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Ethics in the Ether?

Selected Aviation Scenarios from a Decade of CLE's

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Hypothetical One:

"The Beauty Contest"

Our first hypothetical involves a major air disaster and multiple defense firms "jockeying" for a role in the defense. Is there a bright line beyond which a law firm considered for retention becomes sufficiently tainted by [arguably] privileged information so as to preclude it from being retained by a different defendant should it not catch the big fish?

Facts

Stage One – After an aviation accident, the airline involved in the crash, in cooperation with its insurance broker and its underwriter, confer as to possible counsel to represent the airline in the inevitable litigation. Three potential firms are identified. In-house counsel for the airline calls the proposed lead counsel at each firm for an upcoming "beauty contest." The only facts discussed over the phone are that the retention relates to the well-known accident and the identity of the insurer. Has an attorney-client relationship been formed? Is privilege expected?

Stage Two – Assume that in-house counsel advises the proposed firms that if they are interested in the case and have no conflict, in-house counsel will provide a packet to counsel, setting forth internal investigatory information and corporate counsel's initial analysis of strategy and litigation/settlement goals. All three of the defense firms gladly accept the packet. Is this package privileged? What precautions should be taken?

Stage Three – A law firm is chosen. When litigation is initiated against multiple defendants, one of the law firms not chosen appears on behalf of co-defendants. Is this representation precluded because of receipt of the "fact packet?" Does it depend upon whether the same lawyer is being used and how widely the fact packet has been distributed?

Analysis

Privilege, as defined in Black's Law Dictionary, is "the right to prevent disclosure of certain information…especially when the information was originally communicated in a professional or confidential relationship."[1] Perhaps the most well-known relationship giving rise to such a privilege is the relationship between attorney and client, from which arises the attorney-client privilege.[2] In accordance with this privilege, a lawyer is generally prohibited from revealing information relating to the representation of a client without first receiving authorization to do so, *i.e.*, informed consent from the client;[3] "unauthorized" disclosure of privileged information is permissible if necessary to carry out representation.

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1 BLACK'S LAW DICTIONARY 974 (Bryan A. Gardner, ed., 2000).

2 BLACK'S LAW DICTIONARY 974 (Bryan A. Gardner, ed., 2000).

3 ABA Model Rules of Professional Conduct Rule 1.6 (2010).

In order to assert the attorney-client privilege each of the following 4 factors must be present:

1. Client—the holder of the privilege is a client or, at the time of disclosure to the attorney, seeks to become a client;

2. Legal Representation—the communication was made to an attorney in connection with legal representation;

3. In Confidence—the communication was made by the client (or prospective client), without the presence of strangers, for the purpose of securing legal services or an opinion of the law; and,

4. Claimed—the privilege is claimed or asserted (not waived) by the client.[4]

No clear test exists for determining when an implied attorney-client relationship is formed, perhaps because every situation is different. However, the trend of the case law is that such a relationship may be found to exist when a client reasonably believes that an attorney has become his/her lawyer and reasonably relies upon advice given by the attorney. Rule 1.18 of the ABA Model Rules of Professional Conduct governs duties to prospective clients. The Rule states that "a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."[5] The rule continues: "Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client."[6] As such, even though no client-lawyer relationship exists, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation. Comment 2 expands upon the formation of the relationship and states that not all persons who communicate information to a lawyer are entitled to protection under this Rule. If no reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship exists, then a person who communicates information to a lawyer is not a "prospective client."[7] Given the facts in Stage One, it seems difficult to believe the in-house counsel (client) believes that any of the three attorneys represent his interests in a fiduciary capacity. However, any confidences revealed may prove to be privileged.

Moving along to Stage Two of the scenario, ethical rules define a category of information about a client that a lawyer may not ordinarily reveal except to benefit the client. Rule 1.6(a) of the Model Rules of Professional Conduct states that a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation.[8] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. Moreover, "privilege applies to all confidential communications made to an attorney during preliminary

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4 *See generally In re Grand Jury Subpoena*, 341 F.3d 331, 336 (4th Cir. 2003).

5 ABA Model Rules of Professional Conduct Rule 1.18(a) (2010).

6 ABA Model Rules of Professional Conduct Rule 1.18(B) (2010)

7 *Id*. at Comment [2].

8 ABA Model Rules of Professional Conduct Rule 1.6(a) (2010).

discussions of the prospective professional employment, as well as those made during the course of any professional relationship resulting from such discussions."[9] Even if the in-house counsel in Stage Two has not yet established an attorney-client relationship, all three defense firms have a duty to a prospective client to safeguard any documents or other property placed in the lawyer's custody.

Stage Three of the scenario brings to light the ubiquitous conflict of interest discussion in the context of an, arguably, not fully matured lawyer/client relationship. Rule 1.7 states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." A concurrent conflict of interest exists if the representation of one client will be directly adverse to another client or 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.[10] Subsection (b) of the Rule fleshes out the exceptions to the Rule, which include the ability of a lawyer to represent a client if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.

Under the ABA Model Rules of Professional Conduct, the duty of a lawyer to provide competent representation to a client requires the attorney to refuse to accept or continue employment if the representation of one client will be directly adverse to another client, or 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.[11] The substantial relationship test, used to determine whether disqualification of an attorney is required for his or her successive representation of parties with adverse interests, is intended to protect the confidences of former clients when an attorney has been in a position to learn them.[12] However, a lawyer may represent a client if: the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and each affected client gives informed consent, confirmed in writing.[13] Query, has the recipient of the packet been tainted the point where he could not appear aversely to prospective client?

The short answer is that the lawyer may not be precluded if she adheres to the requirements of Model Rule 1.7(b) and procures "informed consent." Comment 22 to Rule 1.7 envisions consent to future conflicts. As such, the law firm considering accepting the litigation packet might procure that client's informed consent for potential conflicts created by receipt of this information should another firm be chosen. Such an informed consent must set out the precise conflicts envisioned and waived and will likely not be effective for unanticipated conflicts, for which a fresh waiver would be needed. (Kudos to the law firm that in trying to add to its portfolio first dots its ethical "I's" and obtains this informed

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9 *Hooser v. Superior Court*, 101 Cal. Rptr. 2d 341(Ct. App. 2000).

10 ABA Model Rules of Professional Conduct Rule 1.7(a) (2010).

11 ABA Model Rules of Professional Conduct Rule 1.1 (2010).

12 *Knight v. Ferguson*, 149 Cal. App. 4th 1207, 57 Cal. Rptr. 3d 823 (2d Dist. 2007).

13 ABA Model Rules of Professional Conduct Rule 1.7(b) (2010).

consent. One cannot help but wonder about the effect of such a [defeatist?] request on the prospective client.)

Hypothetical Two:
Who's the Client Here Anyway?

Facts

Here we tackle the traditional tripartite relationship between insurer, insured, and insurance defense counsel. Defense counsel for Hardsell Propulsion encounters information in the course of her investigation that has coverage implications:

Specifically, discovery in litigation involving an uncontained engine failure reveals a history of failures of the Hardsell Stage Two Turbine Disc. Hardsell's internal investigation reveals that the disc failure was due to Hardsell's improper shot peening of the disc's forged alloy blades resulting in "decreased fatigue resistance, a loss in tensile strength, embrittlement, and a greater susceptibility to vibration damage and fatigue failure."

Further investigation at Hardsell reveals that blade serial numbers 11200-11350, the entirety of "Lot 150" from which the failed blade came, had been subject to the same improper peening.

Investigation also reveals the following critical documents:

- Minutes from a December 1, 2007 meeting of the Hardsell Product Integrity Board in which it was determined that these blades, Lot no. 150, S/Ns 11200-11350 potentially have "serious metallurgical deficiencies" and unanimously agreed to recommend a recall of the entire lot.

- A memorandum of December 3, 2007 from the Product Integrity Board to Hardsell's Senior Vice-President of Quality Control recommending this recall.

- A memorandum of December 7, 2007 from Hardsell's Director of Risk Management to the Director of Quality Control advising that the "action item" with respect to Lot No. 150 had been deferred until sometime after the January 1, 2008 renewal of Hardsell's product liability policy with Push-Pull Insurance Co. (PPI). This document has come to be known as the *Pearl Harbor Memorandum.*

No further action with respect to Lot No. 150 was ever taken and no failures were reported to Hardsell until the accident that is the subject of this litigation.

Hardsell Liability Policy Detail:

The Hardsell policy contains the following exclusion:

* *

We Will Not Insure: Any loss arising from the intentional conduct of the insured that materially increases the risk to PPI and is deliberately withheld from PPI.

* *

The "Pearl Harbor Memorandum":

Insurance counsel for Hardsell, having had significant experience with aviation coverage as well as some basic understanding of common law fraud is of the opinion that the *Pearl Harbor Memorandum* presents serious coverage issues. He advises Hardsell of his concerns and assures Hardsell that he will not share his coverage opinions with the insurer. However, because of the significance of this document in the context of the litigation, he wants to report it to the insurer in his regular status report, on which Hardsell is routinely copied.

- Has counsel for Hardsell conducted himself ethically?
- Must PPI to be advised of the document and its content despite its obvious coverage implications?
- What are reporting counsel's options if Hardsell insists that he make no mention of these events and documents?
- Does it make a difference if these critical documents are currently subject to production pursuant to open discovery requests?

Analysis

Normally, an insurer's duty to defend is coupled with the right to control the defense of the litigation. The purpose of this right is to allow insurers to protect their financial interest in the outcome of litigation and to minimize unwarranted liability claims. Giving the insurer exclusive control over litigation against the insured, safeguards the orderly and proper disbursement of the large sums of money involved in the insurance business.[14] However, the lawyer may not take up the cudgels of the insurance carrier, when its interests are diametrically opposed to the interests of the insured. A lawyer who represents a client is required to do so wholeheartedly and with full determination to assert his client's cause and to protect his rights.[15] With that said, he is not required to participate in or to help in perpetrating a fraud, and if he is satisfied that his client is so conducting himself, it is his duty as an

14 *Parker v. Agricultural Ins. Co.,* 109 Misc.2d 678, 681-82, 440 N.Y.S.2d 964, 967 (N.Y. Sup. Ct. 1981); accord *Desriusseaux v. Val- Truck Corp.*, 230 A.D.2d 704, 705, 646 N.Y.S.2d 161, 162 (App. Div. 1996).

15 *Schwartz v. Sar Corp.*, 195 N.Y.S.2d 496, 497 (N.Y. Sup. Ct. 1959), *rev'd on other grounds*, 195 N.Y.S.2d 819 (App. Div. 1959).

officer of the court to withdraw as counsel. He may not, however, take up the defense of one upon whom the fraud is sought to be practiced, particularly where he has already received the confidence of his client.

When coverage issues exist, some courts are concerned that counsel may prejudice the insured by aiding the insurer in escaping coverage. Thus, where a material coverage issue exists, some courts allow the insured to retain independent counsel of its choice and control the defense of the litigation unless the insurer is willing to waive its coverage defenses. The insurer will be held responsible for the reasonable costs of this additional representation.[16] How the defense counsel discovers the information affecting coverage will determine his or her next step. If the information is discovered through the communications with your client insured, you must protect those attorney-client communications from third parties, including the insurer.[17] If the information discovered did not result from communications with the insured, the attorney should caution that the information about to be disclosed may affect coverage defenses. The attorney still has the duty to apprise the insurer of the status of the matter.[18] In both scenarios defense counsel are generally barred from disclosing the information to the insurer.[19] If the attorney breaches the confidentiality obligation, he or she may be subject to disciplinary procedure and/or malpractice liability.[20]

Hypothetical Three

"Retrained and Passed?": The Training File Transformation

You represent pilot training entity, Safety Flight Training Worldwide ("SFT"). In the aftermath of an accident involving a failed engine compounded by pilot error, you request the training record for the accident's captain, Stephen Cary. Your investigation reveals that Captain Cary twice failed a simulated engine failure test (comments on the simulation test sheet read: "loss of situational awareness; failure to don oxygen equipment during simulated loss of cabin pressure."); nonetheless, SFT incorrectly passed him for recertification in the MB500. Upon interviewing the instructor, you discover that Captain Cary never even completed the recertification course because he had to leave early for a family emergency. In reviewing documents for discovery, you are surprised to find a training sheet added to the file showing Captain Cary had successfully completed recertification training and had been "retrained and passed" on emergency engine failure procedures. Moreover, the director of SFT is about to be deposed and will apparently testify that Captain Cary completed his training. What are your obligations with regard to producing the document and the witness?

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16 Debra A. Winiarski, WALKING THE FINE LINE: A DEFENSE COUNSEL'S PERSPECTIVE, 28 TORT & INS. L.J. 596 (1993).

17 Ryan, CONFIDENTIALITY, DISCLOSURE, AND DISCOVERABILITY IN THE REPRESENTATION OF INSURER AND INSURED, 48 INS. COUNS. J 163 (1981).

18 *See State Farm Mut. Auto. Ins. Co. v. Walker*, 382 F.2d 548 (7th Cir. 1967); *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973).

19 Douglas R. Richmond, WALKING A TIGHTROPE: THE TRIPARTITE RELATIONSHIP BETWEEN INSURER, INSURED, AND INSURANCE DEFENSE COUNSEL 73 NEB. L. REV. 265, 281.

20 *Perez v. Kirk & Carrigan*, 822 S.W.2d 261 (Tex. App. 1991).

Analysis

All attorneys are under a duty not to present false or perjurious testimony. Both the Model Rules and Model Code impose an affirmative duty to avoid participation in wrongdoing, including knowingly presenting false or perjurious testimony, or facilitating a crime or fraud by the client.[21] Rule 3.3 of the ABA Model Rules of Professional Conduct states:

> (a) A lawyer shall not knowingly:
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> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
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> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

While an advocate is responsible for pleadings and other documents prepared for litigation, he does not create the underlying facts. The situation changes quite a bit if a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence. The lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence.[22]

Rule 3.3's prohibition against offering false evidence is the counterpart to Rule 3.4's prohibition against falsifying evidence. Rule 3.3 casts the obligation as part of a lawyer's duty of candor toward a tribunal,

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21 ABA Model Rules of Professional Conduct Rule 3.3(a)(2010).

22 ABA Model Rules of Professional Conduct Rule 3.3 Comment [6] (2010).

while Rule 3.4(b) frames the obligation as being owed to an opposing party and counsel. A single act, of course, can violate both obligations.[23]

The suspicion or outright exposure of perjury can not only cause serious harm to the merits of the client's case but may also lead to personal and professional censure for the lawyer. Both perjury and subornation of perjury are criminal offenses.[24] Punishment of a criminal defendant may be enhanced based on perjury. A lawyer who knowingly presents false testimony is subject to fines and other sanctions, including attorney fees, disqualification and disbarment.[25] Even if the perjury is not immediately exposed and the client wins the case, the subsequent exposure of the perjury may be grounds for relief from the judgment for fraud on the court under Fed. R. Civ. P. 60(b)(3).

In the hypothetical, the lawyer has strong reason to believe that a given document that has "turned up" has been fraudulently created and inserted into the case. The focus here would seem to be on the meaning of "knowingly" using false evidence. Moreover, is the lawyer "using" it if he does not affirmatively himself rely on it? Does the lawyer here have an obligation to affirmatively "out" his client? What if his admonitions to his client are unheeded and the client proceeds to rely on the document under oath? What can the lawyer do short of withdrawing from the case? The lawyer would seem to be facing the Hobson's choice of introducing false evidence or breaching the attorney-client privilege.

#4. "Obviously, Whatever Happened, Happened, But . . ."

Plaintiff Allison Tripp, fell on a slippery substance while entering Terminal 3, the Global Airways terminal in Calamityville Airport, New York intending to fly Global to Chicago, Illinois. Video surveillance for Door #3, where she fell, was inoperative at the time.

Plaintiff engaged local firm, BEGGS & SETTLES, to handle her claim. Her lawyer, William Beggs, is not experienced in either aviation claims or claims against municipalities. He treats it is a standard claim with a three-year limitations period. He fails to file a notice of claim against Calamityville, a municipality, within the requisite ninety days are required by New York's General Municipal Law.

Before initiating litigation, and about a year after the accident, Beggs dispatched a claim letter to Global and Calamityville demanding US$1 Million in damages. In response, Calamityville's corporate counsel declined the claim, citing lack of timely notice of claim. Global's counsel responded that they were investigating the claim and requested medical information and other informal discovery.

The incident report from the local police describes the area of the fall as "dry and clear." Plaintiff's best recollection, as reported to counsel Beggs, is that the slippery substance was just outside the airport

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[23] *In re Swarts*, 30 P.3d 1011 (Kan. 2001) (after learning that evidence consisting of brown paper sack containing handkerchief was missing, county prosecutor brought his own to court and placed it on counsel table during plea change and sentencing hearing, intending to lead defendant to believe evidence was not lost).

[24] *United States v. Dunnigan,* 507 U.S. 87, 88-89, 113 S. Ct. 111, 122 L. Ed. 2d 445 (1993).

[25] *Tedesco v. Mishkin*, 629 F. Supp. 1474, 1487 (S.D.N.Y. 1986).

door and that she fell forward into the terminal building, pushing the door open as she fell. When the police arrived, she was sitting in a nearby waiting area.

Now realizing the state of affairs, Beggs sets a meeting with his client, he informs Ms. Tripp as follows:

> The correct party to sue depends upon the location of the slippery substance. If it was outside the door, its Calamityville's fault, and we should sue them. If the stuff was inside the terminal, then it's the airline's fault, and we should sue them.
>
> So far the airline has been much more receptive to our claim, so it would really be better if it happened inside. Not that I'm trying to influence you of course, but I think we'll have a much better time going against the airline, with you as its customer, than against Calamityville, who has no real interest in you. Of course, the facts are the facts, I'm just telling you the law as applied to the facts, which is my job as your lawyer.

Ms. Tripp responds, "I'm pretty sure I slipped on something inside, so let's go after the airline."

Plaintiff sues the airline, alleging "hazard consisting of a slippery substance inside Terminal Three, just inside Door #3."

He repeats this in discovery responses, and plaintiff recites this version of the accident at her deposition.

Issues:

- Should Beggs have taken the case?
- Did Beggs improperly mislead his client?
- Did Beggs improperly withhold information from his client?
- Did Beggs improperly influence his client to commit perjury?

Analysis

The following guidelines come into play in this forth scenario:

Rule 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3: Diligence

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

Rule 3.3: Candor Toward the Tribunal

> (a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 8.4: Misconduct

It is professional misconduct for a lawyer to:

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

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

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

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

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

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

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin,

ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Commentary

Clearly, plaintiff's counsel herein has overstepped on several grounds. As this is not a hardcore aviation case but more accurately premises liability case with a "municipal twist," it may not have been outside of the Rule 1.1 Competence Rule. However, counsel could and should have attained the necessary familiarity with municipal claims to competently represent the Plaintiff herein.

Having then "blown" the notice of claim period, Beggs likely had a duty to advise his client of his own error. "A classic example of a duty to advise a client of potential malpractice is a lawyer who fails to file a lawsuit for a client within the limitations period". [26]

Beggs clearly then overstepped by combining the lack of information to his client to steer his client toward a cause of action against the only defendant against which a timely cause of action remains.

Hypothetical Five

A "Neutral" Evaluation"

A major personal injury case lands in litigation. Despite their best intentions of trying to settle, the parties are still far apart. The demand stands at US$5 Million, the offer at US$1.5 Million after seven hours in session. In a last effort to settle the case while in caucus session, the parties independently ask the mediator to make a recommendation on a settlement figure.

Rather than deliver a recommendation, the mediator approaches the plaintiff's team. He advises, "Look, I have thought this over and looked at all of the evidence. I know you do not want to hear this, but my evaluation of the case is going to be much closer to defendants than it is to yours. Do you want to proceed with my recommendation, or shall we try to revisit our offers and demands one more time?"

Thereafter, the mediator approaches the defense team, he advises, "look, I have thought this over and looked at all of the evidence. I know you do not want to hear this, but my evaluation of the case is going to be much closer to plaintiff's than it is to yours. Do you want to proceed with my recommendation, or shall we try to revisit our offers and demands one more time?"

After further negotiations, the case settles at US$2.5 Million. Was the mediator's conduct proper?

[26] *Leonard v. Dorsey & Whitney LLP*, 553 F.3d 609 (8th Cir 2009) (citing Restatement (Third) of The Law Governing Lawyers § 20 Com "C" (2000).

Some Guidance. Comment 2 to the ABA Model Rule of Professional Conduct 2.4 notes that in performing the role of third-party neutral, "the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes…or the Model Standards of Conduct for Mediators…"[27]

Model Rule 8.4 says, "It is professional misconduct for a lawyer to…(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Mediation processes certainly fall under this broad umbrella. Nonetheless, the mediation ritual is often replete with bluffing, puffing, feigned indignation, overstated legal positions, and a variety of somewhat insincere negotiating techniques. Should mediation be subject to no better standards than a game of poker?

The line between negotiating savvy and dishonesty has not been precisely established – and probably never will be. However, it can be reasonably inferred that misrepresentation as to facts can be distinguished from "misrepresentation" as to position, opinion, and intention. When another lawyer in mediation represents that he will never settle a case for less than 5X knowing he and his client will in fact accept X, this is generally considered a mere part of the mediation/negotiation ritual. However, a misrepresentation as to the critical facts, e.g., the client's medical condition at the time of the accident, would stand on much shakier ethical ground.

ABA Model Rule 4.1 provides:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

However, who is the mediator's client? Absent a client, this rule would seem inapplicable. Nonetheless Model Rule 8.4 declares that it is misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. Not all mediators are lawyers and bound by the applicable ethical rules.

In the hypothetical presented, has our mediator misrepresented his supposedly objective view of the case to advance settlement? Has he stated two different and mutually incompatible settlement positions to wrongly procure a settlement – a settlement premised upon the parties' reliance on the presumed objectivity and fairness of the mediator? In this author's view, he has misrepresented his views of the case and crossed a line into improper behavior, but I think it's a close call.

In Closing

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[27] MODEL RULES OF PROF'L CONDUCT R. 2.4, comment 2

I hope you have enjoyed or at least tolerated this little trip down ethical memory lane. As in so much else, “forewarned is forearmed,” and I hope these exercises help us all keep our ethical antenna that much better tuned.

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