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To: Office of Court Administration

From: Nassau County Bar Association

Date: May 27, 2016

Re: Proposed Amendments to NY Rules of Professional Conduct.

In response to the Office of Court Administration circulating for public comment a series of proposed amendments to the New York Rules of Professional Conduct, the Nassau County Bar Association's Board of Directors (NCBA) met on May 10, 2016, and adopted the following comments.

At the outset, the NCBA believes that the proposed amendments are well-intentioned. They seek to bring the Rules of Professional Conduct up to date with the particulars of modern technological practices as well as to recognize the necessities of limited disclosures which must ordinarily take place in the transitioning of lawyers and law practices. The comments, below, follow the Proposed Amendments *ad seriatim*.

RULE 1.0(c) Terminology

Additions to Rule 1.0 are generally welcomed and well-reasoned. It brings the term "computer accessed communication" into the present by including things such as smart phones and all other portable devices that can send or receive communications.¹ The new proposal, however, only addresses devices, as opposed to the broader arena of computer, cloud, or other means of communications.

¹ There is a NYSBA ethics opinion 1009 (2014) giving a different all-encompassing definition, which should be considered:

Rule 1.0(c) defines "computer-accessed communication" to mean any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

RULE 1.1 Competence

As the use of “of counsel” or other temporary lawyers in attorney practices becomes more prevalent, the need for more caution is certainly necessary. This is especially the case when a client hires an attorney, who then goes on to hire another to do the work or make appearances. Here, there are a number of new comments that are being proposed.

Comment [6] states that an attorney should obtain informed client consent and “should reasonably believe that the other lawyers’ services will contribute to the competent and ethical representation of the client.”

Of course, the definition of “reasonableness” is a real problem in its vagueness. While the comment provides many factors, some are excellent (e.g., attorney education; and experience) other factors are questionable (e.g., the reputation of the attorney). Other factors ought to also be considered such as the client’s expectations as to who would be doing the work, had a particular relationship to facilitate a discussion, or making the appearance before the court or tribunal; the ability of the newly-retained attorney as compared to the originally retained attorney; or the actual working relationship between the parties).

The Comment then discusses at length the factors that go into determining the reasonableness of the firm’s decision to retain outside lawyers. Other than the client providing informed consent, and that should apply to the billing of those outside lawyers and services (i.e. what type of mark up will the firm make?) I would not recommend the reasonableness language as it is vague and unnecessary that such decision border more on the realm of professional responsibility

The Board should consider whether informed consent is required in every instance. Some may feel that the comment stating that “*lawyer should ordinarily obtain informed consent*” is vague. Others may believe that there ought to be a blanket rule such as the client should provide consent to the retention of attorneys outside of the firm, whether temporary attorneys, staffing or otherwise.

Comment [6A]

This comment seems to carve out the per diem lawyer who fills in for calendar appearances but not for arguing a summary judgment motion. It should be made clearer whether this comment is intended to explain the “Ordinarily informed consent” portion of Comment 6.

Comment [7] seems obvious, and, at the end of the day, ought to be a client’s responsibility, for the most part.

But there is relatively no harm in expressing what attorneys probably would do in any event (e.g., dividing up responsibilities among a team of lawyers), however, the devil is in the details here. This comment mandates that when different firms work to provide legal services for one client “on a particular matter”, they ought to “consult with each other about the scope of their respective roles and the allocation of responsibility among them.” It is unclear, however, what is to be done in representation of multi-national clients employing teams of attorneys globally. Moreover, it is further unknown why the obligation is on the attorneys to coordinate their efforts, rather than on the client to coordinate the efforts of these agents, especially when the client is in

the best position to know the purpose and role of each engagement. Also, the definition of a “particular matter” is unclear. Therefore, it would be undefined whether some attorneys ought to consult one another or not.

Comment [7A] These are appropriate factors about when a client’s consent is necessary for retention of another attorney by a retained lawyer. Please consider adding the client’s expectations as to who would be doing the work, had a particular relationship to facilitate a discussion, or making the appearance before the court or tribunal; the ability of the newly-retained attorney as compared to the originally retained attorney; or the actual working relationship between the parties. Further, the Board ought to consider mandating that the roles and responsibility of the various lawyers should be part of the original discussion with the client to obtain the informed consent.

Comment [8] gives detail as to what an attorney must continue to do in order to remain competent. In addition to keeping abreast of changes in substantive and procedural law in the lawyers’ practice, and “benefits and risks associated with technology the lawyer uses” (both of which are appropriate), it is recommended that lawyers also must “keep abreast of developments” in technology and comparative risks of alternatively available technology. It is not enough to know the risks of the means of one’s own practice, but one ought also to keep abreast of new alternatives or innovations.

RULE 1.4 Communication

Comment [4] provides for attorney responsiveness to clients. This is a frequent complaint against attorneys by aggrieved clients (whether justified or not). This amendment replaces “telephone calls should be promptly returned” with “a lawyer should promptly respond to or acknowledge client communications or arrange for an appropriate person who works with the lawyer to do so.”

The real concern is with respect to clients who may call attorneys on a high frequency bases (in a harassing manner) or who may not wish to pay the attorney for he returned calls. Of course, it is obvious that communications to attorneys must be responded to promptly. However, it is unclear what the Proposed Amendment requires when a client engages in a flurry of email communications with a lawyer in which it is clear that responding further would no longer resolve any open issues. It should be considered that where it is clear that a client’s communication is beyond the ordinary seeking of legal advice or the attorney-client relationship has been affected in such a way so as to be clear that it is no longer effective, then an attorney ought to be able to communicate that no further communications will be responded to, without a violation of the rules.

The Board may also consider modifying “promptly” by words such as “under the circumstances.” Promptly is defined as at once or without delay. Now that clients are communicating electronically with their attorneys 24/7 via text, email and otherwise, there needs to be a “reasonableness” context in so far as the attorney response.

RULE 1.6 Confidentiality of Information

The comments here pertain to the disclosure of information in the course of attorney(s) migration from one practice to another. Generally speaking, the provisions are thoughtful, understand the limited disclosures that must be made (often in increasing stages of disclosure) in lawyers' transitions, and understand the need for the sharing of economic information (such as aggregate receivables) without unnecessary disclosure of confidential client information. The comments, however, do not establish bright-line rules about what must not be disclosed and at what stage. A Factor that we may want to consider suggesting in addition to those already mentioned may be how timing of the disclosure or attorney migration will affect the client or the client's matter.

RULE 1.10 Imputation of Conflicts of Interest

The comments here provide for confidentiality parameters and procedures in the context of the mechanics of conflict checking lateral or merger talks by attorneys. The rule is very well intentioned insofar as it seeks to make disclosures of identities prior to attorneys moving (and thereby incurring a disqualification). However, the provision in Comment [9H] which states that before a lateral attorney is hired (or firm merged) "each client that the lateral lawyers or the merging firms" currently represent and represented "within a reasonable period of time" will be problematic in practice. Not all firms have readily available client lists, and not all attorneys at firms are able to obtain such lists. This would effectively mean that a firm can make it difficult for an attorney or part of its firm practice to move by hiding client lists. Moreover, the requirement that the lateral lawyers or merging firms also reveal "identity of other parties to the matters" is unclear (what "other parties" is this referring to?) and would only exacerbate the problem of a lateral move. While the general proscriptions and suggestions are excellent guideposts, the client list and "other people" lists may prove quite unworkable, depending on the firm.

Rule 1.18 Duties to Prospective Clients

The proposed comments' amendments, here, first replace the term "discussions" with prospective clients with "consultations." Comment [2] states that a Consultation occurs when a lawyer specifically requests or invites the submission of information about a potential representation, but does not occur when "a person provides information in response to an advertising that merely describes a lawyer's education, experience, . . . or provides legal information of a general interest."

A clear line needs to be established, clearly. However, this seems to be too fine of a demarcation. The public in general will not be able to determine if an attorney advertising falls on one side of this "consultation" definition or the other. Moreover, many lawyers employ a general "comments" section on their websites. This comments should specifically state whether this prevalent practice is a Consultation or not. Similarly, what about lawyer referral lines or other advertisements where very specific information is given to the public, and clients are thereby solicited (e.g., 1800-Asbestos)? Other websites have attorneys giving "general" advice, that are anything but "general." What of attorneys giving very specific advice (in the form of webinars)?

Comment [2] currently prohibits an attorney from encouraging someone from consulting with other attorneys for the purpose of disqualifying the consulting attorneys from representing

another party. Curiously, this has been deleted in the Proposed Amendment; the board should consider having this language reinstated. Using the Rules as a sword in litigation in this manner would appear to be making a mockery of the true purpose. A number of us have heard of these kinds of situations, for example, in matrimonial cases.

RULE 4.4 Respect for Rights of Third Persons

Comments [2] and [3] are being amended; they deal with inadvertently disclosed information. I would recommend that inadvertent disclosure not only include the expanded definition of document to include electronically stored information. I would recommend inadvertent disclosure should also include giving someone access to information, not just the information itself (e.g., inadvertent disclosure of a password).

The comments do not necessarily a) require the recipient to not read the document, b) require the return the document, c) prohibit from using the inadvertently produced document, or d) destroy the document. Rather, the Proposed Amendment Comments leave the consequences to utilization of the inadvertent information to the courts and common law, not the ethics Rules. I would recommend that the Board consider having ethical prohibitions tied to the knowing use of inadvertently produced information.

Comment [2] now includes data embedded in the document (e.g., “metadata”) as part of inadvertently produced information. In other words, whereas now metadata may be utilized to determine, for example who authored a document, or when a document was generated or altered, the Proposed Amendment would include this data as an “inadvertent” production. In my opinion, this is simply an ineffective attempt to put the proverbial genie back in the bottle. In the modern age, every document generated has associated with it data showing a legion of different pieces of information, some of which may be highly relevant in litigation, surrogate’s matters, corporate deals, etc. This inclusion of metadata should be reconsidered.

RULE 5.3 Lawyer’s Responsibility for Conduct of Nonlawyers

Proposed Comments, [2] clarifies that attorneys are also responsible for the conduct of nonlawyers working within and outside the firm. One of the major concerns with this comment is that it would force lawyers to seek “reasonable” assurances that the nonlawyers (within or outside) the firm are appropriately supervised and behave in a manner “compatible” with the lawyers’ “professional obligations.” Together with Comment [3], these Proposed requirements are seemingly innocuous, stating that lawyers must use “reasonable” measures to ensure the conduct of nonlawyers within and outside the firm. But, the very palpable concern is the economic and administrative pressure this would place on attorneys – especially small or solo practitioners – who do not have the knowledge, resources, or client bases to take on additional responsibilities. For example, a litigator cannot micro-manage the procedures used by all process servers in the course of their duties in a busy practice. Similarly, an attorney using a copy shop or printing service would have to micro-manage that third party’s cybersecurity to prevent inadvertent leaking of client confidential information. Further, these increased risks would inevitable lead to increased need for insurance coverage, increased questions for attorneys (who is your printer, what measures do they take, who is your process server, etc.?) and of course, increased premiums charged to lawyers. Moreover, it would put a chill on attorneys use of outside service providers. For example, before using a valuation expert, the attorney would first have to inquire into that expert’s personnel, administrative procedures, cybersecurity, and

other information security. One part of the solution may be to limit attorney liability, for example, to instances where a nonlawyer has access to client funds (e.g., if a lawyer is delegating accounting/banking to a bookkeeper he/she will be held responsible for their conduct).

RULE 7.2 Payment for Referrals

The Proposed Amendments to Comments [1] and [3] re-affirm the prohibition to get a referral fee, but now explicitly allow the lead generators and search engine optimizations, so long as certain other rules are complied with (e.g., not misleading, not recommending the lawyer, not compromising the lawyer's independence, etc.).

This category is one where many lawyers walk a close line to what is permitted, if not cross that line, in my opinion. For a large number of Nassau County practitioners, in my opinion, would be much more helpful if the comment were to address what duties an attorney may retain for himself or herself so as not to be deemed completely "referring out" a matter.

With respect to search optimization or referral generation, while these electronic means to an end are effective, unfortunately, the proposed comments do not go far enough. When an unsuspecting public "Googles" for example "DUI arrest Nassau County" they probably do not have any idea of what algorithms are utilized to bring about their top ten Google hits, nor what other means are utilized to bring an attorney's particular name at the top of the list.

These Proposed Amendments, therefore, should go much farther in disclosing to the public what is occurring, making the fees being charged by lead generation open to the public, and the Board may even consider prohibiting the use of lead generation and search optimization in matters where the public may be particularly susceptible (e.g., elder law, foreclosures, matrimonial, etc.)