compensated Thomas pennies on the dollar for the (speculative) diminution in value of Thomas's property. None of C&D's other clients are fighting this MMCO project. If Thomas ended his fight, meaningful opposition to this project from another source was unlikely. Without organized opposition, MMCO's project is likely to go forward. C&D agreed that it would not represent another neighbor in opposition to this specific MMCO project as it would undermine Thomas's settlement with MMCO.

In the future, it is possible that one of C&D's clients, present or new,

could fight a different MMCO project. As part of its settlement negotiations with Thomas, MMCO wants to permanently neutralize C&D from ever opposing them on any MMCO project at any time. They want C&D to agree to never represent another client against it.

This immediately attempts to create a conflict of interest between Thomas and his attorneys, C&D. If Thomas wants the settlement, should he try and push C&D to agree to this term? When C&D refuses, as it must, is it putting its law firm's self-interest over that of its client? This attempt created a theoretical conflict only. C&D stated that under no circumstances would they ever agree to represent MMCO, and Thomas did not make that request of C&D in order to facilitate a settlement.

The Donald Trump Connection

If the fact scenario above strains your sense of belief and fair play, consider this. On March 25, 2016, *The Washington Post* reported the story of New Jersey attorney Glenn Zeitz. In 1996 Zeitz represented an elderly but feisty widow who refused to sell her home in Atlantic City to Donald Trump for his casino expansion. The widow, Vera Coking, was in active litigation with Mr. Trump regarding damage to her home caused by Trump's construction, and due to Trump's attempt to have Ms. Coking's home taken by Atlantic City by eminent domain. While the dispute was raging, Mr. Trump personally called Mr. Zeitz at home. He asked Zeitz to represent him on another eminent domain case in Atlantic City where Trump took a contrary legal position in a fight with casino magnate Steve

Wynn. When Zeitz refused, Trump told Zeitz to rush a settlement of the Coking case so as to eliminate the conflict of interest.

Candidate Trump denied to be interviewed for the story. His spokeswoman said, "This story and these statements are completely false. Additionally, it is ancient history."

Maryland Ideals of Professionalism

The Maryland Ideals of Professionalism are found in the Maryland Rules of Procedure, Appendix 19-B state "A lawyer should aspire (1) to put fidelity to clients before self-interest." As applied to the situation at hand, if Thomas wants to settle the dispute with MMCO, and if MMCO will not agree to a settlement absent C&D's consent to its demands about C&D's future legal activities with other clients, has C&D violated its professional obligation to Thomas or failed to live up to these ideals?

This author believes that C&D is not obligated to be pushed into any agreement contrary to C&D's best interests as a law firm, even if it is contrary to the best interests of Thomas.

In addition, C&D's other land use clients, in particular non-profit community activists, oppose spot zoning requests filed by other developers on other parcels. Indeed, C&D is suing the city to try and overturn city approval of a different project from a different developer, but with a similar set of legal issues. If C&D successfully opposes spot zoning generally, the ripple effect can negate MMCO's spot zoning approvals on its parcels next to Thomas's property, even without opposition from Thomas.

This is a known risk that MMCO has to take. It cannot force C&D into a conflict where it abandons its other clients in order to facilitate Thomas's settlement agreement.

Maryland Rule §19-301.7 (1.7) Conflict of Interest: General Rule

(a) Except as provided in section (b) of this Rule, a lawyer shall not represent a client if the representation involves a conflict of interest. A 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.

MMCO is nothing if not Big and Bad. It knows that pursuant to MD Rule §19-305.6 (5.6), described below, C&D cannot be forever barred by agreement from representing clients on any project in opposition to MMCO. C&D will not agree to close its land use law practice fighting developers.

Maryland Rule §19-305.6 (5.6). Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

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



Comments to Rule §19-305.6 (5.6)

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.

[2] Section (b) of this Rule prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

Can Lawyers Be Made Slaves?

To avoid bumping up against Maryland Rule §19-305.6 (5.6), but to still neutralize C&D in the future, MMCO tried to create within the proposed Thomas settlement agreement an attorney-client privilege between C&D and MMCO. In other words, MMCO wants C&D to represent both Thomas and MMCO in form only. As MMCO's attorney, C&D could then be precluded from ever represent-

ing a different client in opposition to any MMCO project that could come down the road.

To begin, C&D does not agree to represent MMCO. As C&D puts it, "Slavery has been abolished. We will never agree to an attorney-client representation with MMCO." MMCO does not want to retain C&D for any work. MMCO did not offer to pay C&D any money. The sole goal of MMCO is to attempt to permanently create a conflict of interest by which C&D can never represent any other client on any matter involving MMCO. MMCO is attempting to set up a MD Rule §19-301.9 (1.9) conflict.

Maryland Rule §19-301.9 (1.9) Duties to Former Clients

(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 unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

- (1) whose interests are materially adverse to that person; and
- (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(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 except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comments to Rule §19-301.9 (1.9)

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the for-

mer client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule §19-301.11 (1.11).

[2] The scope of a “matter” for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer’s involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded for that reason alone from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be

justly regarded as a changing of sides in the matter in question.

[3] Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person’s spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client’s policies and practices ordinarily will not preclude a subsequent representa-

tion; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Client Files

After Attorney Baker withdrew as his attorney, Thomas asked Baker for the correspondence sent by MMCO demanding its withdrawal. A&B ignored the requests. A&B transferred Thomas's file to the new law firm, but they withheld all correspondence with MMCO concerning the alleged conflict of interest.

Are MMCO's letters part of Thomas's file? Are they part of MMCO's file? Or both? Are the letters protected from Thomas by an attorney client privileged owed to MMCO?

MD Rule §19-301.16(d) (1.16(d)) provides:

(d) Upon termination of 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 or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law (emphasis added).

In *Att'y Griev. Comm'n v. Nichols*, 405 Md. 207, 950 A.2d 778 (2008), the attorney's failure to turn over the attorney's file to the client's new attorney for six months after the client terminated the attorneys services violated (d). As a result of that misconduct and other related misconduct, the sanction was the attorney's indefinite suspension from the practice of law.

Sadly, Attorney Able passed away. It was only after Attorney Baker was reminded of A&B's ethical obligations concerning the client files that he finally turned over one threatening letter from MMCO's counsel. If there are other letters in the files, they are unknown as of this writing.

Conclusion

It is fair to say that any time a small law firm takes on a business client, the firm risks not being able to represent its client's adversaries and competitors. Sometimes attorneys restrict their practices to a certain type of client. For example, a real estate attorney may choose to represent just landlords or just tenants. In the author's opinion, that represents more of a business development decision. Ethics do not dictate this decision. If an attorney represents tenants, he or she might not generate a lot of repeat business; individual tenants might not possess money to pay legal fees. On the other hand, landlords often hire attorneys to file actions. A busy landlord's attorney will never

find himself on the wrong side of his economic bread-and-butter by representing a tenant and later becoming disqualified from representing a landlord by a conflict against his former client.

Thomas is unlikely to ever sue or file a complaint against his first law firm, Able and Baker. They did a good job for him before they withdrew. MMCO will never use A&B to represent them on any other project. It was a ruse. Karma will be complete if A&B never represents any other client on any project opposing MMCO.

Law firm C&D will not agree to participate in a settlement agreement in which its current client benefits, but which harms the law firm. C&D will not agree to refuse to represent any future client against MMCO. Nor will it create a phony attorney-client representation of MMCO as part of a zoning dispute settlement agreement between Thomas and MMCO. Why would it? Thomas has not and would not ask C&D for such acquiescence in order to facilitate Thomas's settlement agreement. MMCO is the big gorilla in town. Patently unreasonable requests do not shame MMCO from making such demands.

Small law firms who represent developers, community groups and individual property owners have to carefully navigate the dynamics of the neighborhood. Conflicts of interest – real or manufactured – jump out of alleyways. This becomes especially true as companies buy and sell land, merge into successor entities and expand their business footprint into new neighborhoods.

Mr. Vogel is an attorney with the law firm of Bar-Adon & Vogel, PLLC, in Washington, D.C. He may be reached at KAVogel@MetroLegalSolutions.com.

EMPLOYMENT LAW PITFALLS FOR SOLO AND SMALL FIRM PRACTITIONERS

By L. Jeanette Rice

IT IS ESSENTIAL THAT SOLO AND SMALL FIRM PRACTITIONERS LEARN TO NAVIGATE THE POTENTIAL PITFALLS OF EMPLOYMENT LAW. FAILURE TO DO SO CAN RESULT IN VIOLATIONS OF LAW, SIGNIFICANT PENALTIES AND EXPOSURE TO LITIGATION.



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set forth below and

EMPLOYMENT

Duties. Company shall expect you to perform such duties as are set forth in the job description attached to your offer letter. You shall also perform such duties as are assigned to you by your Manager as set forth in the job description attached to your offer letter.

Business Activities. During the term of this agreement, you shall devote your full time, attention, and best efforts, and shall not engage in any other business, professional, or other activity that may conflict with your duties as an employee of the Company. You shall not, during the term of this agreement, engage in any business, professional, or other activity that may conflict with your duties as an employee of the Company.

Pitfall 1: Independent Contractor v. Employee

Budget constraints often make it attractive to hire independent contractors instead of employees. It is very important to know the difference between an employee and an independent contractor because simply labelling a worker as an independent contractor is not enough to have ensure such treatment and avoid liability for an incorrect classification.

The Internal Revenue Service defines an “employee” as anyone who performs services and the employer can control what will be done and how it will be done. The tax and other obligations an employer incurs to retain an employee are numerous and can be onerous. An employer must withhold and pay an employee’s FICA and Social Security taxes and provide unemployment and worker’s compensation insurance. While it may be tempting to treat an employee as an independent contractor to avoid these obligations and expenses, this is a pitfall to avoid and one that may come back to haunt you if the employee is injured or terminated. Failure to pay taxes or provide the required insurance will result in interest and penalties being assessed. For example, in Maryland, failure to secure workers’ compensation insurance may subject an employer to a penalty not to exceed \$10,000.

Pitfall 2: Violations of Wage and Hour Laws

Violation of Maryland and Federal wage and hour provisions is another pitfall to avoid. Most businesses are covered under the federal wage and hour laws by enterprise coverage for businesses that gross more than \$500,000 per year or for businesses

engaged in interstate commerce, which is defined very broadly to cover most employers. Maryland also has similar wage and hour laws that apply to all employers. The Fair Labor Standards Act (“FLSA”) requires payment of a minimum wage, which is currently \$8.75 in Maryland, and overtime, at one-and-a-half times an employee’s regular rate, for all time worked after 40 hours in a workweek.

An employee may be exempt from the overtime requirements if they are paid a salary. However, simply paying an employee a salary does not automatically exempt the employer from paying overtime wages. To be exempt from overtime requirements, exempt employees must be paid a salary annually (as opposed to hourly pay) and perform executive, administrative, professional, computer, or outside sales functions. Exempt employees must be paid a fixed salary each pay period which is not reduced because of the quality or quantity of work performed. An employer may dock pay due to absence for one or more full days of personal, sickness, disability, or disciplinary suspension.

The FLSA regulations currently require a minimum salary of \$455 per week, or \$23,660 a year for exempt employees. On May 18, 2016, the US Department of Labor issued final regulations making changes to overtime exemption requirements under the FLSA. The new rules significantly increase the minimum salary and pay levels that employers must meet for employees to be exempt from the FLSA’s overtime requirements. The Final Rule sets the standard salary level at \$47,476 annually for a full-year worker. The new rule was to go into effect December 1, 2016, but on November 22, 2016, U.S. District

Court Judge Amos Mazzant granted an Emergency Motion for Preliminary Injunction and thereby enjoined the Department of Labor from implementing and enforcing the Overtime Final Rule on December 1, 2016. The case was heard in the United States District Court, Eastern District of Texas, Sherman Division. *State of Nevada v. United States Department of Labor*, No: 4:16-CV-00731.

All non-exempt workers are entitled to the basic wage and hour protection, which provides that an employee be paid time and a half for all hours worked over 40 hours in a work week and the employee must be paid on a regular pay schedule. In addition, an employee must be paid for a break of less than 30 minutes. Employees must be paid for all work “suffered or permitted” by the employer, even if the work is not requested or required and even if they occur before or after scheduled work hours, including time spent checking emails or booting up a computer. In addition, while an employee need not be paid for commuting to and from work, they must be paid for all time spent travelling for work.

Pitfall 3: Liability for Acts of Employees

Under respondeat superior, an employer can be liable for the negligent and intentional acts of an employee when the employee is acting within the scope of employment. An employer may also be liable for the intentional acts of an employee arising outside the scope of employment if the employer is negligent in hiring or retaining the employee. Employers have a duty to provide employees with a safe working environment and a duty to the public who would rea-

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sonably be expected to come into contact with employees.

Violent conduct by an employee usually falls outside the scope of employment but an employer could be liable for negligent hiring or retention of an employee, especially if the employer was aware of a specific danger and took no action against the employee. *Henley v. Prince George's County*, 305 Md. 320 (1986). Although an employer may not be required to conduct a criminal background check, an employer must exercise reasonable care in hiring and retaining any employee. Reasonable care requires a reasonable inquiry into the applicant's background. *Evans v. Morsell*, 284 Md. 160 (1978). The fact that an employee has a criminal background will not automatically make an employer liable for an employee's misconduct unless the employee's past criminal act made the harmful act foreseeable. In addition, the injured party must show that the employee's position enabled the wrongful act to occur.

An employer can also be held liable for aggressive or inappropriate conduct when the conduct is motivated by racial, ethnic or sexual bias. In *Vance v. Ball State University*, the United States Supreme Court stated that an employer is vicariously liable for harassment or hostile work environment by a supervisor. 133 S. Ct. 2434 (2013). A supervisor is defined as one empowered to take tangible employment action against the employee, such as hiring, firing, or failing to promote. An employer is liable for harassment or hostile work environment by other employees if the employer is negligent in failing to prevent the harassment from taking place. Relevant factors in determining liability is if the employer did not monitor the work place, failed to respond to complaints, failed to

provide a system for handling complaints and discouraged complaints from being filed. To avoid this pitfall, the employer should have an effective policy against harassment based upon race, color, national origin, religion, age, and disability. The policy should state that the employer will not tolerate harassment based upon any of the protected bases and have procedures for investigating and resolving complaints and protecting complainants against retaliatory harassment.

Pitfall 4: Supervising Non-Lawyer Assistants and Paralegals

Attorneys acting as employers must avoid the unique pitfalls associated with employing non-lawyer assistants and paralegals. An attorney is responsible for supervising non-lawyer staff to ensure that the employee's conduct does not violate the attorney's professional and ethical obligations. Rule 19-305.3 of the Maryland Attorneys' Rules of Professional Conduct ("MARPC") provides that an attorney is responsible for supervising non-lawyer assistants and paralegals to ensure that their conduct is in compliance with the attorney's professional obligations.

Attorneys should keep in mind when making compensation arrangements with a paralegal that an attorney may not split fees with nonlawyers and referral fees are strictly prohibited. However, it is permissible for attorneys to implement a compensation plan that includes bonuses or other amounts based on the individual nonlawyer's productivity or based on the firm's profitability.

Rules 19-301.7 and 19-301.8 prohibit a lawyer from working on the opposite side of a continuing matter; likewise, a

paralegal may not do so. Md. Attorneys' Rules of Prof'l Conduct (2016). The paralegal also cannot work on a matter adverse to a former client for whom he previously worked if the two matters are substantially related and confidentiality may be jeopardized. As a matter of good ethical practice, all potential new employees should be screened for conflicts at the time the firm makes an offer of employment.

Rule 19-305.5 prohibits the unauthorized practice of law or aiding a person in the unauthorized practice of law and an attorney must supervise non-lawyer assistants to ensure that they do not establish attorney-client relationships, give legal advice, appear in court on behalf of a client, or sign pleadings or other papers to be filed in court.

Proper delegation and supervision are key, and this means that an attorney should match the paralegal's skills with the task that needs to be done. For example, an attorney should not assign tasks to a paralegal unless he has the required knowledge and experience to perform the assignment successfully. An attorney can both ensure having qualified paralegals and provide proper supervision by providing adequate instructions and training. Adequate instructions should be given when assigning a new project to a paralegal, and the attorney should also monitor the progress of each assignment to ensure that the paralegal is performing as instructed.

It is essential that the lawyer review the paralegal's work product. It is not enough that the paralegal has performed a particular task dozens of times and will likely again perform the task properly. The lawyer must review the work. Permitting a paralegal to issue work product without a lawyer's review can constitute aiding in the unauthorized practice of law.



Generally, lawyers should implement policies to ensure that clients understand the different roles of lawyers and paralegals. The paralegals should be identified in engagement letters. Paralegals and assistants should be instructed to refer clients to the attorney for legal issues and to avoid giving clients legal advice.

For an attorney, failure to properly supervise paralegals and assistants may lead to disciplinary action if the Attorney Grievance Commission determines that the attorney failed to properly supervise or otherwise aided in the unauthorized practice of law. In addition, because a paralegal's work merges into and becomes the attorney's work, an attorney will be held liable for the malpractice resulting from paralegal working under her supervision. Being sued for malpractice is one of the most severe reputation setbacks that an attorney can face.

The attorney-client privilege and the ethical obligation of client confidentiality extend to the paralegal and all nonlawyers working with the attorney. Attorneys must implement policies to protect client information and to train their staff about

the importance of client confidentiality. This obligation of confidentiality extends to all types of client information including documents, files and electronically stored information. As a practice, attorneys should consider requiring each staff member to sign a confidentiality agreement that prohibits disclosure of any client information and provides penalties for breach, including termination of employment.

Confidentiality also requires the protection of client information stored and transmitted electronically. Communicating with opposing counsel by email poses several potential pitfalls as information may be sent accidentally to unintended recipients, so staff should be instructed on verifying email recipients each time an email is sent. Documents sent to opposing counsel should be saved in a format that prevents the recovery for hidden data such as previous versions. Protecting client files is important, and client documents and files should not be left in the open where they can be viewed by other clients or third parties. In addition, it is essential that staff should be trained to maintain client confidentiality at all times. Client

matters should not be discussed in public between staff members or with family members when at home. Upon termination of employment, attorneys should remind the departing employee of his continuing obligation to maintain the client confidences learned during employment.

Attorneys also need to emphasize that in the event of inadvertent disclosure, be it through erroneously sent e-mail, mislaid documents, or otherwise, the staff must immediately inform the attorney of the inadvertent disclosure. The earlier the attorney learns of the inadvertent disclosure, the quicker steps can be taken to mitigate the problem, including informing the receiving party of the inadvertent disclosure and requesting the return of the materials. To avoid employment pitfalls, it is essential to implement good employment policies that clearly define staff compensation, duties, and expectations. While this may not prevent problems from occurring, these policies can provide some defensive protection. Employers can minimize risk by implementing good employment procedures. An employer should conduct a reasonable investigation into an applicant's background before he or she is hired. At a minimum, the employer should verify previous employment, call references and keep records of these efforts including the persons called and responses provided. Once an employee is hired, the employer should provide the employee with clear written instructions regarding job duties and prohibited conduct, and an employer should also promptly investigate any report or employee misconduct and take action if required.

Ms. Rice is a Partner in the Law Office of Walsh, Becker, Moody & Rice in Bowie, Maryland.



Solo
Seeking
IT
SUPPORT





By Charity Anastasio

The genesis for this article came from another article, *Finding a Good Cybersecurity Company*, written by Sharon D. Nelson and John W. Simek in the ABA Law Practice magazine, November/December 2016. While informative to this piece and definitely worth the read, Nelson and Simek start from the premise that most law firms have Information Technology (IT) support.

Nelson and Simek's assumption is probably overly-optimistic. In working with solo and small practitioners for three and a half years, I have seen a fair share of technology infrastructures set up by children home from college, tired spouses working in the technology field by day and spouse's firm by night, or by the semi-tech savvy lawyer themselves. Often these systems appear secure and sufficient until scrutinized. That scrutiny may come from within the firm, as things break or do not perform well; by hired IT support; or in the worst case, by hackers.

Truth is, configuration of technology is an easy thing to botch and potential vulnerabilities are always shifting and changing. Software and hardware have shelf lives in which they stop performing properly or being supported. The best first line of defense is *basic IT support* which usually includes:

- Identifying IT support needs;
- Recommending and installing hardware and software;
- Providing helpdesk support;
- Patching and updating software regularly;
- Monitoring, auditing and reporting regularly'
- Setting up and updating fire-wall, malware, and antivirus software; and
- Engaging in preventative measures proactively.

This article will discuss what to look for in IT support and what to expect from the relationship. Three individuals were interviewed—Mike Oliver, a self-proclaimed “geek lawyer;” Valerie Nowotnick, a freelance paralegal; and Heinan Landa, an IT professional—for a roundtable perspective.

What will not be covered is infor-

mation security or cybersecurity. Nelson and Simek said “All too often lawyers believe that information technology wholly embraces information security. It does not. While there is a lot of crossover between the two fields, most IT providers are aware of basic security best practices—they are not actually cybersecurity specialists—though they may feel they are!” In other words, *information security* is a different discipline and beyond the scope of basic IT support. For guidance on that, see Nelson and Simek's article.

Finding Quality

Every interviewee named personal recommendations from colleagues as the most important way to start one's research. Mike Oliver of Oliver & Grimsley, LLC said one should start with Maryland State Bar Association (MSBA) resources (he was not paid to say that!). Valerie Nowotnick of Paralegal Consultants cited the MSBA's Solo and Small Section list-serv as a good source for recommendations. Heinan Landa, founder and CEO of Optimal Networks added the American Legal Administrators to the list—another great resource.

Certifications, Education, and Experience

“I think certifications are sometimes overrated,” said Mr. Oliver. Look for an IT professional certified in the major software used by the firm such as the Microsoft Office Suite. Sometimes one can find a provider certified in the practice management of choice, but that is less important. Find an IT vendor that focuses on law firms and thinks of technology as a tool to do the business of law. Mr. Landa recommended law-

yers avoid IT professionals that like technology for technology's sake or recommend everything cutting edge. Tested solutions and tried and true products will keep the business functioning more effectively than bleeding edge.

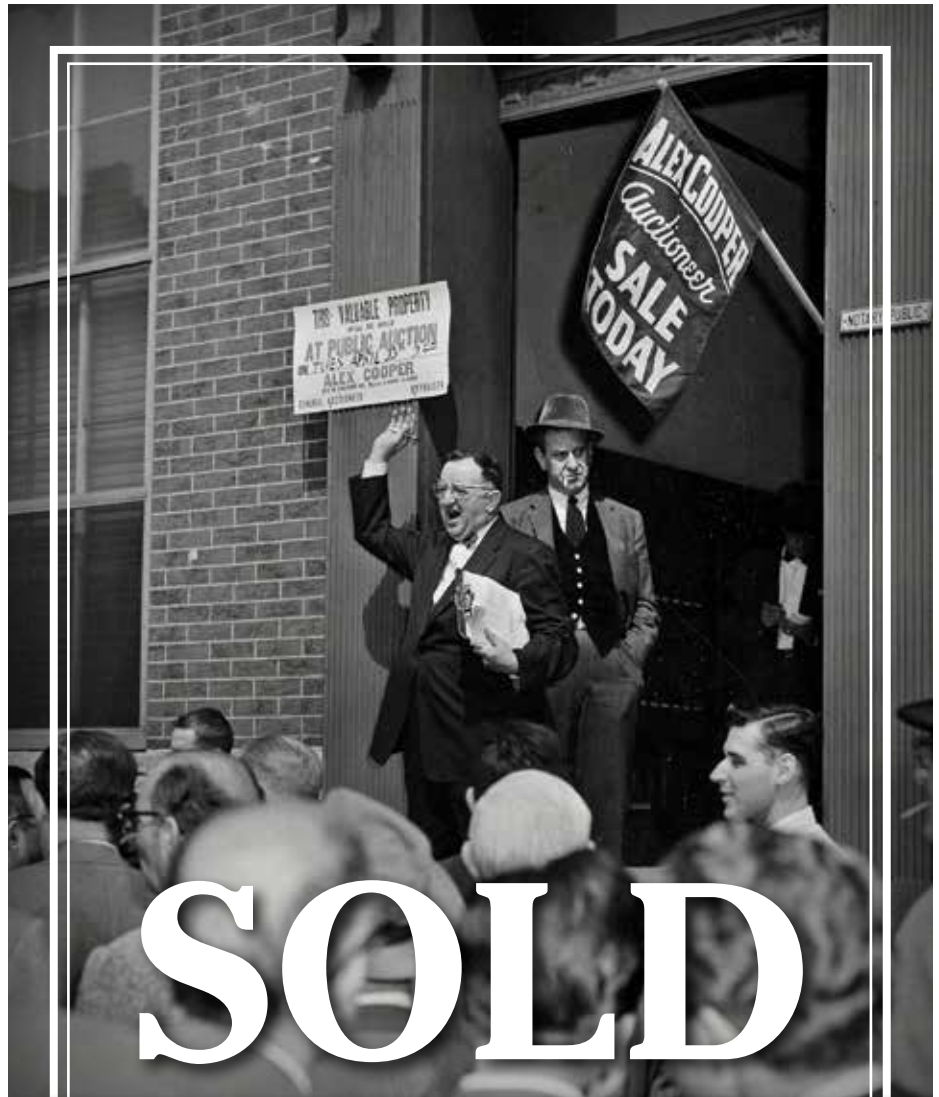
Though Mr. Landa said IT professionals with business degrees or business experience are often top notch, every interviewee noted education is not a supplement for experience. (For a list of cybersecurity certifications see Nelson and Simek's article cited above.)

Hiring Process

Most solo or small practitioners will be hiring an independent contractor to supply IT support. This checklist for hiring an IT vendor is an amalgam of the interviewees' recommendations:

- **Evaluate technology/workflow needs**
- **Write a basic strategic plan for reaching those needs**
- **Get at least three recommendations**
- **Interview the referral sources**
 - Was she responsive when you had an emergency?
 - Do you understand what she tells you?
 - Do you feel respected?
 - Did she ask pertinent questions?
 - Does she answer with prompt confidence?
 - Do you feel recommendations were scaled appropriately to firm size and needs?
 - Does she regularly update systems and keep you abreast of technology needs?
 - Is the bill reasonable?

- **Do research into the recommended professionals**
 - Contact them and ask for references
 - Check references, keeping in mind that they are cherry picked
 - Do an internet search, and check the BBB site to see their rating and any complaints
- **Interview top picks, asking hypothetical-style questions**
 - What are your hours of service? Are you available 24/7?
 - What is your standard response time?
 - Do you do managed services, and if so, what tools do you use?
 - What basic firewall and antivirus solutions do you recommend?
 - How would you advise me if I said "I want to go paperless?"
 - How would you help me if I said "Sync my email and contacts to my smart-phone"?
 - What do you think of BYOD? (Bring Your Own Device [to work].)
 - How would you resolve my issue if my computer crashed during trial preparation late Friday, when the trial is Monday morning?
 - What do you think of cloud storage?
 - Explain to me how you would protect confidential client information and what products you would recommend.
 - Explain to me what ransomware is. (Even though they are not cybersecurity



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experts, they should know what this is and be able to explain it clearly.)

- If I was hacked what would you do next?
- **Narrow down to one or two vendors**
 - Have vendor sign confidentiality agreement
 - Communicate technology and workflow needs to vendor
 - Ask the vendor for an assessment and bid
- **Review assessment and bid**

- **If it feels off, take it to another vendor or compare to second assessment and bid**
- **Hire best candidate for best price**
- **Negotiate terms**
- **Sign service agreement with a confidentiality agreement**

Hiring in-house IT support as a solo and small firm is highly unlikely. Even medium firms frequently outsource. But if growth warrants in-house, a similar process may be followed. Interview more than

one candidate, do not rush to hire, check references, ask smart interview questions, and always trust the gut. Remember that whether in-house or an independent contractor, the Rules of Professional Conduct impose duties and obligations to monitor, understand, and manage IT work, just the same as a bookkeeper or paralegal. One must know what the IT reports mean, how client confidences are protected, what products and protections are in place, and how IT support does the work generally.



After hiring, continue to monitor performance. Look over her shoulder and see how confident and efficient she is as she fixes a problem on premises. If using the helpdesk, follow along as she remotely accesses and fixes the problem. Ask employees who called how helpful the IT support was and give the vendor constructive feedback to improve the relationship and clarify needs.

Performance Expectations

“A good IT person will make someone feel comfortable—not talk over their heads and not recommend stuff they don’t need,” said Valerie Nowotnick. If one is of a certain generation, thoughts may flicker back to Nick Burns, *Saturday Night Live’s* IT Guy character (“Move!”). Most recognize not all IT profession-

als are bastions of good communication skills. Still, one need not settle. Expect to be treated well, and to have support staff treated well. Expect that tasks will be explained in plain English without too much detail or a demeaning tone. If IT support comes in-office, expect her to be patient as a user navigates the system on her instructions. If she remotely accesses the system to fix, expect that she ask permission before taking over a machine and explain what she is doing as she proceeds. As an aside, remote services are viable for a firm that is wholly cloud based. “Local IT support is a must if a mission critical server is part of the infrastructure,” Mr. Oliver said.

Good IT professionals also understand their scope of knowledge. Just as lawyers need to know when to associate, IT support needs to be

comfortable saying “That is information security and beyond my understanding. It requires a special consultant to properly be addressed,” then be able to work well with that consultant when hired. There are sometimes pressures from an IT professional’s clientele to keep costs down and handle it themselves, but one does not ask their general practitioner to operate when he refers them out so apply the same logic here. (Imagine asking a GP doctor: *I can’t pay that surgeon’s rate. Can you just try to fix my artery on your own this once?*)

Price Point Expectations

One way law and information technology are similar is that there is no clear indication what the standard or normal price point should be. But

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the classic contact conundrum that the buyer will want to pay less and the seller will want to charge more will stand.

Because there is no standard rates, interview answers were inconsistent. Everyone said price was fact dependent. Mr. Oliver thought a solo or small practitioner would be in good shape to find managed service IT support at between \$25 and \$50 per desk and \$100 to \$200 per server per month. He believes over \$100 per desk per month excessive. Mr. Oliver noted that while Apple products are more user-friendly and secure for his law office, there are fewer IT vendors who work effectively with Apple so finding a reasonably priced managed service provider was hard because of the lack of competition.

From the IT vendor perspective, Mr. Landa came at it from a revenue/budgeting perspective. He thought that a law office should expect to pay around five percent of their revenue for IT support, with a range from three to eight percent depending on needs. Mr. Landa thought solo practitioners were at a disadvantage in price and would be on the higher end of revenue percentage because, to his view, they would not need less security and infrastructure just because they are smaller. He said “A reasonable hourly rate would probably be \$125 to \$175 for IT support.” He said there is a wide variety in packages—services offered—and a one to three lawyer firm could pay anywhere from \$300 to \$5,000 a month, depending on technology needs. “The more an organization size fluctuates, the more IT support will cost, especially if it has big plans for growth,” he said.

Division of Labor

With so much disparity in price and a need to maintain low overhead, minimize technology needs securely with sweat equity. What can safely be done without help? Mr. Oliver said lawyers should proactively learn and maintain their local machines as much as possible, reasonably splitting the tasks like this:

Lawyer	IT support
Run antivirus protection	Server maintenance
Run software updates	Firewall setup and maintenance
Local machine maintenance	Systems security maintenance and monitoring
Determine software needs	Regular monitoring and reporting
Cloud service provider maintenance	Cloud service provider set up

Ms. Nowotnick maintained that the most lawyers could troubleshoot their technology problems themselves and that security updates were easy to maintain by following simple directions. She said IT support should be brought in when a large project like a server migration was needed, or when the firm had outgrown their systems and needed additional workstations.

In contrast, Mr. Landa said he prefers when a law firm brings in IT Support earlier on instead of trying to troubleshoot problems themselves. For example, if a machine crashes repeatedly at the same time of day for three days, it would be better to call the helpdesk instead of trying to tough it out. “Doing it yourself if viable up to a point. But what some lawyers do is waste a lot of time trying to figure out something that we could do quicker if we have the right information,” he said. The one thing he urged lawyers to know cold is their practice management programs.

“Don’t expect us to know your time and billing software as well as you.” Mr. Landa said. Their job is to understand how that system works within the technology ecosystem or infrastructure, not the operations on each individual program.

That’s Surprising!

Each interviewee was asked they thought would surprise lawyers about the lawyer-IT relationship. The interviewer thought someone would say *sticker shock*. Instead, the interviewer was *surprised* by these poignant observations:

Expect a confidentiality agreement. One interviewee went as far as to say “Don’t hire an IT vendor that doesn’t come with their own confidentiality agreement.” If the vendor has an agreement, read it and make sure it comports with confidentiality ethics rules. If you prefer, draft your own confidentiality agreement that comports with the rules and require the vendor to sign it.

Tinkering is a must. Lawyers and IT professionals speak different languages: One is all about the law and precedent and the other is all about fiddling with things and trial and error. The lack of certainty in the midst of tinkering is unsettling to lawyers, but lawyers would do well to accept that it is part of the IT workflow.

Simple Tasks are not always simple. Many lawyers would be surprised at the inordinate time and effort technology problem solving can cost. Just because it seems it should be easy does not mean it is. There are legitimate reasons IT support would say *no* or not be able to fulfill a request (e.g. current infrastructure limitations, security requirements,

April

**Things fall apart; the centre cannot hold;
Mere anarchy is loosed upon the world,
The blood-dimmed tide is loosed, and everywhere
The ceremony of innocence is drowned;
The best lack all conviction, while the worst
Are full of passionate intensity.**

William Butler Yeats, *The Second Coming*

The stanza you just read is not the 1977 Jeremiad of a member of our profession who has just finished reading *Bates v. State Bar of Arizona* – but it could have been. In *Bates*, a unanimous Supreme Court held for the first time that attorney advertising and messaging to prospective clients was constitutionally protected speech. 433 U.S. 350 (1977). Though this speech was “commercial,” and therefore subject to regulation, states could not ban it outright. Post-*Bates*, the Court of Appeals of Maryland acknowledged “interest in expanding public information about legal services ought to prevail over considerations of tradition,” Comment Md. Rule 19-702.2, Comment 1, and, with apologies to Yeats, “loosed upon [our] world” attorney advertising.

Fools!

**Effective 4.1.2017 You
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Yourself as a Specialist.**

By Robert Zarbin





Looking back, this being the 40th anniversary of *Bates*, things have not “fallen apart” and the centre has held, in spite of the dystopian predictions of *Bates’* naysayers. The past four decades have witnessed an exercise by attorneys of their right to commercial speech. Images of smoking phone booths notwithstanding, the spots have served their constitutionally protected objectives. All that having been said, until recently a remnant of the ban on attorney advertising remained on the books. Under the heading “Communications of Fields of Practice,” Maryland Rule 19-207.4(a) states “An attorney shall not hold himself or herself out publicly as a specialist.” Effective April 1, 2017, per a December 2016 Order of the Court of Appeals, this sentence will be deleted from the Rule. That the Court was contemplating this change was signaled in footnote 1 of the dissent in *Attorney Grievance Comm’n v. Zhang*, 440 Md. 128, 181 (2014). There, Judge McDonald, joined by Judge Adkins, observed:

A random walk through the websites of law firms listed in the yellow pages of the Maryland Lawyers’ Manual yields many instances in which lawyers strongly imply, or state in other words, that they specialize in certain fields. Limitation of one’s practice to certain areas and disclosure of that limitation to the public is a good thing. A lawyer who tries to be a jack of all trades will be competent at none and may commit more serious violations of the MLRPC. A person who is looking for a lawyer to help with a divorce should not waste time considering whether

to hire a lawyer whose practice is devoted entirely to workers’ compensation. At worst, the violation of MLRPC 7.4(a) here is a case of “ineligible synonym,” perhaps worthy of a five-yard penalty from the podium, but not itself a cause for disbarment.

Id.

Akin to the reason the Volstead Act was repealed, it appears the Court of Appeals concluded that, for all intents and purposes, attorneys were marketing themselves as specialists, though they were careful not to use that unmentionable word. But by merely striking the prohibition without further comment or instruction, the Court unleashes members of the Maryland bar without a bright line demarcation between a general practitioner and a specialist. How will the Court distinguish between ill-founded boasting and fact-based expertise?

Not only will members of the bar looking to market themselves as specialists have to ponder the meaning of that term, but using the term has consequences above and beyond whether its use was actionable. A general practitioner is held to the standard of a general practitioner. A “C” student, so to speak. Attorneys who re-brand themselves as specialists, risk being held to a higher standard of care—an “A” student—and expose themselves to being disciplined if it appears that the use of the label misled the client.

I write to offer some insight into these issues. For those who can’t wait to broadcast they are specialists, we offer the words of author Sherrilyn Kenyon: “just because you can doesn’t mean you should.”

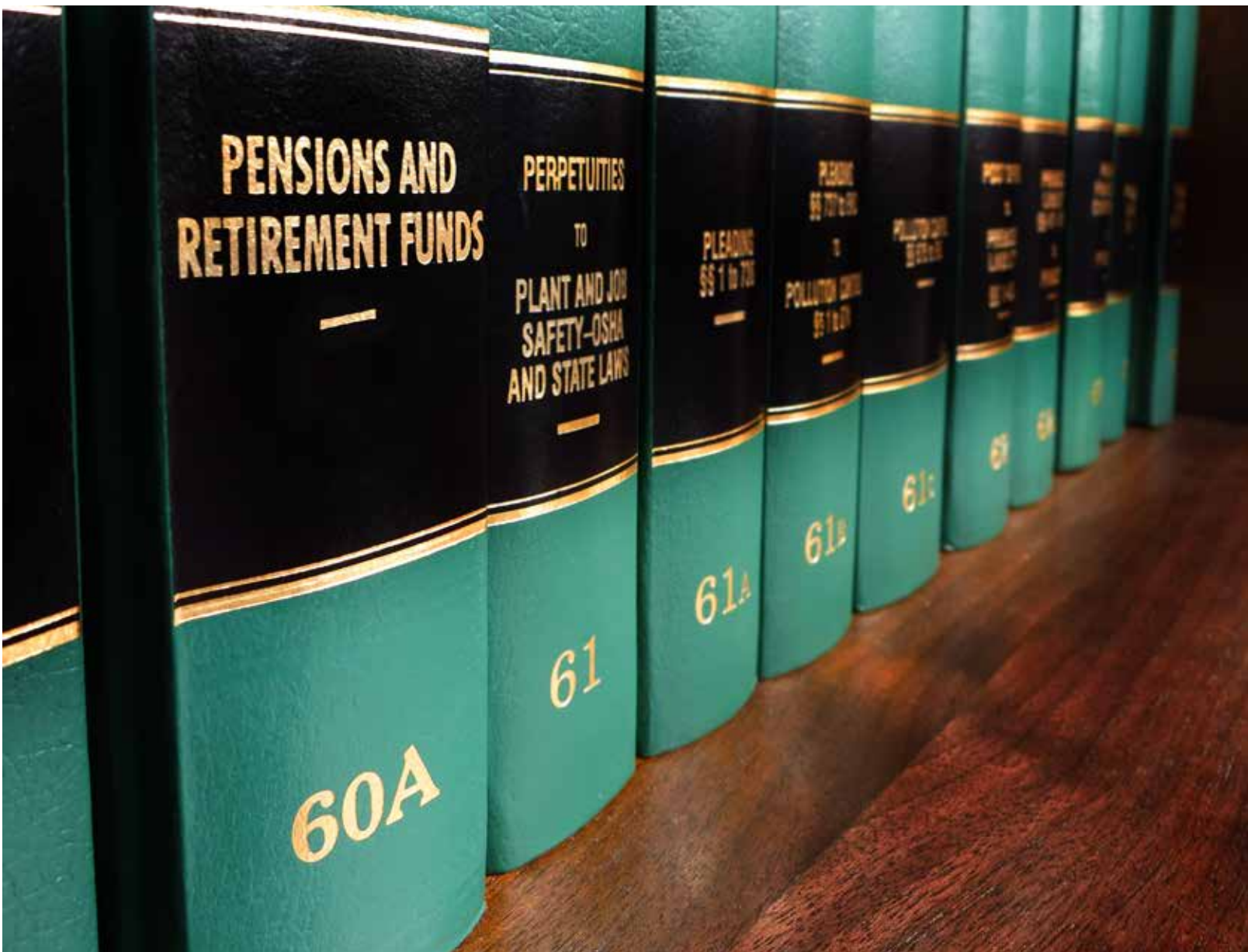
Are You Specialized?

Nowhere in the Rules governing professional conduct is there a “safe harbor” for would-be attorney/specialists; no “blessed” formula that, if followed to the letter, will not later be questioned. There being no “bright line” rule, it is hoped that bar counsel will agree with Dictionary.com, where a specialist is “a person who devotes himself or herself to one subject or to one particular branch of a subject or pursuit.” But when it comes to practicing law, just how should an attorney’s devotional commitment to an area of law be measured?

The answer to this question begins with the reasons lawyers have until now been prohibited from hawking a specialty. Consumers shopping for a lawyer, much like patients looking for a doctor, gravitate toward a professional who seems most capable of fighting for the hoped-for result. A specialist appears more skilled, and therefore more capable, than a general practitioner. More importantly, specialization sends the message that the lawyer practices the area of law regularly, giving him or her an insider’s edge.

To address these concerns, some advocate a credentialing process, where an attorney is officially certified in a specialty. Akin to Board Certification for doctors, a candidate who completes prescribed coursework, attains a prescribed level of peer recognition and tries a quantified number of cases gains the right to market himself or herself as a certified specialist in a given area of law. Model Rule 7.4(d) of the ABA’s Model Code of Professional Conduct is an example of a credential-based approach:

A lawyer shall not state or imply



that a lawyer is certified as a specialist in a particular field of law, unless:

- (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
- (2) the name of the certifying organization is clearly identified in the communication.

The primary problem with credentialing is that, no matter how comprehensive a list of criteria, there is no quantifiable measure of what

it means to specialize. A workers' compensation lawyer fresh out of law school, who reads the Worker's Compensation Act with the intensity of a Talmudic scholar, no doubt can recite that body of law better than seasoned members of the bar who have practiced before the Commission for decades. But mere knowledge of black letter law doth not a specialist make. Unless and until this workers' compensation Solon figures out where the Commission hearing sites are located, not to mention what types of evidence Commissioners find persuasive, he or she cannot truthfully claim a specialty in work-

ers' compensation.

Similarly, if time spent practicing in a given area of law counts toward official certification, how will this on-the-job experience be rated? Among plaintiffs' auto tort claims, there are District Court and Circuit Court cases; minor injury, major injury and death claims; insured and uninsured motorists, workers' compensation third-party claims. Assuming a time-in-trade credentialing process is adopted, it is likely that a lawyer with twenty years of District Court trial work would qualify as a certified auto accident specialist. But, would not

that label mislead a consumer looking for an attorney qualified to handle a wrongful death claim?

That it is impossible to compose a comprehensive list of criteria needed to credential a specialty is confirmed by the drafters of the ABA rule quoted above. Rather than defining what is, and what is not, a specialist, the Proposed Rule drafters merely passed the buck to an unspecified "organization," albeit one approved by state bar associations and/or the ABA. Leaving aside the fact that the Rule offers no guidance regarding what types of organizations would be approved to certify a specialist, many of whom will no doubt charge for the certification, without any standards to guide credentialing decisions there is no way in which to assess the merits of the certification.

Notably, the Court of Appeals, when it voted to strike the ban of specialist marketing from Maryland's version of Model Rule 7.4, did not then adopt 7.4(d) of the Model Rule. This failure to require a credentialing prerequisite shifts the responsibility to gauging specialty away from impartial organizations and places it entirely on the lawyer claiming to be a specialist. Anyone who sees this as a license to make idle claims of specialization is likely to blunder into a minefield known as Maryland Rule 19-207.1:

An attorney shall not make a false or misleading communication about the attorney or the attorney's services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) is likely to create an unjusti-

fied expectation about results the attorney can achieve, or states or implies that the attorney can achieve results by means that violate the Maryland Attorneys' Rules of Professional Conduct or other law; or

(c) compares the attorney's services with other attorneys' services, unless the comparison can be factually substantiated

It is here, in the text of this Rule, that the customer shopping for legal services is better protected. Notably, the Court of Appeals previously recognized that "'bad taste' . . . is

not a synonym for 'misleading,' nor does 'crassness' necessarily equate with 'false advertising'" *Attorney Grievance Comm'n v. Ficker*, 319 Md. 305, 318 (1988). An offensive ad is not an offending ad.

Instead, the accuracy of the claim of specialty will be judged on the totality of the message and the accomplishments of the messenger who made it. A practitioner who claims a specialty does so with recognition that he or she may have to justify that claim at a later date. With this in mind, a member of the bar planning to tout a specialty should exercise due diligence and



assemble a file containing the factual predicates supporting the claim. Bear in mind that because the Court of Appeals did not adopt the credentialing protocol in ABA Model Rule 7.4(d), there is no “safe harbor” for being certified as a specialist by an organization. Such a certification would no doubt support a specialty claim, but it would not be dispositive of an inquiry if whether a message was inherently misleading.

Special Standards

Regarding the impact of touting a specialty on one’s malpractice exposure, the legal community need only look to medical profession. A general practitioner is held to a locality rule, a standard of care that “skill only which physicians and surgeons of ordinary ability and skill, practicing in similar localities, with opportunities for no larger experience, ordinarily possess.” *Shilkret v. Annapolis Emergency Hospital Assoc.*, 276 Md. 187, 195 (1975). But, “where a physician holds himself out as a specialist, he is held to a higher standard of knowledge and skill than a general practitioner.” *Id.* at 197.

Now that lawyers have joined the ranks of doctors touting a specialty, these legal specialists can expect to be held to a higher standard than a general practitioner. Nuanced judgment calls that might not amount to a breach of the ordinary standard of care, might now constitute a tortious breach of the level of competence expected of a specialist.

In addition to a heightened standard of care, the would-be specialist lawyers should be cognizant of the potential consequences of the accuracy of statements made to would-be clients. Maryland recognizes a cause

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of action for intentional misrepresentation (fraud). *Martens Chevrolet, Inc. v. Seney*, 292 Md. 328 (1982); *Weisman v. Connors*, 312 Md. 428 (1988). If a lawyer claiming a specialty is retained to file suit, and later a jury enters a defense verdict, can the now-unhappy client sue the lawyer if it turns out that he or she is not truly a specialist? After all, the aggrieved client will claim that the outcome would have been different, perhaps because the case would not have been tried or because the defense would have settled out of respect for the credible threat posed by a real specialist.

Conclusion

Effective April Fools’ Day, members of the Maryland bar can call themselves specialists. For those who truly meet that standard, the revision

of the Rule is no doubt a blessing. These hard working devotees to a practice area can now get credited for their hard work. Consumers as well will benefit, because they will now have something more than an attorney standing atop a truck to consider when hiring a lawyer. As with every blessing, though, there is also a curse. The term legal specialist defies precise definition. Looking to capitalize on this uncertainty, there are some who may believe the revised rule is an invitation to up-code advertising from general practitioner to specialist. It is my hope that anyone contemplating such a move will read this article, then ponder that bad things that would follow.

Mr. Zarbin is a sole practitioner in Upper Marlboro, Maryland, where he focuses in legal matters involving personal injury and workers’ compensation.

Going Out on Your Own? What Entity Should You Choose?





By Stuart Levine

Okay. You're about ready to leave the firm you're with and go out either on your own or with a buddy or two. You've researched office space, computer hardware, suitable software, telephones, etc. But what sort of entity should you organize for your practice? It will come as no surprise to those who know me that I would say, "Use an LLC." After all, my career has been intimately intertwined with the development of LLCs, and LLCs are my "default" entity of choice.

However, the choice of using an LLC only begins the decision-making process. It is necessary to understand how all of the pieces of the puzzle work together.

Why Not A Professional Service Corporation?

There is a discrete portion of the Maryland Corporations & Associations Article which deals exclusively with professional corporations called the Maryland Professional Service Corporation Act (the "MD PSCA") Md. Code Ann., Corps. & Ass'ns §§5-101 to 133 (2015). MD PSCA has a total of 33 sections, mandating everything from the number of professions a professional service corporation can conduct (only one), to a requirement that the stock certificate contain a particular descriptive legend, to a host of provisions that deal with death, disqualification, etc., and the subsequent purchase of a shareholder's stock interest.

In contrast, the Maryland Limited Liability Company Act (the "LLC Act"), has only two provisions that apply solely to LLCs engaged in professional practice:

- *Section 4A-203.1.* makes it clear that professional regulatory bodies retain their authority over individuals who are engaged in providing professional services that are within the jurisdiction of the regulatory bodies even if they conduct their practices through LLCs; and
- *Section 4A-301.1.* states that even though a professional practice is being conducted through an LLC, the individual practitioners remain liable to

their clients for their own negligent errors or omissions and for loss due to negligent supervision, etc.

Md. Code Ann., Corps. & Ass'ns §§4A-203.1 and 4A-301.1 (2015).

Simply stated, the LLC Act makes it explicit that LLCs cannot be used to excuse individual practitioners from their ethical obligations or their obligations to provide services in a competent manner. Yet, except for these two limitations, the LLC Act lets the owners write the terms of their own deal.

So, this article could end here, right? Well, not so fast.

The choice of entity issue involves more than the acronym that one tacks on at the end of a professional business entity's name. LLCs are, by their nature, malleable. They can, in appropriate circumstances, be classified for tax purposes as disregarded entities, partnerships, C corporations, or S corporations. It is this part of the decision-making process that requires planning and thought.

The Tax Entity Classification Decision Making Tree

An LLC that has only one owner is, by default, a "disregarded entity". That is, it is disregarded as an entity separate from its owner and files no separate federal or state income tax returns. Rather, its income or loss is reported on the tax return of the owner. *Treas. Reg. § 301.7701-3(b)(1)(ii)*. An LLC that has two or more owners will be treated as a partnership for federal and state income tax purposes. *Treas. Reg. § 301.7701-3(b)(1)(i)*.

Either a single-member or a multi-

member LLC can elect to be classified as a corporation for tax purposes. If the owner(s) want an LLC to be classified as a C corporation, the owner(s) must file a Form 8832. The effective date of the election will be the date specified on Form 8832, but cannot be more than 75 days prior to the date on which the election is filed and cannot be more than 12 months after the date on which the election is filed. *Treas. Reg. § 301.7701-3(c)(1)(i)-(iv)*.

Alternatively, if the owners desire that an LLC be classified as an S corporation, the LLC must qualify as an S corporation and file a Form 2553. In such a case, the deemed election to be classified as an S corporation for tax purposes will apply as of the effective date of the S corporation election and will remain in effect until the entity makes a valid election to be classified as other than an association treated as a corporation for tax purposes. *Treas. Reg. § 301.7701-3(c)(1)(v)(C)*.

What are the benefits and drawbacks of the various choices? While the characteristics of each choice are described below, let me suggest that the lodestone to be applied to reach the best decision is the maintenance of flexibility.

Disregarded Entities and Tax Partnerships

Disregarded entities are simple. The sole owner of the LLC (and remember, to be a disregarded entity, there can be only one owner) calculates profits and losses each year and reports those losses on the Schedule C that is part of the Form 1040 (U.S. Individual Income Tax Return). That means that all of the owner's income is subject to self-employment

tax (“SECA Tax”) under Internal Revenue Code (“IRC”) § 1401 *et seq.* In essence, for 2017, the first \$127,200 of income is subject to SECA Tax of 15.30 percent. Income over the \$127,200 cap is subject only to the 2.9 percent health insurance (Medicare) tax. The cap rises in annual steps to \$175,200 in 2025. There is also an additional Medicare tax of 0.9 percent on income in excess of \$200,000. This tax result is the same with respect to tax partnerships as to income allocable to the partners. All of the income of all of the partners is subject to SECA Tax.

The economic effect of this SECA Tax is mitigated to some degree because the taxes are somewhat deductible in computing profit and loss for income tax purposes. Assuming a Schedule C profit of \$150,000.00 before computing SECA Tax, the owner of the LLC will have to pay a total self-employment tax of \$19,790, but will be allowed a tax deduction for income tax purposes of \$9,895. (In making this computation, I used the calculator here: <http://slnews.us/pb020517b> and assumed that the taxpayer was married, filing jointly.) The deduction will generally result in approximately a \$3,500 income tax benefit. This means that the SECA Tax in this example, on a net-net basis, will create a tax burden of roughly \$16,300.

It is worthy of note that partners are not, and cannot, be employees of an LLC that is a tax partnership. *Cf.*, CCA 201640014, <http://slnews.us/pb020517c>. Thus, the LLC members will not be able to withhold income or SECA Tax and will have to make quarterly estimated returns and pay quarterly estimated taxes. It is quite surprising to me that many tax preparers are not aware of this and

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instruct their LLC clients to withhold taxes, file quarterly and annual employment tax returns, and issue W-2s to the partners.

The growth in the amount of SECA Tax paid by self-employed individuals has led to a greater use of entities taxed as corporations. After briefly describing the tax structure of entities classified as C corporations, I will show why there has been a move to use entities classified as S corporations.

Entities Classified as C Corporations

With respect to all entities classified as corporations for tax purposes, whether C corporations or S corporations, the owner(s) wear two hats: that of employees and that of owners/shareholders. (This may be a bit confusing, but a member of an LLC that is classified as a corporation for

income tax purposes is a shareholder for income tax purposes.) That means that all wage income is subject to Social Security and Medicare taxes under the Federal Insurance Contribution Act (“FICA”). For all practical purposes, to the extent that an owner is paid wage income subject to FICA, the net FICA Tax burden is approximately the same as would be the case with disregarded entities and tax partnerships.

What if the owners simply don't pay out all of the income from the practice? Bad move. In such event the retained profit will be subject to income tax at the level of the entity. The entity will be deemed to be a “personal service corporation” for income tax purposes. *See* IRC § 269A. That is, the retained income is taxed at a flat rate of 35 percent. *See* IRC § 11(b)(2). And, when the net income (that is, the profit less the amount paid in corporate income

tax) is paid to the owner/employees, the payment will not be deductible. Clearly, the 35 percent income tax is higher than the 15.3 percent SECA Tax (and a lot higher than the mere 2.9 percent Medicare tax).

Most professional service businesses are cash basis taxpayers. The practical effect of that is, at the end of the year, the owners have to scurry around to calculate and pay out all of the cash in the form of salaries. This may be a very stressful process, particularly if the owners have differences amongst themselves as to how the compensation pie is to be divided.

Entities Classified as S Corporations

Unlike C corporations, S corporations are not subject to entity-level taxes. And, unlike wages income, S corporation dividends are not subject to either FICA Tax or SECA Tax. So, the logical process is simply to form an LLC, make an S election, pay out as little as possible in salaries, and take the remainder of the profit as S corporation dividends. Easy, right? Well, not exactly.

The Internal Revenue Service ("IRS") has long taken the position that a taxpayer should not be permitted to evade FICA by characterizing compensation paid to its shareholder as dividends, rather than wages. See

Jamil E. Abdallah, T.C. Memo 2013-279; *Spicer Accounting, Inc. v. United States*, 918 F.2d 90, 93 (9th Cir.1990); *Veterinary Surgical Consultants, P.C.*, 117 T.C. 141, 145-146 (2001), *aff'd sub nom. Yeagle Drywall Co. v. Commissioner*, 54 Fed. Appx. 100 (3d Cir.2002). See also, *Scott Singer Installations, Inc.*, T.C. Memo. 2016-161 (payments made to controlling shareholder were compensation payments subject to FICA, not repayments of loans). The amount actually claimed to be paid as remuneration must be reasonable. *David E. Watson, P.C. v. U.S.*, 668 F.3d 1008 (8th Cir. 2012).

Well, what amount of compensation is reasonable? The IRS has said: The key to establishing reason-



able compensation is determining what the shareholder-employee did for the S corporation. As such, we need to look to the source of the S corporation's gross receipts.

The three major sources are:

1. Services of shareholder,
2. Services of non-shareholder employees, or
3. Capital and equipment.

If the gross receipts and profits come from items 2 and 3, then that should not be associated with the shareholder-employee's personal services and it is reasonable that the shareholder would receive distributions along with compensations.

On the other hand, if most of the gross receipts and profits are associated with the shareholder's personal services, then most of the profit distribution should be allocated as compensation.

In addition to the shareholder-employee direct generation of gross receipts, the shareholder-employee should also be compensated for administrative work performed for the other income producing employees or assets. For example, a manager may not directly produce gross receipts, but he assists the other employees or assets which are producing the day-to-day gross receipts.

See "S Corporation Compensation and Medical Insurance Issues," printed February 5, 2017, and available for download here: <http://slnews.us/pb020517d>

To be clear, a sole practitioner, without significant staff or capital investment, cannot claim that income from the practitioner's law practice is not associated with his

or her personal services. Even a law firm with numerous owners will likely have little capital invested in the practice and a relatively small staff. Thus, for many practices, the use of an S corporation to minimize FICA/SECA Tax is likely to be a theoretical mirage.

That being said, without having conducted a rigorous scientific study, many competent tax advisors take a much more aggressive position on this issue than I do. And, given the low percentage of tax returns that get audited, which percentage seems, at least in the short run, to be destined to decline even further, there doesn't seem to be much evidence that these aggressive positions are being challenged. Stated differently, there may very well be a chasm between the position outlined on the IRS website and the practical reality of being able to take an aggressive position without being challenged.

Is That All There Is?

Tax planning is not all there is. I present the following mantra to clients who are planning to go into a new venture:

All business deals have to address the same questions:

- What goes in?;
- What is expected of the participants on an ongoing basis?;
- What comes out both in the form of compensation and, when the business is concluded, in liquidation?;
- Who calls what shots?; and
- What happens when the deal breaks down either because expectations are not met, a participant dies or becomes disabled, disputes break out amongst the parties, etc.?

LLCs, either as disregarded entities or as partnerships, are incredibly flexible. Most importantly, they are easy to get into and out of. Let's address the five points of the mantra.

What Goes In: The participants can, at the outset of a relationship, fix precisely the amount of capital they are either contributing to the venture or expected to contribute. Most significantly, as anyone who has a substantial number of years in practice can tell you, partners come and partners go. The use of S corporations, which require that all interests have similar economic rights, is inherently awkward and cumbersome when partners come and go. LLCs, as partnerships, can be carefully tailored to allow differentials in voting, income, and even the amount of time and effort that has to be devoted to the practice.

It should be noted that taking in new participants is easier for LLCs organized as partnerships rather than corporations. That is because all contributions to a partnership in exchange for a partnership interest are tax-free events. *See IRC § 721(a)*. However, contributions to a corporation are only tax-free to the extent that the contributor receives eighty percent of the interests in the corporation. *IRC §§ 351(a) and 368(c)*. Further, if the firm assumes the liabilities of the contributor, that assumption may constitute a taxable sale. *See IRC § 357*. The use of an LLC that is a tax partnership allows the participants to avoid these traps.

What Is Expected of the Participants: It is good practice for any law firm to have some sort of employment agreement between the LLC and the members. These agreements outline what is expected of the members, how much leave they

are allowed, etc. And, of course, the agreements can establish compensation formulae.

Note, however, that under the LLC Act, the term “Operating Agreement” is defined to mean “the agreement of the members and any amendments thereto, as to the affairs of a limited liability company and the conduct of its business.” Md. Code Ann., Corps. & Ass’ns § 4A-101(p) (2015). Therefore, as a practical matter, some care must be taken to coordinate the terms of any service agreement and the terms of the document that is entitled “operating agreement” because they are likely to be interpreted together. *Compare Bontempo v. Lare*, 444 Md. 344 (2015); *Edenbaum v. Schwarcz-Osztreicherne*, 165 Md. App. 233 (2005).

What Goes Out: Law is, at its core, a business that provides labor. The understanding among the parties should, of necessity, reflect their understanding as to their rewards for their efforts. To that end, remember that those efforts reflect a triad of contributors: finders, minders, and grinders. Although challenging, attempt to achieve an understanding as to the balance among these conflicting interests. And, of course, try to set forth, in writing, the nature of that understanding.

Also note that if the LLC is taxed as a corporation and there is some sort of allocation of profits at the end of the year that differs from the ownership percentages of the members, that differential must be determined and the distributions made on or before December 31 of the year. If the LLC is taxed as a partnership, the parties have until March 15 following the year in question. *See IRC § 761(c)*.

Even in an LLC that is a disregarded entity, there should be an



operating agreement which should provide that the distributions to the sole member are made in consideration of the services that the sole member provides to the LLC. That is, the distributions are not made to the sole member in the sole member’s capacity as an owner, but in the sole member’s capacity as a provider of services to the LLC. This will help to insulate the sole member in the event that general creditors exhaust the LLC’s assets and attempt to enforce claims against the owner.

Who Calls What Shots: Most multiple-member LLCs likely have a

very informal decision-making process. And, of course, that decision-making process works great until it doesn’t. At a minimum, the LLC should outline an effective management structure that will be used when disputes arise.

Breakdown Events: At some point, all good things must come to an end. The practice of law is not immune to this immutable rule. Individuals die, retire, become disabled, and fall out with their partners. The LLC operating agreement should prescribe the outcome when these events occur. Needless to say, a full treatment of



these sorts of issues is way beyond the scope this article. However, one issue should be noted because it is involved with the initial decision whether to organize the practice as a corporation or a partnership for tax purposes.

Under IRC § 736(b)(2) “payments in exchange for an interest in partnership property shall not include amounts paid for (A) unrealized receivables of the partnership or (B) good will of the partnership, except to the extent that the partnership agreement provides for a payment with respect to good will. Stated

in plain English, the parties have the right to allocate the manner in which payments to retired partners are capital payments (which are not deductible to the partnership, but are treated as capital gain to the retired partner) or taxed as ordinary income to the retired partner (and, thus, deductible to the partnership). There are no similar provisions in the corporate tax provisions of the IRC. Thus, choosing partnership tax treatment provides much more flexibility in structuring business arrangements.

Conclusion

Yes, using an LLC to form your professional practice requires the expenditure of intellectual resources. Nevertheless, the ultimate payoff is that you will have a business arrangement that is tailored to your needs, not simply a generic one prescribed by statute.

Mr. Levine is an attorney in Towson whose practice focuses on business and tax issues. He may be reached at sltax@taxation-business.com.



Rule 4.2 Communication with Person Represented by Counsel Guidance

ETHICS DOCKET NO. 2017-02

The Committee understands that Rule 4.2 poses perplexing questions for many in the bar regarding who is protected by the Rule and under what circumstances a lawyer may contact an agent or employee of an organization who may have information about a matter. The Committee concluded that offering some guidance on the rule in the context of contacting constituents of organizations both governmental and private might be helpful.

Analysis

Any ethics analysis regarding a lawyer communicating with a person, including an agent, officer, director, and/or employee of an organization, necessarily must begin with consideration of Rule 4.2 of the Maryland Rules of Professional Conduct. That Rule provides as follows:

Rule 4.2. Communication with Person Represented by Counsel.

(a) Except as provided in paragraph (c), in representing a client, a lawyer shall not communicate about the subject of the representation with a person who the lawyer knows is represented in the matter by another

lawyer unless the lawyer has the consent of the other lawyer or is authorized by law or court order to do so.

(b) If the person represented by another lawyer is an organization, the prohibition extends to each of the organization's (1) current officers, directors, and managing agents and (2) current agents or employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability. The lawyer may not communicate with a current agent or employee of the organization unless the lawyer first has made inquiry to ensure that the agent or employee is not an individual with whom communication is prohibited by this paragraph and has disclosed to the individual the lawyer's identity and the fact that the lawyer represents a client who has an interest adverse to the organization.

(c) A lawyer may communicate with a government official about matters that are the subject of the representation if the government official has the authority to

redress the grievances of the lawyer's client and the lawyer first makes the disclosures specified in paragraph (b).

The policy behind this Rule is explained in the comments and in treatises and law review articles discussing the Rule. The language adopted by the states differs, so relying upon ethics opinions or court decisions from other states can be tricky, yet often helpful. Comment [1] makes clear that the Rule "contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer... against possible overreaching by other lawyers... This comment, and the protections afforded by the Rule, recognize that nonlawyers may not appreciate fully the implications of inquiries to them by counsel for opposing parties and may not be aware that, by reason of responding to such inquiries, they may compromise the attorney-client privilege or create potential civil or criminal liability for an associated organization.

Despite this rather straightforward purpose, the Rule can give rise to various thorny questions in application. One of the foremost legal ethicists, Geoffrey Hazard -

in an article in the *Hastings Law Journal* with Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 *Hastings L.J.* 797 (2009) discusses the overbreadth of the Rule and argues for changing it while describing a number of scenarios where the Rule is applied today and how the suggested changes might lead to what the authors argue yields a preferred result. The authors describe eight scenarios in which the Rule functions and how it functions and discuss the varied problems with each. Some of those scenarios illustrate the types of issues this Committee believes need to be clarified. In addition, as an additional resource, the Restatement of the Law Governing Lawyers, in Sections 100 and 101, discusses contact with governmental and organizational entities, as well as their current and former employees.

Although the Rule is designed to ensure protection of those represented by counsel, it is also clear from the Rule and the comments that Rule 4.2 operates differently when the organization is a government unit as constitutional rights under the First Amendment protect a person's right to seek redress of grievances directly from the government and its officials. In that regard, Subsection (c) of Rule 4.2 specifically acknowledges that the lawyer may communicate with a governmental official about client grievances that the governmental official has the authority to redress provided certain disclosures are made. Comment [9] explains that, subject to the aforesaid disclosure, communications with governmental officials having authority to redress grievances is permissible

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without the prior consent of the lawyer representing the government, but does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. Rather, the paragraph provides lawyers with access to decision makers in the government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty or that the government personnel are conducting themselves improperly with respect to aspects of the dispute. It does not provide direct access on routine disputes, such as ordinary discovery disputes or extensions of time.

Within these general guidelines and parameters set forth in the Rules of Professional Conduct are

a whole range of potential circumstances that can arise in litigation, in anticipation of litigation, or otherwise as to the boundaries of the protections afforded under Rule 4.2.

Applicable Authorities and Caselaw

As a Committee, we recognize that we find ourselves hamstrung to respond to specific inquiries about whether the Rule applies as presented to us by parties in litigation or who are at odds over how the Rule applies. Part of this Committee's reluctance to answer specific inquiries about conduct under Rule 4.2 stems from our recognition that issues concerning efforts by counsel for an adverse party to talk with employees or former employees of an entity or interview witnesses who may be employed by or for-

merly employed by an opposing party or organization are fraught with uncertainty and can only be resolved on a case by case factual basis. The Committee's Guidelines make plain that it is not a fact finder.

To understand fully the Rule and its implications for those lawyers seeking to protect their clients and privileged information and as well as those lawyers seeking to develop facts and information as advocates in litigation, several key components of the Rule must be addressed.

At the outset, the Committee can comfortably conclude that the general counsel for an organization, either public or private, cannot assert that the Rule applies to all employees of the organization based solely upon their employment. At the same time, a lawyer seeking to interview an employee of a represented organization must carefully consider whether the employee is off limits under Rule 4.2. Employees expressly included within the Rule's reach are "the organization's (1) current officers, directors, and managing agents and (2) current agents or employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability." The scope of an organization's constituents included in the protections of Md. Rule 4.2 are paralleled, with some variation, in the Model Rule Comments and in the Restatement of the Law of Lawyering. Comment 9 to Model Rule 4.2 states: "In the case of a represented organization, this Rule prohibits communications with

a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

Restatement (Third) of the Law Governing Lawyers, Section 100 (2000) states that a represented person includes:

- (2) a *current* employee or other agent of an organization represented by a lawyer:
 - a. if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has power to compromise or settle the matter;
 - b. if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or
 - c. if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter

The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 95-3 96, in which it discussed the scope of Rule 4.2 when dealing with an organization as the represented client:

When a corporation or other organization is known to be represented with respect to a particular matter, the bar applies only to communications with those employees who have managerial responsibility,

those whose act or omission may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question. Thus, a lawyer representing the organization cannot insulate all employees from contacts with opposing lawyers by asserting a blanket representation of the organization.

The Supreme Court of Ohio, as Board of Commissioners on Grievances and Discipline, issued Opinion 2005-3 (2005) and addressed the question: "Is it proper for counsel who represents an interest adverse to a corporation to communicate without consent of the corporation's counsel with certain current and former employees of the corporation, when the corporate counsel asserts blanket representation of the corporation and all current and former employees?" The Ohio Supreme Court responded:

Corporate counsel's assertion of blanket representation of the corporation and all its corporate employees is bluster. It is inappropriate. First, a unilateral declaration by a corporation's counsel that he or she represents all current and former employees does not make it so. Second, such blanket representation of a corporation and all its current and former employees would in many instances be fraught with impermissible conflicts of interest for the corporate lawyer.

See also *Terra International, Inc. v. Mississippi Chemical Corp.*, 913 F. Supp. 1306 (N.D. Ia. 1996), quoting *Carter-Herman v. City of Philadelphia*, 897 F. Supp. 899 (E.D. Pa. 1 995)(an organization cannot by declaration insulate its employees from contact as "an organization could thwart

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the purpose of Rule 4.2 simply by unilaterally pronouncing its representation of all of its employees.”).

“Proper application of the no-contact rule to a represented organization has been the source of much confusion and debate.” *Toward a Revised 4.2 No-Contact Rule*, 60 *Hastings L.J.* at 831. Hazard first recognizes that courts have rejected attempts by corporate counsel to insulate all employees from contact by opposing counsel. *Id.* at n. 213 (citing *See, e.g., Harry A. v. Duncan*, 330 F. Supp. 2d 1133, 1137-38 (D. Mont. 2004); *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 1, 6 (D.D.C. 2004); *Michaels v. Woodland*, 988 F. Supp. 468, 472 (D.N.J. 1997); ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 95-396 (1995)). Hazard explains that various factors “weigh in favor of a narrower scope of covered constituents” and among them is the heightened importance of informal fact-finding in an organizational context. Informal interviews with employees may be the only means for a party opposing a represented person to obtain key facts and information. Much information will be in the “exclusive control” of the organization and its employees, and may not be produced through formal discovery. Moreover, employees who would have offered prejudicial information in an informal private environment may be hesitant to do so in front of the corporation’s lawyer for fear of retaliation. Accordingly, as the New York Court of Appeals explained, “[t]he broader the definition of ‘party’ in the interests of fairness to the corporation, the greater the cost in terms of foreclosing vital informal access to

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facts.” *Id.*, at 832-33.¹

As such, the Committee believes that an organization’s desire to protect against intrusions into matters protected by attorney client privilege must be balanced against the bedrock of a system that encourages open exchange of information in a search for truth. Hazard further notes that limiting informal discovery imposes additional burdens in the organizational context. By increasing the costs of litigation through formal discovery, it may preclude the possibility of suit for individual plaintiffs who often have comparatively fewer resources. And by precluding individual plaintiffs’ access to vital sources of information, it may discourage lawsuits, frustrating private litigation’s role as an “important means of controlling abuses of corporate power and restraining abuses of law.” *Id.*, at

833- 34. This Committee’s recognition that such a balance exists is qualified by the clear understanding that the balance must also prevent opposing counsel from seeking privileged or confidential information.

Hazard also points out that the scope of the corporate constituents covered under Rule 4.2 should not be overbroad as it may not be in some corporate employees’ interests to be declared to be represented by corporate counsel and thus off limits. *Id.* at 805 (“A whistleblower within a represented organization has an interest in speaking with outside counsel without first gaining approval from the organizations lawyer.”) and 833 (“An employee’s interest may well diverge from those of the organization.”).

As set forth *infra*, counsel should consider the various factors iden-

tified in an effort to determine whether an employee is within the scope of Rule 4.2. The language of Maryland Rule 4.2 expressly and repeatedly refers only to the inclusion of “current” employees within its scope. Surely, under the general principle of statutory or Rule construction, the repeated use of “current” cannot be ignored. Indeed, Comment 7 to Model Rule 4.2 fairly parallels Md. Rule 4.2 regarding current employees who are covered constituents and then specifically makes plain that the scope of Model Rule 4.2 does not extend to former employees:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization’s lawyers concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. *Consent of the organization’s lawyer is not required for communication with a former constituent.* If the former constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.” Comment 7 to Rule 4.2.

While Comment 7 to the Maryland Rules does not contain this express language, Maryland Rule 4.2 itself refers to “current employees”. Moreover, Rule 4.4(b) and its comments provide further support for the limitation of Rule 4.2 to “current” constituents. In that regard, Rule 4.4(b) separately provides:

(b) In communicating with third persons, an attorney representing a client in a matter shall not seek information relating to the matter that the attorney knows or reasonably should know is protected from disclosure by statute or by an established evidentiary privilege, unless the protection has been waived. The attorney who receives information that is protected from disclosure shall (1) terminate the communication immediately and (2) give notice of the disclosure to any tribunal in which the matter is pending and to the person entitled to enforce the protection against disclosure.

In distinguishing current from former employees, the Maryland Court of Appeals explained in Comment 2 that “present or former organizational employees or agents may have information that is protected as a privileged attorney-client communication or as work product. An attorney may not knowingly seek to obtain confidential information from a person who has no authority to waive the privilege. Regarding current employees of a represented organization, see also Rule 4.2.”

The Court of Appeals tracked this alignment of Rule 4.2 with “current” employees and Rule 4.4 with “former” employees in Comment 6 to Rule 4.2: “Regarding communications with former employees, see Rule 4.4(b).”

Thus, when the Committee reads these Rules, comments and supporting authorities together, we conclude that the protections under Rule 4.2 apply only to current agents and employees and that Rule 4.4 provides guidance as to which former agents and employees may be off limits.

Maryland state courts have not addressed the issue, but several federal courts construing Maryland law and rules have. Noteworthy perhaps, is the fact that the court in *Sharpe v. Leonard Stulman Enters. Ltd. Pshp.* although acknowledging the discord among Maryland federal court opinions that have addressed the issue, concludes that the various opinions achieve consensus on one issue: i.e., that the Rule does not include former employees who do not possess confidential or privileged information or whose statements or actions cannot be imputed to their former employer:

On the Rule’s face and even with the aid of the official Comment, Rule 4.2 is at best unclear regarding its application to ex parte contact with former employees of a party organization. In the absence of applicable Maryland precedent addressing this issue, several members of this Court have considered the scope and application of this Rule in cases involving ex parte communication with former employees, reaching somewhat different results. See *Plan Comm. v. Driggs*, 217 B.R. 67 (D. Md. 1998) (Motz, C.J.); *Davidson Supply Co., Inc. v. P.P.E., Inc.*, 986 F. Supp. 956 (D. Md. 1997) (Smalkin, J.); *Zachair, Ltd. v. Driggs*, 965 F. Supp. 741 (D. Md. 1997) (Davis, J.); *Camden v. Maryland*, 910 F. Supp. 1115 (D. Md. 1996) (Messitte, J.). To the extent that these cases disagree over the proper scope of the Rule, however, this Court need not resolve the conflict, because all of these cases agree that the Rule does not prohibit ex parte communication with former employees who do not possess confidential or privileged information, and whose

statements or actions cannot be imputed to their former employer.

Sharpe v. Leonard Stulman Enters. Ltd. Pshp., 12 F. Supp. 2d 502, 504 (D. Md. 1998).

For additional judicial guidance on these questions, there are a series of cases decided by the United States District Court for the District of Maryland in which these issues have been examined and digested by various distinguished jurists and, in one instance, by a Magistrate Judge. These courts have reached different conclusions based upon the circumstances presented. In some cases, interrogation of ex-employees or existing employees was allowed, and, in others, actions taken to interview such former or existing employees resulted in sanctions including disqualification of counsel and/or exclusion of evidence. We draw your attention to the following cases including *Sharpe*:

Camden v. Maryland, 910 F. Supp. 1115 (D. Md. 1996) (Peter J. Messitte, J.)

Zachair, Ltd. v. Driggs, 965 F. Supp. 741 (D. Md. 1997) (Andre M. Davis, J.)

Ag Gro Servs. Co. ex rel. Ag Gro Servs. Co. v. Sophia Land Co., 8 F. Supp. 2d 495 (D. Md. 1997) (Marvin J. Garbis, J.)

Davidson Supply Co. v. P.P.E., Inc., 986 F. Supp. 956 (D. Md. 1997) (Frederic N. Smalkin, J.)

Plan Comm. In the Driggs Reorganization Case v. Driggs, 217 B.R. 67 (D. Md. 1998) (J. Frederick Motz, J.)

Sharpe v. Leonard Stulman Enters. Ltd. Pshp., 12 F. Supp. 2d 502

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(D. Md. 1998) (Benson Everett Legg, J.)

Collier v. Ram Partners, Inc., 159 F. Supp. 2d 889 (D. Md. 2001) (Andre M. Davis, J.)

Rogosin v. Mayor of Balt., 164 F. Supp. 2d 684 (D. Md. 2001) (James K. Bredar, Magistrate Judge)

We note that the federal cases that applied Rule 4.2 to former constituents largely did so to protect information subject to the attorney-client privilege, but Rule 4.4(b) independently prohibits an attorney from soliciting such information. Given the express language of the Rules and comments, we believe that the Court in *Davidson Supply Co. v. P.P.E., Inc.*, 986 F. Supp. 956 (D. Md. 1997) properly

declined to extend Rule 4.2 to former constituents and suggested such an extension “should be made by a duly promulgated amendment to the rule itself, rather than by the gloss of caselaw.” This analysis accurately reflects the opinion of this Committee.

Of these decisions, one that addresses a situation involving a governmental organization is the case *Rogosin v. Mayor of Balt.*, 164 F. Supp. 2d 684 (D. Md. 2001) (Magistrate Judge James K. Bredar), in which Plaintiffs, who were alleging employment discrimination claims against their employer, the City of Baltimore, sought the Court’s permission to interview informally certain present employees of the City as they might have information relevant to their claims. Unstated in the request for relief (that is, informal interviews) was

the premise that these witnesses could be reluctant to provide information in a supervised interview or one in which counsel for the City insisted on being present.

The Court, recognizing the conflicting results reached in the decisions cited above, ultimately denied the Motion for Leave to be permitted to conduct *ex parte* interviews. However, the Court also did not forbid Plaintiff's counsel from conducting the interviews, leaving it to counsel to determine from the principles enunciated in the authorities cited above, whether one or more of those interviews would be appropriate. The Court left open the question of whether Rule 4.2 applied to former employees, but expressed its reluctance to issue what the Court considered to be an "advisory opinion" as follows:

"Moreover, if Rule 4.2 does apply to *ex parte* contacts with certain former employees, any number of factors may affect whether it forbids contact with a particular employee. It would be difficult for this Court to issue an opinion that takes into account every possible factor that may affect whether a former employee has such knowledge as to render contact inappropriate. Although it would also be difficult for lawyers to make this assessment as they consider whether to talk *ex parte* with a former employee of a party-opponent, it would be easier for them to do so because they, unlike the Court, would be aware of more specific facts." Rogosin, 164 F. Supp. 2d at 686.

The Court, as guidance, also highlighted the following two principles

that emerge from the conflicting opinions recited above:

1. No judge of the United States District Court has held that Rule 4.2 bars *ex parte* contact with all former employees; and
2. *Ex parte* communication with a former employee that resulted in the lawyer obtaining confidential information or documents may result in sanctions regardless of whether Rule 4.2 is held to apply.

This second principle finds express support in Rule 4.4 (b), which prohibits a lawyer representing a client from seeking information from a third party that is protected from disclosure by statute or privilege. In Comment 2 to Rule 4.4, the Maryland Rules Committee made plain that this applied to former employees, and stated that Rule 4.2 applied to "current" employees. Again, support appears to exist for the position that the Maryland Court of Appeals contemplated that Rule 4.2 applied to "current" employees and that the protections of Rule 4.4 would cover all third parties, including "former" employees. Comment 2 to Rule 4.4.

Although the Court did not grant or deny Plaintiffs lawyer free access to existing or former employees of the City, the Court, in footnote 1, provided the following guidance:

"Obviously, most former employees of the City Law Department will possess information that is subject to the attorney-client privilege or is otherwise confidential by virtue of the fact that they act as the City's legal counsel in a variety of matters. The prohibition on lawyers contacting former employees who have been extensively exposed to

privileged information cannot be read so broadly as to bar a lawyer from conducting *ex parte* interviews with employees who have been exposed to privileged information about other matters, but have not been extensively exposed to privileged information about the case in which the lawyer is involved. Nevertheless, the lawyer conducting such interviews must also scrupulously avoid intruding upon privileges relating to other matters during the interview." Rogosin, 164 F. Supp. 2d at 687.

Certainly, in regard to former employees, counsel would be well served to proceed cautiously given the lack of uniformity in the reported decisions with regard to whether and how Rules 4.2 and 4.4 apply to former employees.

In *Toward a Revised 4.2 No-Contact Rule* (Hazard, 2009), the authors view the concepts that need to be considered in order to evaluate whether Rule 4.2 applies to current or former employees as:

1. The extent to which persons sought to be interviewed may have been privy to confidential communications with counsel;
2. The extent to which the employee may have been personally and substantially involved in decisions that may have a bearing on positions one or the other side may take in the litigation;
3. Whether the person is or is not a lawyer since one of the fundamental objectives of Rule 4.2 is to protect non-lawyers from inadvertently waiving the attorney-client privilege or other protections which may exist under the law²;
4. Whether the person's acts or

omissions in the matter would bind the organization for civil or criminal liability;

5. Whether there may be some other reason under the law where such inquiry is not only permitted, but encouraged; and
6. Whether a government official has the authority to redress the grievances of the inquirer.

Thus, by the language of Rule 4.2 and the comments thereunder, a blanket prohibition that would

preclude an adverse party or their counsel from communicating with any representative of an organization or governmental body under all circumstances, may be overbroad. Rule 3.4 applies to an organization's lawyer who improperly prohibits contact with employees and former employees beyond the reach of Rule 4.2. Rule 3.4, provides that a lawyer shall not:

"...(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

1. the person is a relative or an employee or other agent of a client; and
2. the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information."

Just as attorneys must proceed cautiously with approaching employees who may be covered by Rule 4.2, attorneys also need to proceed cautiously when considering the range of employees who are directed to refrain from contact

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with another attorney. In both of these roles, attorneys need to do the hard work and specific analysis to determine the scope of employees covered by the language of Rule 4.2(b)(2).

Conclusion

In sum, when you look at the language of Rule 4.2 in the context of the Comments and history of the Rule with an eye toward the specific prohibitions of Rule 3.4 and those in Rule 4.4 and the decisional case law, the following fundamental conclusions emerge:

1. A determination as to whether access can properly be obtained to employees or former employees of an organization must be resolved on a case by case basis and cannot be ruled upon categorically without specification of who the employees are, what the party requesting is seeking, and the likelihood that such persons have access to confidential information that would thereby be compromised.
2. Any effort to interview current

or former employees of a represented organization must be undertaken carefully so as to avoid intrusion into what may be attorney-client protected information;

3. Prudence warrants that a lawyer interrogating such people give appropriate warnings so as to ensure that the witness, whether a lay person or a lawyer, understands who the inquirer represents, the purpose of the inquiry and a warning so as to avoid intrusion into confidential information;
4. While there may be no blanket prohibition against interviewing all present or former employees of an organization or governmental body, conclusive and uniformly applicable ground rules may be difficult to formulate in advance;
5. In cases where an attorney has reason to believe that an employee of a represented organization might be covered by the no-contact rule, that attorney would be well advised to either conduct discovery or communicate with the opposing counsel concerning the employee's status before contacting the employee;
6. Where questions arise as to whether an employee is within the scope of Rule 4.2, the inquiring lawyer may seek permission from the Court or other decision making body before conducting any such interviews; and
7. If an organization is actually affording a defense to an employee or former employee, based upon an obligation to defend or indemnify, such as

under the State or the Local Government Tort Claims Acts, then the employee or former employee may be a represented party apart from the organization.

In addition to these principles, we also highlight several additional principles set forth in the Comments to Rule 4.2:

- Comment 2 makes plain that the Rule does not prohibit communication with a represented person, or employee or agent of that person, on matters outside the representation.
- Comment 5 makes plain that the Rule applies to any person whether or not a party to a formal proceeding, contract or negotiation, who is represented by counsel with regard to a matter. And, the Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate the communication if, after commencing the communication, the lawyer learns that the person is represented.
- Comment 6 explains: "If an agent or employee of a represented person that is an organization is represented in a matter by his or her own counsel, the consent of that counsel to a communication will be sufficient for purposes of this Rule."

We hope that this information is helpful to you and to other members of the Bar.

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The McCammon Group

is pleased to announce our newest Neutral

Hon. Daniel M. Long (Ret.)

Retired Judge, Circuit Court for Somerset County

The Honorable Daniel M. Long recently retired after over thirty years of distinguished public service. Judge Long served as Judge for the Circuit Court of Somerset County for twenty-six years, during which time he served as Circuit Administration Judge and County Administrative Judge. Prior to his appointment to the bench, Judge Long was elected as a Member of the Maryland House of Delegates, where he served admirably for seven years while also maintaining a successful private law practice in Somerset and Worcester Counties. Judge Long is a Recipient of the Judge Anselm Sodaro Judicial Civility Award from the Maryland State Bar Association, and he was selected as 2015's "Judge of the Year" by the Litigation Section of the Maryland State Bar Association. Judge Long now brings this exemplary record of service and achievement to The McCammon Group to serve the mediation, arbitration, and special master needs of lawyers and litigants throughout Maryland and beyond.



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