

AVERTING POTENTIAL ETHICAL PROBLEMS IN COLLECTIONS

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“Tensions” Between the Fair Debt Collection Practices Act (15 U.S.C. § 1692, *et seq.*) and the Rules of Professional Conduct

The application of the Fair Debt Collection Practices Act (“FDCPA”) to attorneys has created certain “tensions” between an attorney’s responsibilities under the Code of Professional Conduct and compliance with the FDCPA, as recognized by Justice Kennedy in his dissenting opinion in *Jerman v. Carlisle*:

An attorney's obligation in the face of uncertainty is to give the client his or her best professional assessment of the law's mandate. Under the Court's interpretation of the FDCPA, however, even that might leave the attorney vulnerable to suit. For if the attorney proceeds based on an interpretation later rejected by the courts, today's decision deems that to be actionable as an intentional “violation,” with personal financial liability soon to follow. Indeed, even where a particular practice is compelled by existing precedent, the attorney may be sued if that precedent is later overturned.¹

Aside from the obvious tension noted by Justice Kennedy, other tensions exist. For example, in the American Bar Association’s Model Rule of Professional Conduct 4.3 (hereinafter the “ABA

Model Rules”) entitled “Dealing with Unrepresented Person” it provides that

[t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.²

Typically, statements made to the unrepresented person should be limited to the client’s intentions and actions that are capable of being carried out.³ One author cautions against providing *any advice* to the unrepresented person for fear it may create an attorney-client relationship.⁴

However, some courts have interpreted the FDCPA as *requiring* a debt collector to provide the unrepresented person with advice.⁵ For example, the Seventh Circuit provided a “safe harbor” notice to be provided to a debtor when service of a lawsuit constitutes the initial communication:

This *advice* pertains to your dealings with me as a debt collector. It does not affect your dealings with the court, and in particular it does not change the time at which you must answer the complaint.

* * *

The *advice* in this letter also does not affect my relations with the court. As a lawyer, I may file papers in the suit

according to the court's rules and the judge's instructions.⁶

In *Clomon v. Jackson*, the Second Circuit found that attorneys may be liable under § 1692e(3) if they are not “materially involved” in the files upon which they are sending debt collection letters.⁷ The Second Circuit later found, in *Greco v. Trauner*, that a collection letter from an attorney that stated, “At this time, no attorney with this firm has personally reviewed the particular circumstances of your account” was sufficient to defeat a § 1692e(3) claim because “the least sophisticated consumer, upon reading this letter, must be taken to understand that no attorney had yet evaluated his or her case, or made recommendations regarding the validity of the creditor's claims.”⁸ The disclaimer became widely known as the “*Greco* disclaimer” and was widely incorporated into letters sent by debt-collecting attorneys.⁹

The Third Circuit Court of Appeals found that the use of a *Greco* disclaimer on the reverse side of an attorney's debt collection letter was *itself* a violation of § 1692e because the disclaimer when used in conjunction with attorney letterhead might “raise the specter of potential legal action by using its law firm title to collect a debt when the firm was not acting in its legal capacity when it sent the letters.”¹⁰ It declined to consider whether an attorney debt collector might “under appropriate circumstances, comply with the strictures of the Act by including language that makes clear that the attorney was not, at the time of the letter's transmission, acting in any legal capacity.”¹¹

This ability to “disclaim” attorney involvement developed in FDCPA case law, was rejected in a recent ethics opinion from committees of the New Jersey’s Supreme Court.¹² That opinion found that lawyers who send collection letters using their law firm letterhead are necessarily engaged in the practice of law and cannot delegate the sending of collection letters on law firm letterhead to unsupervised nonlawyers. Engaging in such practice would constitute assisting nonlawyers in the unauthorized practice of law.¹³ The opinion was requested by the New Jersey Supreme Court in response to a New Jersey collection attorney’s use of the *Greco* disclaimer in his firm’s collection letters.¹⁴

“Tensions” Between the CFPB and the Rules of Professional Conduct

Section 1024 of the Consumer Financial Protection Act of 2010¹⁵ (the “Dodd-Frank Act”), grants the Consumer Financial Protection Bureau (“CFPB”) authority to supervise certain persons for compliance with Federal consumer financial laws.

Under the authority granted it under the Dodd-Frank Act, the CFPB issued its Larger Participant Rule (the “LPR”) on October 24, 2012. The LPR proposes to regulate non-banks, including attorneys, who “collect debt related to a consumer financial product or service.”¹⁶ The LPR applies to law firms or lawyers that have more than \$10 million in “annual receipts” resulting from consumer debt collection. Under the LPR, the CFPB will supervise, examine and enforce consumer protection laws with respect to these entities.¹⁷

However, in a “Service Bulletin” issued by the CFPB earlier in 2012, it stated that it also has authority to supervise, examine and enforce consumer protection laws with respect to entities that it deems provide a “material service” to certain insured depository institutions, credit unions or non-bank, Larger Participants, “in connection with” their “offering of a consumer financial product or service.”¹⁸ It identified law firms as among these “service providers.” The Service Provider Bulletin does not limit the scope of authority to annual receipts, meaning those law firms (or small businesses) whose annual receipts are \$10 million or less may be subject to supervision, examination and enforcement by the CFPB. Whether the CFPB will attempt to regulate this broader category of lawyers or law firms is yet to be seen.

Lawyers facing CFPB regulation should be aware that the CFPB has stated that it “will at times request from its supervised entities information that may be subject to one or more statutory or common law privileges, including, for example, the attorney-client privilege and attorney work product protection.”¹⁹ In discussing requests for privileged information in its Final Rule, the CFPB noted that it will request “privileged information only when it determines that such information is material to its supervisory objectives and that it cannot practicably obtain the same information from non-privileged sources.”²⁰

Whether to disclose confidential and/or privileged client information in response to a CFPB examination or demand poses a conflict for lawyers.

The CFPB believes that its ability to compel production of privileged information is consistent with authority already provided to the prudential regulators.²¹ It also reasons that under 12 U.S.C. 1785(j) and 1828(x), a supervised institution's submission of privileged information to its regulator does not cause a waiver of any applicable privilege.²² The American Bar Association ("ABA") disagrees with this assessment.²³ The ABA does not believe the CFPB possess authority under the Dodd-Frank Act to compel disclosure of privileged or work-product information and there is uncertainty as to whether the non-waiver provisions of §§ 1785(j) and 1828(x) do extend to privileged information provided to the CFPB.²⁴

Regardless of whether the CFPB may compel the disclosure of privileged information, 12 U.S.C. 1785(j) and 1828(x) do not explicitly address the disclosure of privileged information by a client's lawyer – rather, only disclosure by the client to a prudential regulator is subject to non-waiver. Section 1828(x) provides that “submission by any person of any information to [a prudential regulator] . . . shall not be construed as waiving, destroying, or otherwise affecting any privilege **such person** may claim with respect to such information under Federal or State law as to any person or entity other than such Board, supervisor, or authority.”(emphasis added)²⁵

Attorneys cannot claim a client's information is privileged – the privilege belongs to the client and must be asserted by the client.²⁶ Under §§ 1785(j) and 1828(x), an attorney can be construed as not

being “such person” who may claim a privilege and fall within the non-waiver protection.

Aside from the evidentiary privilege, Model Rule 1.6(a) prevents an attorney from releasing information related to her representation of a client. The Model Rule is broader than the evidence privilege in the sense that it covers information that is not be protected by privilege evidence rules.²⁷

Model Rule 1.6(a) delineates instances when the release of confidential information is authorized; namely, where (1) the client gives his attorney “informed consent;” (2) the consent is implied “in order to carry out the representation;” or, (3) it is permitted under (b). The exception provided by Model Rule 1.6(b) relevant here is 1.6(b)(6), which provides that disclosure can be made “to comply with other law or a court order.” However, if the ABA’s Comments are correct, then the CFPB lacks any authority to compel disclosure *and* making such a disclosure is not protected by 12 U.S.C. 1785(j) and 1828(x).

Supervising Non-Lawyers

Conduct surrounding the supervision of non-lawyer staff and the authority of staff to undertake actions without attorney permission is of particular concern to debt-collection attorneys. Debt-collection attorneys should consider ABA Model Rule 5.3 entitled *Responsibilities Regarding Non-Lawyer Assistants*, and particularly as it is adopted in the jurisdictions in which they are licensed to practice law. The level of supervision and safeguards

required will differ under the circumstances of the lawyer's practice.²⁸

1. Policies and Procedures are the Core of Model Rule 5.3 Compliance

The Model Rule requires lawyers having “managerial authority” in a law firm to “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance” that non-lawyers’ conduct will be “compatible” with the lawyer’s professional obligations.²⁹ Lawyers who have only “supervisory authority over [] nonlawyer[s]” must make “reasonable efforts” to ensure that the non-lawyer’s conduct is “compatible with the professional obligations of the lawyer . . .”³⁰

Debt-collection attorneys, particularly those engaged in retail collections, should already have developed “procedures reasonably adapted to avoid . . . error[s]” of FDCPA compliance.³¹ However, Model Rule 5.3 calls for procedures governing other areas of firm practice where non-lawyers lend assistance. For example, collection attorneys have faced discipline when the attorney had no procedures in place to protect against misappropriation of trust funds.³²

In order for the procedures and mechanisms used to supervise non-lawyer assistants to be “measures giving reasonable assurance” of compatible conduct, managerial lawyers should take into consideration the nature and the *amount* of work to which non-lawyers are lending assistance and accordingly tailor their procedures.³³

2. Model Rule 5.5 - Assisting Non-lawyers in the Unauthorized Practice of Law

When a managerial lawyer fails to have reasonable procedures in place to ensure ethically compatible conduct by her non-lawyer assistants, the lawyer may also run afoul of ABA Model Rule 5.5 entitled, *Unauthorized Practice of Law; Multijurisdictional Practice of Law*. ABA Model Rule 5.5(a) provides “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” A failure to supervise non-lawyer assistants can result in a lawyer having assisted his non-lawyer assistants in conduct only authorized for licensed attorneys.

Examples of conduct which run afoul of conduct rules similar to ABA Model Rule 5.5 are non-lawyer assistants accepting cases, providing legal advice or make legal decisions.³⁴ Some jurisdictions have issued opinions stating that a non-lawyer may not routinely generate and send demand letters with an attorney’s name and facsimile signature, absent the attorney’s approval. Doing so not only violates ABA Model Rule 5.3 and 5.5 but also 8.4 (misconduct).³⁵ Others have opined that non-lawyers may not draft legal documents, institute, negotiate, or settle lawsuits without the proper supervision of a lawyer.³⁶

Attorneys should carefully consider the treatment given to the use of non-lawyer assistants by their licensing jurisdictions. For example, New Jersey restricts correspondence made by non-lawyer assistants to a firm’s clients, opposing counsel or courts unless the

communication 1) is permitted by the supervising attorney, 2) the supervising attorney is “aware of the exact nature of the correspondence;” and, 3) the supervising attorney is “satisfied that it is non-substantive and does not cross the line into the unauthorized practice of law.”³⁷ Prior to this Opinion, non-lawyers were prohibited from sending *any* correspondence.³⁸

Potential pitfalls under ABA Model Rule 5.5 arise for attorneys acting as local counsel. When acting as local counsel, attorneys should be mindful that their role is to supervise out-of-state attorneys not licensed in the jurisdiction where the professional services are being provided. A Federal Bankruptcy Court sitting in the District of Kansas admonished an attorney acting as local counsel for filing deficient pleadings prepared by attorneys not licensed in Kansas and not admitted *pro hac vice*:

What is less clear is whether the "outsourcing" of preparation of bankruptcy filings to non-lawyers or lawyers not licensed in this state constitutes unauthorized practice. If a Kansas-licensed lawyer such as Willette supervises this activity and retains responsibility for the work, that delegation of work is not necessarily prohibited. Here, Willette bears ultimate responsibility for R&A's work product, especially because he represented that it was his own. To the extent that Willette's supervision was inadequate, the staff of R&A engaged in the unauthorized practice of law and Willette assisted it.³⁹

Both local counsel and the firms that retain them should note a decision from the District of New Jersey, which criticized the

practice of a “a consumer protection law firm that has represented thousands of consumers to date and relies solely on the fee-shifting provision of the [Fair Debt Collection Practices Act (15 U.S.C. §§ 1681, *et seq.*)] to be paid.”⁴⁰ That court found that attorneys not admitted in New Jersey were retained by a New Jersey resident, conducted the client interview and directed the course of the litigation, independent of the participation or supervision of local counsel and, therefore, “failed to engage in such a reasonable course of professional conduct.”⁴¹

Conflicts

Debt-collection attorneys may face situations creating conflicts between current clients or between a current and former client, particularly when attempting to execute upon the wages or assets of one who is a debtor to more than one client. Resolving these conflicts requires analysis of ABA Model Rules 1.7, 1.8 and 1.9 as adopted in the jurisdictions where the conduct will occur.

Although conflicts may be waived under certain circumstances, under ABA Model Rule 1.7 a concurrent conflict cannot be waived where the representation involves the assertion of a claim by one client against another client represented by the same lawyer “in the same litigation or other proceeding before a tribunal.”⁴² Thus, in competing claims between two clients against the same debtor’s assets, a lawyer may be precluded from representing both clients absent informed consent. This is because a lawyer “shall not use information relating to representation of a client to the disadvantage of the client unless the client after full disclosure and

consultation, gives informed consent,” except as permitted or required by the rules.⁴³

Attention must be paid to the form of the Model Rules adopted in your jurisdictions. Although New Jersey Rule of Professional Conduct 1.7 follows the ABA Model Rule, there is a significant, material distinction in its interpretation. New Jersey decisions concerning Rule 1.7 hold that representation is impermissible where there is an “appearance of impropriety.”⁴⁴ An “appearance of impropriety” can disqualify an attorney even if all other requirements of RPC 1.9 are satisfied. The “appearance of impropriety” doctrine has been described as:

[T]he test is whether “an ordinary knowledgeable citizen *acquainted* with the facts would conclude that the multiple representation” would disserve the interest of one of the clients. If a conclusion has already been made that no confidential information is to be released, and the matter in which representation is to be provided is not one in which the associate had any prior involvement, we do not believe that given these assurances there is any residual appearance of impropriety sufficient to justify the broad prophylactic prohibition we announced in Opinion 564, *supra*, 116 *N.J.L.J.* 204.⁴⁵

These conflict rules are applicable to lawyers working within the same firm. Lawyers engaged in the same firm shall not “knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7 or RPC 1.9,” absent certain circumstances.⁴⁶

Fee Sharing

Sharing fees is permissible between lawyers when certain conditions are satisfied.

The Official Comments to the ABA Model Rules provide that lawyers may divide their fees “either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole.” Further, the client must agree to the arrangement, including the particulars of the fee division and must be in a writing signed by the client.⁴⁷

A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter.⁴⁸

New Jersey follows the ABA Model Rules, but referral fees are strictly prohibited except under certain circumstances.⁴⁹ Referral fees are permitted for attorneys certified by the New Jersey Supreme Court Board in a specialty, and then only under certain conditions. New Jersey Court R. 1:39-6(d).⁵⁰ However, fee sharing in New Jersey is not permissible between a lawyer and a non-lawyer.⁵¹ The applicable New Jersey Rules of Professional Conduct are 1.5 and 5.4.

When a fee is paid to an attorney for work done for the attorney’s client, or the client is directly paid the attorney’s fees, the client cannot retain any portion of the fee. Attorney’s fees that are paid “in whole or part for the client’s legal expenses . . . [must be] actually incurred in the specific matter for which they are paid.”⁵²

ABA's Commission on Ethics 20/20

This August the ABA released several suggested changes to its Model Rules proposed by its Commission on Ethics 20/20. Several of the changes are significant for attorneys engaged in debt collection.

Amendments to Model Rule 1.0 (Terminology)

Rule 1.0(n), defining “writing,” is amended by deleting “email” and replacing it with “electronic communications.”

Comment 9 is amended to note that screening procedures (assuring the confidential information known by a disqualified lawyer remains protected), includes the protection of “information, including information in the electronic form.”

Amendments to Model Rule 1.1 (Competence)

There is no change to the text of the Rule, but significant changes are made to the Comments. New Comments 6 and 7 address retaining or contracting with other lawyers to assist in the provision of legal services to a client. Comment 6 provides that *before* a lawyer retains or contracts with outside lawyers, a lawyer 1) “should ordinarily obtain informed consent from the client;” and 2) should “reasonably believe” the outside lawyer will “contribute to the competent and ethical representation of the client.” The Comment suggests Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law) are all implicated.

Comment 7 is added to address those situations in which lawyers from more than one firm are providing legal services to a client in a particular matter. In those instances the lawyers should, “ordinarily,” consult with one another and the client about the scope of their respective legal services and the allocation of responsibility.

Existing Comment 6 is re-designated as Comment 8 and contains an interesting amendment. The revision provides that not only should a lawyer “keep abreast of changes in the law and its practice,” but also “the benefits and risks associated with relevant technology.”

Amendments to Model Rule 1.4 (Communication)

Comment 6 is amended by deleting “Client telephone calls should be promptly returned or acknowledged” and replacing it with “A lawyer should promptly respond to or acknowledge client communications.”

Amendments to Model Rule 1.6 (Confidentiality of Information)

A new section (c) is added:

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

Comment 16 is now designated as Comment 18 and provides that a lawyer must act competently to safeguard information related to her representation of the client, not only from inadvertent or unauthorized disclosure, but in a nod to technology, from

“unauthorized access by third parties.” A lawyer does not violate the Rule if “the lawyer has made reasonable efforts to prevent the access or disclosure.” Several factors are suggested (but not deemed all-inclusive) when measuring the reasonableness of the lawyer’s efforts: 1) “the sensitivity of the information;” 2) “likelihood of disclosure if additional safeguards are not employed;” 3) cost of using additional safeguards; 4) the difficulty of implementing the additional safeguards; and, 5) the extent to which the additional safeguards “adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).”

Amendments to Model Rule 4.4 (Respect for Rights of Third Persons)

The text of Rule 4.4(b) is amended to cover not only a lawyer’s receipt of documents, but also of “electronically stored information,” which was inadvertently “sent.”

Comment 2 is revised to make clear that documents or electronically stored information are “inadvertently sent” when they are “accidentally transmitted” or “accidentally included with information that was intentionally transmitted.”

Amendments to Model Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)

The title of this Rule changes from “Responsibilities Regarding Nonlawyer Assistants” to “Responsibilities Regarding Nonlawyer *Assistance*” which expresses a change in the scope of the Rule. While there is no change to the text of Model Rule 5.3, substantial changes are made to the Comments.

Comment 2 is designated as Comment 1 and is substantially modified. Comment 1 previously stated that lawyers with managerial authority (under 5.3(a)) are required to make reasonable efforts “to establish internal policies and procedures” concerning non-lawyer conduct. The revised comment provides that lawyers with managerial authority should “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm **and nonlawyers outside the firm who work on firm matters** act in a way compatible **with the professional obligations of the lawyer.**” (additions in **bold**).

The revised Comment 1 also provides that 5.3(b) now addresses the responsibilities of lawyers with direct supervisory authority over nonlawyers within *and* outside the firm. The revised comment also notes that 5.3(c) specifies those circumstances where a lawyer can be responsible for a nonlawyer’s conduct, regardless of whether the non-lawyer is within or outside the firm.

A new Comment 3 is added addressing nonlawyers outside the firm. It provides that lawyers may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client, such as investigative or paraprofessional services, document management firms and storage of client information in “cloud” services. It notes that the lawyer’s obligation to supervise nonlawyer assistance provided from entities outside the firm will depend on the circumstances, and would include

- 1) the education, experience and reputation of the nonlawyer;
- 2) the nature of the services involved;

- 3) the terms of any arrangements concerning the protection of client information;
- 4) the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

Comment 3 also asks that a lawyer consider the implications of Rules 1.1(competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law. Finally, the Comment instructs that when “engaging or directing” nonlawyers outside the firm,

[A] lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

A new comment 4 is added providing guidance when a client selects for the lawyer the nonlawyers outside the firm and directs her lawyer to use that outside service. In those instances, the comment states that the lawyer “should ordinarily agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer.”

Other Revisions Adopted Related to Technology and Client Development

The Commission on Ethics 20/20 also made revisions intended to address the impact of technology on a lawyer’s conduct in client development. These changes are found in Rules 1.18 (Duties to Prospective Client), 7.1 (Communications Concerning a Lawyer’s Services), 7.2 (Advertising), 7.3 (originally entitled, Direct Contact with Prospective Clients) and 5.5 (UPL/MPL).

Amendments to Model Rule 1.18

The revisions clarify the scope of the Rule. Currently, the Rule encompasses information learned from discussions with prospective clients and the information learned during the consultation. The revision expands who is a prospective client from a person who “discuss[es] with a lawyer the possibility” of engagement to a person who “consults with a lawyer **about** the possibility” of engagement. Information “learned from a prospective client” is now protected as opposed to “information learned in the consultation.” Comment 2 is substantially modified to provide that a “consultation” depends on the circumstances but can occur either in writing, orally or by electronic communications. For example, the Comment notes that a consultation has likely occurred if the lawyer requests “either in person or through the lawyer’s advertising in any medium,” that prospective clients submit information to the lawyer “without clear and reasonably understandable warnings and cautionary statements that limit the lawyer’s obligations,” and the prospective client submits information. In contrast, a lawyer who merely advertises her education, background and experience or provides information of general interest does not create a consultation when a prospective client communicates information to that lawyer, “without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship.”

Amendments to Model Rule 7.1 (Communications Concerning a Lawyer’s Services)

Comment 2 is revised to provide that the “use of appropriate disclaimer or qualifying language may preclude a finding that a

statement is likely to create unjustified expectations or otherwise mislead the public” as opposed to the prior “a prospective client.”

Amendments to Model Rule 7.2 (Advertising)

Comments 2 and 3 are revised to explicitly include emails and websites within the scope of Rule 7.2. Comment 3 now equates the Internet and other forms of electronic communication along with television as “the most powerful media for getting information to the public.” The prior form of the Comment only provided this elevated status to television, noting that “electronic media, such as the Internet, can be an important source of information about legal services.”

Comment 5 contains major revisions concerning referral sources. It strictly prohibits a lawyer from paying “others for recommending the lawyer’s services or channeling professional work in a manner that violates Rule 7.3.” There is no change to the Comment’s understanding that it is permissible to pay others for the costs associated with publishing or disseminating permissible advertising and communications.

Comment 5 also adds a section devoted solely to Internet-based client generation services, saying the same do not violate the Rule so long as the lead generator 1) does not recommend the lawyer; 2) payments made for the service do not violate Rules 1.5(e) (Fee Sharing) or 5.4 (professional independence of the lawyer); and 3) the lead generators communications are consistent with Rule 7.1 (communications concerning a lawyer’s services). It would be a violation if a lawyer pays a lead generator that 1) states, implies or “creates a reasonable impression that it is recommending the

lawyer; 2) is making the referral without compensation; or 3) has analyzed the legal issue when determining the lawyer that should receive the referral.

Amendments to Model Rule 7.3 (Direct Contact with Prospective Clients)

The title of the Rule has been changed to Solicitation of Clients. The text of the Rule and Comments remove the term “prospective client,” leaving the solicitation as one being made to anyone. The text refers to a “target of the solicitation” in (b)(1) and in Comment 1 discusses a “targeted communication” as one directed to a “specific person . . . that offers to provide, or can reasonably be understood as offering to provide, legal services.”

Communications directed to the general public, in response to a request for information or “automatically generated in response to Internet searches” are not solicitations that are targeted communications.

Amendments to Model Rule 5.5 (Unauthorized Practice of Law; Multijurisdictional Practice of Law)

Comment 21 is revised as follows:

Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

The nature of the Internet allows lawyer advertising to reach a broad range of persons, including persons who may be located in

jurisdictions where the lawyer is not licensed. The Comment reminds us to consider Rules 7.1 and 7.5 in the course of advertising.

¹ *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1634 (2010).

² ABA Model Rule 4.3.

³ *Phila. Eth. Op.* 89-17 (1989).

⁴ John Freeman, *Ex Parte Contacts with Potential Witnesses*, S.C. LAW., Mar.-Apr. 1997, at 11 (discussing some ethical constraints on lawyers conducting informal discovery).

⁵ *Thomas v. Law Firm of Simpson & Cybak*, 392 F.3d 914, 919-920 (7th Cir. 2004).

⁶ *Id.*, (emphasis added).

⁷ *Clomon v. Jackson*, 988 F.2d 1314, 1321 (2d Cir. 1993).

⁸ *Greco v. Trauner, Cohen & Thomas, L.L.P.*, 412 F.3d 360, 365 (2d Cir. 2005).

⁹ *Leshner v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 995 (3d Cir. 2011); *Gonzalez v. Kay*, 577 F.3d 600, 602 (5th Cir. 2009).

¹⁰ *Leshner v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d at 1003.

¹¹ *Id.*

¹² *N.J. Comm. on the Unauth. Prac. of Law Op.* 48, *N.J. Adv. Comm. on Prof. Ethics Op.* 725 (May 30, 2012) (Since the [Unauthorized Practice of Law] Committee issued Opinion 8 in 1972, it has been clear that lawyers who send collection letters are engaged in the practice of law. A lawyer cannot disclaim the fact that he or she is engaging in the practice of law when using law firm letterhead. A lawyer who has not reviewed the file, made appropriate inquiry, and exercised professional judgment has engaged in an incompetent and grossly negligent practice of law in violation of RPC 1.1(a)).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. 5301, et seq.

¹⁶ 12 C.F.R. 1090

¹⁷ *Id.*

¹⁸ Consumer Financial Protection Bureau Bulletin 2012-03, April 13, 2012.

¹⁹ 77 FR 15286 (March 15, 2012).

²⁰ 77 FR 39617, 39620 (July 5, 2012).

²¹ *Id.*

²² 77 FR 15286

²³ American Bar Association (“ABA”) Comment Letter on Proposed Rule on Confidential Treatment of Privileged Information, April 12, 2012.

²⁴ *Id.* (“By enacting 12 U.S.C. § 1828(x), Congress clarified that any privileged or work product protected materials that banks share with Federal banking agencies remain privileged as to all other parties. However, the fact that Congress believed a statute was necessary to establish this protection undermines the Bureau’s claim that such protection is inherent in the Federal regulatory scheme and also undermines the Bureau’s underlying premise that submissions of privileged information by supervised entities to Federal banking agencies are legally required and hence involuntary.”).

²⁵ 12 U.S.C. 1828(x). The text of § 1785(j) is substantially the same.

²⁶ *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-359 (D. Mass. 1950).

²⁷ ABA Model Rule 1.6, Comment 3 (“The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.”)

²⁸ *Attorney Grievance Comm'n v. Hallmon*, 343 Md. 390, 397 (1996).

²⁹ ABA Model Rule 5.3(a).

³⁰ ABA Model Rule 5.3(b).

³¹ 15 U.S.C. 1692k(c).

³² *Matter of Miller*, 178 Ariz. 257, 872 P.2d 661 (1994); *Matter of Galbasini*, 163 Ariz. 120, 786 P.2d 971 (1990); *In re Cater*, 887 A.2d 1 (DC 2005); *Florida Bar v. McAtee*, 601 So. 2d 1199 (Fla. 1992).

- ³³ *In re Hecker*, Supreme Court of New Jersey, Disciplinary Review Board, Docket No. DRB-09-372, p. 78 (August 9, 2010) (In *dicta* the Board stated: “Although . . . respondent put several mechanisms in place to ensure that [] employees would not violate the FDCPA, such as the training manual and training sessions, those mechanisms were obviously inadequate for the staggering volume of [] work.”)
- ³⁴ *Attorney Grievance Comm'n v. Hallmon*, 343 Md. at 397; *In re Opinion No. 24*, 128 N.J. 114, 123 (1992); *In re Jackman*, 165 N.J. 580, 586-87 (2000).
- ³⁵ *Phila. Eth. Opinion* 90-24 (December 1990).
- ³⁶ *S.C. Bar Ethics Adv. Op.* # 91-18.
- ³⁷ *N.J. Advisory Comm. on Professional Ethics Op.* 720 (Mar. 23, 2011), *N.J. Comm. on the Unauthorized Practice of Law Op.* 46 (Mar 23, 2011)
- ³⁸ *Id.*
- ³⁹ *In re Wood*, 408 B.R. 841, 852-853 (Bankr. D. Kan. 2009)
- ⁴⁰ *Bilazzo v. Portfolio Recovery Assocs., LLC*, 2012 U.S. Dist. LEXIS 89094, 29-30 (D.N.J. June 25, 2012)
- ⁴¹ *Id.*, at **37
- ⁴² *N.J. R.P.C.* 1.7(b)(4).
- ⁴³ *N.J. R.P.C.* 1.8(b).
- ⁴⁴ A lawyer may undertake representation against a former client if the matter is neither the same, nor substantially related to any matter in which the former client was represented by the attorney, provided there is not an “appearance of impropriety.” *N.J. Advisory Comm. on Professional Ethics Op.* 654 (Oct. 17, 1991). It is an issue of fact whether a matter is “substantially related” to a prior representation. *N.J. Advisory Comm. on Professional Ethics Op.* 525 (Apr. 5, 1984); *Reardon v. Marlayne, Inc.*, 83 N.J. 460, 477 (1980) (refusing to permit the client to waive the actual conflict and a conflict under the doctrine of “an appearance of impropriety”).
- ⁴⁵ *N.J. Advisory Comm. on Professional Ethics Op.* 654.
- ⁴⁶ *N.J. R.P.C.* 1.10(a) (the exception is “unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”).
- ⁴⁷ *Comment 7* to ABA Model Rule 1.5.
- ⁴⁸ *See*, ABA Model Rule 1.1.
- ⁴⁹ *N.J. R.P.C.* 7.2(c) and 7.3(d).
- ⁵⁰ New Jersey Court Rule 1:39-6(d).

AVERTING POTENTIAL ETHICAL PROBLEMS IN COLLECTIONS

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⁵¹ *N.J. Advisory Comm. on Professional Ethics Op. 669* (Nov. 2, 1992); *N.J. Advisory Comm. on Professional Ethics Op. 93* (Apr. 21, 1966). Non-attorneys sharing in legal fees are subject to a disorderly persons offense. *N.J.S.A. 2C:21-22*.

⁵² *N.J. Advisory Comm. on Professional Ethics Op. 669* (Nov. 2, 1992); *N.J. Advisory Comm. on Professional Ethics Op. 93* (Apr. 21, 1966). Non-attorneys sharing in legal fees are subject to a disorderly persons offense. *N.J.S.A. 2C:21-22*.