Ethics and Professionalism Potpourri

Plenary Session

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ETHICS AND PROFESSIONALISM POTPOURRI:

Preferred Practice Pointers—pet peeves and proper protocol practically every practitioner (should) ponder

By: Neil C. Gordon

A. EXEMPTIONS

1. ***Schwab v. Reilly*, __ U.S. __, 130 S.Ct. 2652 (2010)**
2. ***Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992)**
3. ***In re Gebhart*, 621 F.3d 1206 (9th Cir. 2010)**
4. ***Proposed Amendment to Official Form 6C***
5. ***In re Stoney*, 445 B.R. 543 (Bankr. E.D. Va. 2011)**
6. ***In re Winshell*, 2010 Bankr. LEXIS 4883 (Bankr. E.D. Wash. December 20, 2010)**
7. ***In re Hall*, 453 B.R. 22 (Bankr. D.Mass. 2011)**
8. ***In re Salazar*, 449. B.R. 890 (Bankr. N.D. Tex. 2011)**
9. ***In re Moore,* 442 B.R. 865 (Bankr. N.D. Tex. 2010)**
10. ***In re Wiczek*, 452 B.R. 762 (Bankr. Minn. 2011)**

(1) Supreme Court reverses Circuit Court's in-kind exemption holding

The debtor in this case had valued her kitchen equipment at $10,718 and claimed an exemption in that same dollar amount (i.e., an in-kind exemption). The trustee did not object within the 30-day period allowed by Rule 4003(b). When the trustee sought to sell the equipment, the debtor objected to his motion claiming that the asset had been removed from the estate through an exemption, the deadline to object to which had already expired. The Bankruptcy Court, District Court, and Circuit Court all ruled in favor of the debtor. The Supreme Court reversed, agreeing with the trustee (and the United States and National Association of Bankruptcy Trustees as *amici curiae)* that the Bankruptcy Code defines the property the debtor is authorized to exempt as an interest, the value of which may not exceed a certain dollar amount in a particular type of asset, not as the asset itself. Accordingly, the trustee had no duty to object to an exemption within the limits the Code allowed. *Schwab v. Reilly*, ____ U.S. ____, 130 S.Ct. 2652 (2010).

The Supreme Court determined that the Third Circuit erred in holding that the Supreme Court's earlier decision in *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992), dictated a contrary conclusion. While *Taylor*, likewise concerned a trustee's obligation to object to the debtor's entry of a "value claimed as exempt," there was no colorable basis for claiming the exemption. In *Schwab v. Reilly*, the opposite was true as the amounts listed by the debtor as the value of the claimed exemptions were facially within the limits prescribed by the Code and raised no warning flags that warranted an objection. *Taylor* did not rest on an "unstated premise" that a debtor who exempts the entire reported value of an asset is claiming the "full amount," whatever it turns out to be. Instead, *Taylor* stood for the straightforward proposition that an interested party must object to a claimed exemption if the amount the debtor lists as the "value claimed exempt" is not within statutory limits. The Supreme Court concluded that the debtor's approach "threatens to convert a fresh start into a free pass." The Supreme Court's ruling effectively overturns *In re Green*, 31 F.3d 1098 (11^{th} Cir. 1994) where the Eleventh Circuit also interpreted *Taylor* to mean that an in-kind exemption was an indication of a claim that the asset was being fully exempted regardless of its actual value, thereby requiring an objection to the exemption claimed.

In dicta, the Court noted that the listing of an exemption as "100% FMV" or similar declaration would alert the trustee of a need to object. *Schwab* at p. 20. But the Court did not actually recognize the validity of such an exemption, having held the statute requires the debtor to exempt an interest stated in dollar terms for an asset that is dollar limited. In fact, the Court questions the effectiveness of such an exemption claim, as follows: "Section 541 is clear that title to the equipment passed to Reilly's estate at the commencement of her case, and §§ 552(d)(5) and (6) are equally clear that her reclamation right is limited to exempting an interest in the equipment, not the equipment itself. Accordingly, it is far from obvious that the Code would 'entitle' Reilly to clear title in the equipment even if she claimed as exempt a 'full' or '100%' interest in it (which she did not)." *Schwab* at p. 22, fn. 21.

Nevertheless, many have seized on the dicta to assert the validity of a "100% FMV" type exemption, and much litigation has followed.

(2) Trustees entitled to sell homes based on post-petition appreciation

In the two consolidated cases, individual debtors had filed Chapter 7 petitions in 2003 and 2004 respectively and obtained their discharge later in the same year. In each case, there was disclosed equity in the homes that did not exceed the lawful exemption amounts. Debtors had, in fact, listed the dollar amount of equity in each case as exempt. In neither case did the trustee file an objection to the claimed exemption. Because of other assets in the cases, the estates remained open. The trustees believed that while the cases remained open, the homes had appreciated in value significantly. In one case, the trustee sought to employ a broker to sell the home and was met with a motion by the debtor to compel abandonment. The bankruptcy court ruled in favor of the trustee, and the district court affirmed. Debtor then appealed to the Ninth Circuit. In the other case, due to payment defaults, the lender had filed a stay relief motion that the trustee opposed on the basis of the equity. The bankruptcy court ruled against the trustee on the basis of the failure to object to the exemption. The Ninth Circuit BAP reversed and held that the appreciation in the homestead belonged to the estate. That decision was also appealed to the Ninth Circuit. The Ninth Circuit affirmed both the district court and BAP opinions, holding that the increase in value belonged to the bankruptcy estates in each of the cases. *In re Gebhart*, 621 F.3d 1206 (9th Cir. 2010). In light of *Schwab v. Reilly*, 130 S.Ct. 2652 (2010), it was clear to the Ninth Circuit that the trustee had no obligation to object to the exemptions claimed in each case even though the value of the claimed exemptions plus the amount of the encumbrances was, in each case, equal to the market value of the residences. The failure to object did not remove the entire asset from the estate. The Ninth Circuit noted that in *Reilly*, the debtor had undervalued the asset where as in these cases they were accurately valued. Nevertheless, any additional value in the property remained property of the estate regardless of whether the property increased in value after the filing. Moreover, the Circuit Court held that what is frozen as of the date of the filing of a petition is the value of the debtor's exemption, not the fair market value of the property claimed as exempt. Finally, the Circuit Court acknowledged that, in some instances, trustees might be inclined to leave the case open longer than necessary. However, the remedy for such misconduct is not, as the debtor suggested, to estop the trustee from selling the property or to force the estate to abandon the asset; to do so would deny creditors assets that had not been exempted. Rather, the remedy is for the debtor to seek an abandonment under § 554(b) or hold the U.S. Trustee to its oversight obligations. [*Comment*: Based on this holding, certainly trustees in the Ninth Circuit will be tempted to keep open cases during rising real estate markets, and debtors will be tempted to move quickly for abandonment under § 554(b).]

(3) Debtor's claim of exemption of "100% of FMV"

(i) Proposed amendment to Official Form 6C allows debtors to state an exemption in the "full fair market value of exempted property"

The Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure were submitted for public comment in August of 2011. The amendment to Official Form 6C proposes to change the column for value of claimed exemption by providing two options: one that says "Exemption limited to $_______" and the other that says "Full fair market value of the exempted property;" and the debtor would be instructed to "Check one box only for each claimed exemption." The drafters state that this amendment would reflect the Supreme Court's decision in *Schwab.* The Committee states that:

> At the end of the majority opinion [in *Schwab*], the Court explained how a debtor can indicate the intent to exempt "the full market value of the asset or the asset itself" in a manner that puts the trustee on notice of the scope of the claimed exemption. The Court stated that the debtor can list as the exempt value of the asset on Schedule C 'full fair market value (FMV)' or '100% of FMV.'" Then, the Court explained, "[i]f the trustee fails to object, or if the trustee objects and the objection is overruled, the debtor will be entitled to exclude the full value of the asset."

However, because the current Schedule C requires only four pieces of information (description of property, law provided each exemption, value of claimed exemption, and current value of property without deducting exemption), the Committee is "concern[ed] that only knowledgeable debtors (or more likely, debtors represented by knowledgeable lawyers) would understand that 'value of claimed exemption' could be stated in something other than a specific dollar amount." Therefore, the Committee felt the proposed amendment necessary to "avoid any misperception that the debtor is required to provide a specific dollar amount for the exemption."

This proposed amendment would turn the holding in *Schwab* on its head by ignoring the holding and adopting the dicta without regard for the footnote that casts doubt upon it.

(ii) Trustee's objection to form of exemption ("100% of FMV") sustained where relevant exempting statute expressly limits the exemption to a maximum cash value

Debtor listed most of her Virginia property as exempt under an exemption value of "100% of FMV" pursuant to Virginia Code Sections based on debtor's position that debtor was attempting to fully exempt the assets regardless of their actual value and regardless of whether those exemptions would then exceed the amount allowed under Virginia state law. Debtor argued that the methodology employed was expressly authorized in *Schwab v. Reilly*, ____ U.S. ____ 130 S.Ct. 2652 (2010). The objection was sustained. *In re Stoney*, 445 B.R. 543 (Bankr. E.D. Va. 2011). Judge St. John first noted that Virginia was an opt-out state which required debtor to provide a "reasonably certain" description of the property to be exempted and a cash valuation for each asset and a numerical value for the exemption claimed. Thus, debtor's attempted valuation of her exemptions in the percentage format failed to comply with the requirements of Virginia state law. The court then analyzed the *Schwab* case and addressed the debtor's reliance on Justice Thomas's observation in *dicta* where he indicated that using "100% of FMV" would put a trustee on notice that the full value of the asset was being claimed as exempt. However, Judge St. John found that it was a misreading of *Schwab* to conclude that the use of such a designation was valid and unobjectionable. To do otherwise would "permit a judicial superseding of the state statutory requirements for exemptions and functionally negate the express authority of a state to opt out and impose its exemption limitations … on debtors who are citizens of the opt-out state." The court noted that a similar holding was reached in *In re Winshell*, 2010 Bankr. LEXIS 4883 (Bankr. E.D. Wash. December 20, 2010). Here and in *Winshell*, both courts held that the trustee would be entitled to object to such an exemption methodology and that the court would be duty bound to sustain the objection. Judge St. John concluded that the debtor would have "the burden of going forward and thus show a plausible basis for the claim that showed 100% of FMV of an asset falls within the statutory limit on the amount that may be exempted." While the trustee's objection was sustained, the trustee's additional request that the court determine that a trustee is not required to object to exemptions in this format was overruled. *See also In re Hall*, 453 B.R. 22 (Bankr. Mass. 2011) ("the *Schwab* Court was careful to differentiate the type of exemption claimed by the Debtor here (an exemption limited to a maximum monetary amount) and those exemptions allowing a debtor to exempt certain assets in full.").

(iii) Trustee's objection to form of exemption ("100% of FMV") sustained where exemption does not comport with state law

The court consolidated objections by Chapter 13 and Chapter 7 trustees to nine separate cases where debtors had claimed "100% of FMV" for claims of exemptions in certain property. The court sustained all of the trustee objections, regardless of whether the exemptions were claimed under federal or Texas state law. *In re Salazar*, 449. B.R. 890 (Bankr. N.D. Tex. 2011). The trustees objected because "100% of FMV" failed to apprise them or other parties in interest of a definitive amount being claimed. Debtors, however, argued that the Supreme Court recognized that methodology as an acceptable manner to claim an exemption. The court here disagreed, holding that an objection thereto was facially valid. The debtor would be required to cure the exemption claim by amending it to place it within the statutory limit. Further, the court recognized that an evidentiary hearing was unnecessary to resolve an objection limited to the manner in which the debtor had claimed the exemption. Judge Jones further noted that even if no objection was made to an exemption claim of "100% of FMV," under *Schwab v. Reilly*, 130 S.Ct. 2652 (2010), title to the property would not pass to the debtor even if no objection were filed. Following *In re Gebhart*, 621 F.3d 1206 (9^{th} Cir. 2010), the court stated that in the unlikely event that an asset, an interest in which had been exempted by the debtor, appreciated in value to the point it exceeded the statutory limit, the trustee would still hold title to such asset. Accordingly, all objections were sustained.

(iv) Trustee's objection to form of exemption ("100% of FMV") denied—evidentiary hearing required to determine whether exemption within statutory limit

After filing a Chapter 13 case, debtors listed their exemptions as "100% of FMV" for each asset listed. The trustee objected arguing that debtors were seeking to exempt more than they were statutorily entitled to do. Judge Lynn recognized that under *Schwab*, the *Reilly* , ____ U.S. ____, 130 S.Ct. 2652 (2010), exemptions were of a debtor's interest in property rather than to the property itself. Here, however, the court noted that debtors were claiming exemptions under Texas statutes which refer to the property itself. Thus, the court determined that the debtor could claim exemptions in this manner placing the trustee on notice that the asset was being claimed fully exempt and requiring the trustee to object. Once the trustee had objected, the debtor would have the burden of going forward and establishing a plausible basis for claiming the exemption in that manner and that it was within the statutory limit allowed. If that burden is satisfied, the trustee would have the burden of proving that, in fact, the claimed exemption exceeded the statutory limit. *In re Moore*, 442 B.R. 865 (Bankr. N.D. Tex. 2010).

(v) Trustee's objection to amended exemption in "100% of FMV" sustained where exemption was attempt to force trustee into evidentiary hearing on value

The chapter 7 trustee objected to the debtors' claim of exemptions "to the extent the claimed exemptions exceed the amount remaining (if any) of the amount available to the [Debtors] under 11 U.S.C. § 522(d)(5) . . . [which] should be limited to the amount remaining available to [them] under 11 U.S.C. § 522(d)(5)." The trustee's objection was sustained pursuant to court order. The debtors then retained new counsel, who amended the debtors' exemptions in several business enterprises to "100% of FMV." The trustee objected to the amended claim of exemptions stating that there was no cognizable theory under which the debtors could assert an exemption in the assets greater than what they already possess by virtue of the order and asserted that the debtor' amended exemptions were claimed in bad faith and requested an evidentiary hearing on the issue of bad faith. The debtors argued that the court's order left open an issue of whether there was any value in the business enterprises above the value of the now-allowed exemption; if there was not, there was no possible recovery for the estate and no right of the trustee to assert further control over the interests themselves. The court disagreed for two reasons. First, the estate retains title to the enterprise interests and hence control over them whether they have value to the estate or not. Second, bankruptcy entails two separate processes, a judicial process and administrative process, and "the judicial process must give way to the fluid operation of the open market, in the [t]rustee's hands-on administration of the estate." The court found that the liquidation stage of the bankruptcy case did not require a valuation hearing—a "judicial proceeding to establish, in the abstract, that [the trustee's] effort might be efficacious under the general conditions of the current market." Therefore, the court sustained the objection, stating that the debtors had "no right to force the issue of control of the equity interests themselves, by raising a hypothetical issue of value." The court also denied the trustee's request for a hearing on bad faith, finding that debtor's counsel's analysis of *Schwab* could not be termed "frivolous" or "abusive" and the trustee had not recited facts or law sufficient for the court to award her attorney's fees pursuant to Rule 9011, 28 U.S.C. § 1927, or the court's inherent authority to impose sanctions on a party for bad faith conduct in litigation. *In re Wiczek*, 452 B.R. 762 (Bankr. Minn. 2011).

B. COUNSEL'S DUTY TO VERIFY INFORMATION PROVIDED BY THE DEBTOR AND SUBMIT CORRECT INFORMATION TO THE COURT

1. ***Rule 9011 of the Federal Rules of Bankruptcy Procedure***
2. ***In re Trudell*, 424 B.R. 786 (Bankr. W.D. Mich. 2010)**
3. ***In re Simmons*, 2011 Bankr. LEXIS 3363 (Bankr. N.D. Cal. Sept. 7, 2011)**

Rule 9011 provides:

(a) Signature. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to the Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
>
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
>
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
>
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

Fed. R. Bankr. P. 9011(a) & (b).

(1) Rule 9011 applies to failure of counsel to ensure accuracy of schedules

The debtors filed a Chapter 7 petition and, although they had not yet prepared their tax returns for that year, responded "none" to the inquiry on Schedule B requiring disclosure of "Other contingent and unliquidated claims of every nature, including tax refunds . . ." The debtors completed their tax returns a few weeks later and determined that they were entitled to a tax refund of over $5,000. The debtors informed the Chapter 7 trustee, but failed to amend their schedules until nearly a month after the tax returns were prepared. The Chapter 7 trustee objected to exemption of the tax refund, arguing, inter alia, that that debtors acted in bad faith or recklessly when they estimated in their original schedules that they would not be receiving a refund. The court denied the trustee's objection, finding that the debtor's acted neither intentionally or recklessly. However, the Court then turned to whether the debtor's attorney should be held accountable for the omitted estimate. The Court stated that Rule 9011's application to statements of affairs and schedules is debatable, noting that "the specific exception of statement of affairs and schedules from the signing requirement of subpart (a) leaves some to question as to whether schedules do in fact fall within the scope of Rule 9011." However, the Court stated that section 707(b)(4)(D), which was added to the Code as part of the 2005 amendments, "unquestionably imposes a duty upon the debtor's attorney to ensure the accuracy of this client's schedules." Section 707(b)(4)(D) of the Bankruptcy Code provides: "The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." 11 U.S.C. § 707(b)(4)(D). The Court further noted that enforcement of the duty here was particularly appropriate because a debtor's failure to disclose in his Schedule B his good faith estimate of tax refunds for which returns have yet to be filed is a vexing issue in the district of the Court as well as others. The Court then stated that while section 707(b)(4)(D) provided no guidance as to how violation of the certification made are to be enforced, subparts (b)(4)(A) and (B) each reference Rule 9011 and section 707(b)(4)(D) parallels those two subsections. Therefore, the Court determined it would initiate a separate hearing under section 707(b)(4)(D) against debtor's counsel to determine whether to sanction him pursuant to Rule 9011. *In re Trudell*, 424 B.R. 786 (Bankr. W.D. Mich. 2010)

(2) Rule 9011 applied to impose sanctions on counsel for filing false application

The debtor's counsel, Kathie J. Simmons, admitted that it was her regular custom and practice to file an application to pay the court filing fee in installments even though her clients had paid her in full for the filing fee. In so doing, Simmons was, in effect, tricking her clients into making her interest free loans. Simmons' scheme came to light when she failed to make an installment payment in one debtor's case, causing the case to be dismissed. The Court imposed a 90-day partial suspension, followed by a 45-day full suspension, and a $10,000 fine against Simmons, finding that she had violated Rule 9011 two ways. First, Simmons knew when she was filing the applications for leave to pay the filing fee in installments that her clients could afford to pay the full filing fee and in fact had paid her in full. *See* Fed. R. Bankr. P. 9011(b)(3) (providing that whenever an attorney presents a paper to the court he or she is certifying that the factual contentions have evidentiary support). Second, in electronically filing the application, Simmons falsely certified that her clients had signed it when in fact that had not, and knew nothing of it. *In re Simmons*, 2011 Bankr. LEXIS 3363 (Bankr. N.D. Cal. Sept. 7, 2011).

D. PREPETITION FEE ARRANGEMENTS FOR PAYMENT OF POSTPETITION SERVICES

1. ***Walton v. Clark & Washington*, 454 B.R. 537 (Bankr. M.D. Fla 2011)**
2. ***In re Mansfield*, 394 B.R. 783 (Bankr. E.D. Pa. 2008)**
3. ***In re Waldo*, 417 B.R. 854 (Bankr. E.D. Tenn. 2009)**
4. ***In re Griffin*, 313 B.R. 757 (Bankr. N.D. Ill. 2004)**
5. ***In re Gordon v. Hines*, 147 F.3d 1185 (9th Cir. 1998)**

(1) United States Trustee's objection to use of postdated checks to pay for postpetition services, as provided for under a prepetition fee agreement, sustained

Under its fee agreement, Clark & Washington accepted postdated checks as payment of its attorney's fee. Specifically, the fee agreement required the client to pay a flat fee for all prepetition services (generally in the amount of $250) and informed the client that prepetition fees not paid before the bankruptcy case is filed are subject to discharge. The fee agreement further required that the client pay Clark & Washington a retainer (generally in the amount of $1,000) to be applied as payment for postpetition services; the retainer consists of postdated checks, which are deposited by Clark & Washington after the petition date, and in some cases, after the discharge has been entered. The Court found that the fee arrangement (i) violates Bankruptcy Code section 362's automatic stay; (ii) violates Bankruptcy Code section 524's discharge injunction; and (iii) creates a conflict of interest between Clark & Washington and its clients. *Walton v. Clark & Washington*¸ 454 B.R. 537 (Bankr. M.D. Fla. July 12, 2011).
The Court first decided that a postdated check is a "claim" under Bankruptcy Code section 101(5) because "a postdated check—like a promissory note—really is nothing more than a promise to pay a certain sum of money at a specified time." Further, because "contract-based claims arise at the time the contract is entered into" and the fee agreement was entered before the petition date, the postdated check is a prepetition claim. In so holding, the court specifically rejected the idea that allocating the postdated checks to payment of postpetition services alters this outcome or converts the postdated checks into executory contracts. Further, even if the postdated checks were viewed as executory contracts, the Court stated the result would be the same, as the Chapter 7 Trustee would reject the contract pursuant to section 365, which would give rise to an unsecured prepetition claim for damages. The Court next decided that depositing the postdated checks after the petition date amounts to a postpetition attempt to collect a prepetition claim; therefore, the act violates the automatic stay of section 362. In addition, once the discharge has been entered, continued attempts to collect on the postdated checks violates the discharge injunction under section 524. Finally, the Court decided that the fee arrangement created an impermissible conflict of interest between the firm and its clients. Pursuant to the Rules regulating the Florida Bar, a lawyer may not enter into a business transaction with a client or knowingly acquire a security interest adverse to the client unless the terms of the transaction are fair and fully disclosed in writing in terms that can be reasonably understood by the client, the client is advised in writing of the desirability of seeking advice from independent counsel, and the client gives informed consent in writing. Although the fee agreement disclosed that prospective clients may need to consult independent counsel regarding the firm's fee arrangement, the Court found the disclosure was either ambiguous or an inaccurate statement of the law; therefore, it was not sufficient to cure the conflict of interest.

(2) Majority View – Prepetition agreements to pay a flat fee for pre- and post-petition services in post-petition installments are dischargeable debts

In *In re Mansfield*, 394 B.R. 783 (Bankr. E.D. Pa. 2008), the Court considered whether a Chapter 7 debtor's attorney who was a party to a "flat fee" prepetition retention agreement could pursue the postpetition collection of any unpaid portion of the fee. The Court held that "when a flat or fixed fee prepetition agreement is at issue, the fee must be paid in full prior to the commencement of the debtor's case or the fee is discharged under § 727(b)." However, the Court stated this conclusion does not foreclose a debtor's ability to pay for postpetition services after the petition date. The Court reasoned that "[d]espite the breadth of the definition of "claim" in Section 101(4)(A), it must be recognized that it strains the notion of a viable 'claim against the debtor that arose before' the filing of the Chapter 7 petition . . . to attach that label to a lawyer's ability—though agreed upon prepetition—to receive payment of a contracted-for fee only if and when the lawyer performs the postpetition services that create the entitlement to that fee." The Court stated that "an attorney's right to payment for legal services performed postpetition pursuant to a fee agreement which, in some manner, segregates prepetition fees from postpetition fees . . . arises when the postpetition services are performed." Therefore, "legal fees which are segregated from prepetition legal fees and incurred for postpetition legal services constitute a postpetition debt and are, therefore, an obligation of the Chapter 7 debtor (as opposed to the estate) which he or she has an obligation to pay out of his or her postpetition earnings or exempt assets. *See also In re Waldo*, 417 B.R. 854 (Bankr. E.D. Tenn. 2009) (consolidating contested matters in seven cases where the United States Trustee objected to Clark & Washington's practice of taking postdated checks for payment of flat fee agreements entered prepetition and holding that unpaid portions of the flat fee constitutes a prepetition obligation of a debtor that is dischargeable and that, by accepting postdated checks for dischargeable debts and not advising their clients that the debts were potentially dischargeable, Clark & Washington creates a conflict of interest with the debtors under Tennessee's disciplinary rules and that, by depositing the postdated checks, Clark & Washington violated the automatic stay and/or discharge injunction); *In re Griffin*, 313 B.R. 757 (Bankr. N.D. Ill. 2004) (holding that a debtor's personal liability on the entire retainer agreement entered into pre-petition is dischargeable under § 727).

(3) Minority View – Flat or fixed fee agreements entered prepetition for pre- and post-petition services are nondischargeable in Chapter 7 and pursuit of unpaid fees by counsel is not a violation of the automatic stay

The debtor initiated this case by filing a Chapter 13 petition. A year later, the debtor retained new counsel, Robert L. Gordon, to convert her case to one under Chapter 7. Because the debtor could not pay Gordon's $875 flat fee in advance, the debtor and Gordon entered into a written fee agreement for payment in seven monthly installments of $125 each, supported by a promissory note and seven postdated checks (the first to be cashed pre-conversion and the remainder to be cashed post-conversion). After the case was converted and Gordon had cashed two postdated checks (bringing Gordon's total receipts for his services to $375), the debtor rehired her former counsel, who advised her to stop payment on the uncashed postdated checks. In response to the stop payment order, Gordon's firm sent the debtor a "past due" notice and left a message for the debtor on her answering machine. The debtor then filed a motion for contempt against Gordon for willful violation of the automatic stay. The bankruptcy court denied the contempt motion, but reduced Gordon's fees to $375. On appeal, the BAP reversed finding that the fee arrangement gave the attorney a prepetition claim for payment attributable to services to be rendered later in the case—a claim that is discharged upon filing the Chapter 7 petition—and remanded to the bankruptcy court for determination of damages under section 362(h). Gordon then appealed to the Ninth Circuit. *In re Gordon v. Hines*, 147 F.3d 1185 (9th Cir. 1998). The Ninth Circuit found that Gordon's $875 fee expressly covered both pre- and post-petition work and framed the issue as whether an attorney is entitled to collect fees for postpetition legal services bargained for pursuant to a prefiling fee agreement. The Ninth Circuit found that this case exemplifies the potential problems of recovery posed by such a prefiling fee arrangement and that the proposed solutions to the problem (i.e., initially contracting only to provide prepetition services and entering into a separate agreement postpetition to provide any necessary postpetition services, seeking to have the debtor reaffirm its prepetition fee agreement, and viewing the agreement as an executor contract) all potentially run afoul of one Code provision or another. While noting that the "optimum solution" would call for action by Congress, the Ninth Circuit, citing to the "doctrine of necessity," reversed the BAP and held that "all claims for lawyers' compensation stemming from such postpetition services actually provided to the debtor really do not fall within the automatic stay provisions of Section 362(a)(6) or the discharge provisions of Section 727." Further, because Gordon was discharged before he completed his services, the Ninth Circuit remanded the case to the bankruptcy court to determine Gordon's reasonable compensation under a quantum meruit theory of recovery.

American Bankruptcy Institute &
the Stetson University College of Law
The 36th Annual Judge Alexander L. Paskay Seminar
on Bankruptcy Law & Practice
March 17, 2012

True Tales of Incivility & Advocacy, or
When Pen Outpaces Patience

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Authors Note: In reporting accurately incidents of lack of civility in practice, the author has left comments made as reported on the respective records. Some of these unedited and un-redacted statements may shock or offend the reader. While the language as used in the subject case is distasteful, it is left unedited to display the nature of conduct as it occurred (see Saldana v. Kmart Corp., 260 F.3d 228, 235-38 (3d Cit. 2001). The author regrets any offense taken by the reader and trusts the reader to understand that inclusion of these statements is not an endorsement of either the words or actions of the parties undertaking them; rather, they are presented as examples of what has been found by courts to be anathema to the civil practice of advocacy.

On August 6, 2011, the American Bar Association opened its Annual Meeting in Toronto, Ontario, Canada. On hand to speak was United States Supreme Court Justice Stephen G. Breyer, who took the opportunity to extol the virtues of civility in the practice of law. *"We want good lawyers to be in a profession and nation that reflects civility. We have to begin here,"* Justice Breyer said. Later speakers pointed to civility as the basis for the ability of parties adverse in one matter to still join together in other matters, citing specifically the instance of attorneys David Boies and Theodore Olson, who represented opposing sides in the *Bush v. Gore* case in 2000 who, in 2009 teamed up to fight California's Proposition 8. Conversely, *lack* of civility has been cited as a factor in driving lawyers out of the profession[1].

CIVILITY GUIDELINES

Generally speaking, the area of attorney civility exists in three realms; in deposition; in the courtroom (and in motion practice before the Court), and; in everyday practice.

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[1] Patrick J. Schlitz, *On Being A Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52 Vand. L. Rev. 871, 888-906 (1999)

Federal Rule of Civil Procedure 30 provides guidance for depositions by oral examination, stating a detailed protocol that governs the conduct of all parties at depositions. Of special note is Fed. R. Civ. P. 30(c)(1), which mandates that "*examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence*." As of this writing, there are no consistent Federal Rules directly and exclusively addressing matters of civility in cases filed in the Federal courts, although, as we will examine, Rule 11, in its various permutations, can be used. Recognizing this need, in 2011 the American Bankruptcy Institute, through its National Ethics Standards Task Force, communicated to the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States (the "Rules Committee") a request that the Rules Committee take up consideration of the establishment of uniform Rules addressing civility through the formation of a national "bankruptcy bar" formed pursuant to Fed. R. Bankr. P. 9029. Attempting to provide a consistent practice as previously mentioned, several U.S. District Courts have codified principles of civility, including the U.S. District Court for the Central District of California and the U.S. District Courts for the Eastern and Western Districts of Michigan, among others.

Outside of the Federal courts, the American Bar Association Rules of Professional Conduct <u>do not</u> directly address civility issues; however, several counties, courts and several states have attempted to codify bounds for civility, often terming these areas of focus as "Professionalism". In many cases, these guidelines are voluntary, as in the case of the District of Columbia, for example. Given the mix of formal and informal guidelines and the variety of jurisdictional issues between county, state and federal courts, it behooves an attorney practicing in a court not usually their own to familiarize themselves with the court's established guidelines as well as those established by the attorneys that practice before that Court.[2] Recognizing the importance of civility, the ABA issued a Resolution[3] stating that civility is "*a foundation for democracy and the rule of law*" and that the organization "*urge[d] lawyers to set a high standard for civil discourse as an example for others in resolving differences constructively and without disparagement of others.*"

The enemy of civility is perhaps the unrefined or unqualified perception by a lawyer of his or her obligation to zealously represent their client. While the ABA Model Rule of Professional Conduct 1.3 is traditionally read to require "zealous advocacy", the Rule was amended in 1983 to remove "zeal" and, instead, instructs that a "*lawyer shall act with reasonable diligence and promptness in representing a client*." But "*diligent and prompt advocacy*" just lacks the same punch as "*zealous*". Perhaps because this differentiation goes underappreciated, or perhaps because counsel finds himself or herself

[2] A comprehensive list of Professionalism & Civility Guidelines is available online at *http://www.americanbar.org/groups/professional_responsibility/resources/professionalism/professionalism_codes.html*

[3] American Bar Association Report to the House of Delegates – <u>Resolution</u>. Available online at *http://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/civility.authcheckdam.pdf*

unable to be an objective advisor to their client, there are striking examples where "diligent and prompt" yield to "pounding on the table".

The purpose of civility guidelines is unambiguous. These guidelines exist to ensure that the playing field is even across all parties; that facts and circumstance prevail over bullying and invective. That the adage *"When the law is on your side, argue the law; when the facts are on your side, argue the facts; when you have neither the law nor the facts; pound on the table and scream"* doesn't accrue a casualty count in practice. There is a benefit to the individual parties, as well. Parties before the Court deserve the even-handed application of the Court's judgment, free of any external influence clouding their issue before the Court.

A cloud that might come from, for example, calling the Judge a "*black robed bigot*" and a "*Catholic Knight Witch Hunter*" in a motion.

RECENT EXAMPLES OF INCIVILITY IN PRACTICE

Motion Practice and Federal Rule of Civil Procedure 11

In the late autumn and early winter of 2011, law blogs and the legal ethics world turned their eyes toward the United States Bankruptcy Court for the District of Minnesota. Rebutting the stereotype of Minnesotans' temperament, the discourse in an otherwise unremarkable Chapter 7 proceeding had recently become decidedly "un-nice". On November 25, 2011, in the previously low-profile Chapter 7 proceeding of debtor Yehud-Monosson USA, Inc.[4], the Debtor filed a Motion to Vacate the bankruptcy court's previous order continuing a hearing on the Trustee's motion for a finding of contempt of court. This motion for contempt against the Debtor was for what the Trustee alleged was a continued failure to comply with the Court's previous order to turn over information to the Trustee. The Debtor, alleging incorrect or incomplete notice as to the time of the hearing, did not appear at the Nov 17, 2011 hearing on the motion for contempt, prompting the Court to continue the hearing to December 6, 2011 and directed the Debtor's President to appear.

The Debtor's Expedited Motion To Vacate Order[5] Dated November 18, 2011 is where the case ran off the civility rails, to utterly torture a metaphor. Paragraph 4 of the Expedited Motion begins[6]:

> In fact, Chapter 7 Trustee [NM] had actually scheduled the hearing with [Judge], the Catholic judge, for 1:00 p.m. but sent notice to the Debtor that the hearing was set for 1:30 p.m. Debtor seriously questions Chapter 7 Trustee [NM]'s motive in informing Debtor of the wrong time for the hearing. Was it to the

[4] Case No. 11-42834, *In re* Yehud-Monosson USA, Inc., Bankr. D. Minn.
[5] Case No. 11-42834, D.I. 197
[6] Specific names used in the motions have been redacted and replaced with initials or otherwise descriptive replacements.

> make the job of the black-robed bigot that much easier? So, rather than forcing the Court to hear the case on its merits, the matter can just go by default? Debtor is suspicious of the Chapter 7 Trustee [NM]'s motive given her track record of lies, deceit, treachery, and connivery, particularly, since the Chapter 7 Trustee [NM], the U.S. Trustee [CK], and [Judge], the Catholic judge, have been communicating with each other about this Debtor on an ex parte basis. U.S. Trustee [CK], Chapter 7 Trustee [NM], and [Judge], the Catholic judge, are of the same race and religion and their track record demonstrates their conspiracy and deceitful practices to hurt the Debtor. Even though all documents have been produced, Jesuitess [NM] keeps repeating the same lie that records are missing.

Much as this author wishes this was the nadir of colloquy in the case, this is not to be. The very next sentence in the motion is:

> Across the country the court systems and particularly the Bankruptcy Court in Minnesota, are composed of a bunch of ignoramus, bigoted Catholic beasts that carry the sword of the church. Judge [previous Judge] is a Jesuit, Judge [Judge] is a Catholic Knight Witch Hunter, U.S. Trustee [CK] is a priest's boy, and the infamous Chapter 7 Trustee [NM] is a Jesuitess. Debtor and its representatives have never experienced any justice at the hands of these inquisitors. Since Debtor has been vocal is exposing their dirty deeds, these dirty Catholics have conspired together to hurt Debtor.

The Motion continues for 5 additional paragraphs of "Procedural and Factual Background" before continuing on, devoid of the previous level of invective except for an instance, in Paragraph 22, where the Debtor again refers to "the Catholic judge". The document was electronically filed under Debtor's counsel's ECF ID and was electronically signed by counsel.

On December 7, 2011, the Court entered two Orders To Show Cause as to each of the Debtor's attorney and the Debtor's President[7] [8] citing ten enumerated statements, which were presented in the Factual Background section of the Debtor's motion, which the Court characterized as being "*replete with unsupported and outrageous allegations of bigotry, deceit, conspiracy, and scandalous statements against this court, Judge [Previous Judge], the trustee, the United States Trustee, and bankruptcy courts in general.*" The Court mandated the appearance of counsel and Debtor's President at a hearing on the Orders to Show Cause to be held on January 4, 2012, concomitant with the continued hearing on the Trustee's motion for a finding of contempt.

The basis of the Orders to Show Cause was Bankruptcy Rule 9011(b), which starts (in part):

> By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other

[7] Names of Debtor's counsel and Debtor's president have been replaced with common descriptors.
[8] Case No. 11-42834, Docket No. 207 & 208, respectively.

> paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
>
> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
> (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
> (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The Court found there to be sufficient reason as to issue the Orders to Show Cause as to why sanctions should be imposed under Fed. R. Bankr. P. 9011 "*with respect to each of the statements ... that were contained in the "factual background" section of debtor's motion."*

On December 8, 2011, the Court entered an Order[9] granting, in part, the Trustee's Motion for an Order Finding [Debtor's President] in Contempt of Court for her failure to comply with the Court's previous turnover order, and providing for the finding to be withdrawn upon [Debtor's President's] compliance with the turnover order. The Court also ordered the United States Marshal or any Authorized United States Officer to deliver [Debtor's President] to the January 4, 2011 hearing.

On December 19, 2011, the Chapter 7 Trustee filed with the Court an Affidavit[10] citing which documents had not yet been received and stating that, on December 15, 2011, three envelopes served on [Debtor's President] via U.S. Mail were returned to the Trustee with "RETURN TO SENDER" handwritten on the front of the envelopes. The Trustee's Affidavit was four paragraphs in length.

In response to the Trustee's December 19th Affidavit, [Debtor's President] filed on December 29, 2011 her Affidavit Of [Debtor's President] In Response to Chapter 7 Trustee [NM]'s Affidavit of Non-Compliance[11], in which [Debtor's President]:

- Refers to the Chapter 7 Trustee as a "Jesuitess" (at 6-7);
- Accuses the Judge, the U.S. Trustee's trial attorney and the Chapter 7 Trustee of "illegally hold[ing] a secret hearing, have[ing] secret discussions and [issuing] an illegal order" [Response at 7].

[9] Case No. 11-42834, D.I. 211
[10] Case No. 11-42834, D.I. 217, *"Trustee's Affidavit of Non-Compliance"*
[11] Case No. 11-42834, D.I. 218

In response to the Order to Show Cause, Debtor's counsel filed a Response on December 30, 2011[12] which sets out a lengthy series of statements and allegations which have appeared in other litigation related to the Debtor and its parent and affiliates, including the Dr. R. C. Samanta Roy Institute of Science and Technology – a non-profit organization ("SIST"), which itself had been a Debtor in cases filed in the District of Delaware in 2009. In the thirty-nine page response, counsel devotes the first ten pages to explaining and justifying the statements at the heart of the court's Order to Show Cause. Following this is twenty-five pages of "Historical Facts Supporting Controversial Statements", which can only be described as a lengthy compilation of information and opinion related to such wide-ranging issues as the Jesuit Order; the Borgia family (misspelled "Borja"); the sinking of the H.M.S. Titanic; the rise of the Nazi Party in 1930s Germany; the Vietnam conflict, and; the assassination of President John F. Kennedy. Counsel then devotes two pages to legal argument and one page to the sanctions contemplated.

On January 3, 2012, the Court entered a Warrant for the Arrest of [Debtor's President][13] for what the Court stated was her "failure to comply with the [Court's] order dated December 8, 2011." On January 4, 2012, after a hearing on the Orders to Show Cause and the Motion for Contempt, the Court issued Orders[14] imposing sanctions in the amount of $5,000 (or $500 for each of the specified incidents) against each of Debtor's counsel and the Debtor's President. In addition to the monetary sanctions,

- Counsel and [President] were enjoined from "*filing in the future any document in this court that refers to the religious beliefs, or lack thereof"* of any of the parties in interest in the case or calling "any or all of them disparaging names based on their religious beliefs or lack thereof";
- Counsel was directed to attend, at her expense, ten hours of legal ethics training in the form of CLEs, within twelve months of issuance of the order and to file an affidavit of completion with the Court;
- Counsel would be referred "*to the United States District Court for the District of Minnesota, for possible removal, if deemed appropriate by that Court, from the roster of attorneys admitted to practice before the United States District Court and this court under Loc. R. Bankr. P. (D. Minn.) 9010-3(a)."*

As previously mentioned, the Yehud-Monosson case was not these parties' first time before the Bankruptcy Court. In 2009, SIST filed a Chapter 11 proceeding in the District of Delaware[15], which was subsequently dismissed by the Court[16], citing a list of reasons justifying dismissal. The Debtors appealed the dismissal to the District Court,

[12] Case No. 11-42834, D.I. 220 "Response Of [Debtor's counsel] To Order To Show Cause"
[13] Case No. 11-42834, D.I. 221
[14] Case No. 11-42834, D.I.222 (Order for Sanctions as to [Debtor's counsel]) & 223 (Order for Sanctions as to [Debtor's President])
[15] *In re* Dr. R.C. Samanta Roy Institute of Science & Technology, Inc., Case No. 09-10876. (Bankr. D. Del.)
[16] Case No. 09-10876, D.I. 291

which affirmed the Bankruptcy Court's order. The Debtor then appealed again to the Circuit Court, which affirmed the order already on record (in July 2011).

Shortly after the dismissal order was entered for SIST and its related entities, one of the related entities, Midwest Oil of Minnesota, LLC, filed a Chapter 11 petition in the District of Delaware[17]. Shortly after the filing of the voluntary petition, the Debtor filed a Motion[18] for recusal of the Judge in the case (who had been the Judge in the previous Chapter 11 cases) and the Debtor's Managing Member [the same person who was the Yehud-Monosson Debtor's President], filed her Affidavit In Support Of Motion For Recusal Of Judge +++[19] [20] and Debtor's counsel filed a Memorandum Of Law[21] in support of the Debtor's recusal motion.

As in the Yehud-Monosson case that would follow this case, the Debtor made numerous characterizations of the Judge, including:

- Throughout the duration of the proceeding in the [previous] consolidated case in 2009, [Judge] +++ overtly displayed partiality and prejudice against this debtor and its affiliates [at 6];
- that the Judge had *ex parte* communications with counsel for the municipality in which the Debtor's parent company is located, which counsel had "*likely directed +++ to look at the thousands of intentional negative and defamatory programs regarding debtor and its affiliates that have been posted online…"* [at 10];
- that the judge "took us back to the Inquisition and Holocaust. If +++ is presiding over this matter, Debtor might as well reserve the hearse, buy the coffin, and wait for the pallbearers." [at 11]

The judge recused himself and, ultimately, this case was also dismissed.

Rule 9011(b) provides that parties presenting to the court in pleading, written motion or other document certify – by signing, filing, submitting or later advocating – that there has been reasonably inquiry that the presentation is not for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation. Rule 9011(c) allows for the court, after notice and an opportunity for response, to impose "an appropriate sanction" on any attorney, law firm or party that has violated the rule. Rule 9011(c)(4) dictates that:

> "A Sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to

[17] *In re* Midwest Oil of Minnesota, LLC, Case No. 10-12771. (Bankr. D. Del)
[18] Case No. 10-12771, D.I. 13
[19] The Judge's last name has been replaced with "+++" here.
[20] Case No. 10-12771, D.I. 14
[21] Case no. 10-12771, D.I. 15

> the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

Thus, the purpose of a sanction is to prevent or otherwise deter similar conduct by others. A reasonable party will infer, also, that the purpose is to ensure that the offender in question does not repeat the sanctioned activity, as well.

What goes unaddressed, for good reason, is the question as to whether or not parties who have developed a practice of inflammatory conduct before the tribunal, where such conduct is not sanctioned to the point of creating a lasting lesson for the offender, will recidivate. There are not many examples of repeat offenses after sanctions have been imposed – however, it's reasonable to believe that, given the history of rhetoric in the two cases cited above, if it's going to happen, it may involve some of the parties involved therein. The question raised, then, will be this: *what is the value of a token sanction?*

<u>Depositions and Federal Rule of Civil Procedure 30</u>

On February 29, 2008, U. S. District Court Judge Eduarco C. Robreno issued a Memorandum and Order imposing sanctions exceeding twenty-six thousand dollars ($26,000) against a deponent and his counsel. In the suit before the court, *In re* GMAC Bank v. HTFC Corp.[22], the Order imposing sanctions[23] provided a shopping list of violations of Fed. R. Civ. P. 30.

Federal Rule of Civil Procedure 30 addresses conduct at depositions by oral examination and states that the "examination and cross-examination of a deponent should proceed as they would at trial." The court noted that "more than 98% of the cases filed in the federal courts result in disposition by way of settlement or pretrial adjudication [24]," and that "these results turn on evidence obtained during depositions[25]," emphasizing the importance of depositions in the justice system.

In reviewing the current case, the court found that the deponent's

> "assault on the deposition proceedings involved three types of inappropriate behavior: 1) engaging in hostile, uncivil, and vulgar conduct; 2) impeding, delaying, and frustrating fair examination; and 3) failing to answer and providing intentionally evasive answers to deposition questions." [Memorandum at 1]

In twelve hours of videotaped deposition testimony, the deponent used the word "fuck" and variants at least seventy-three separate times. The court continued:

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22 Case No. 06-05291-ER, E. Dist. Pa

23 Case No. 06-05291, D.I. 54

24 Memorandum & Order (pp. 6-7)

25 Memorandum & Order (p. 7)

> "To put this in perspective—in this commercial case, where GMAC's claim is for breach of contract and HTFC's counterclaim is for tortious interference with contract—the word "contract" and variants thereof were used only 14 times."[Memorandum p.11]

The presence of a video camera at the deposition reinforced the court's assertion, as the video record of the deposition showed the deponent following his outbursts and verbal attacks with "*a gleeful smirk directed at his counsel, at the transcriptionist, and even directly at the camera."* [Memorandum p.15]

Federal Rule of Civil Procedure 30(d)(2) allows the court to impose an appropriate sanction – including the reasonable expenses and attorney's fees incurred by any party – on a person who impedes, delays, or frustrates the fair examination of the deponent." Furthermore, case law provides that "Costs and attorneys' fees awarded are those incurred as a result of the frustration of fair deposition examination."[26] The court ultimately found that the sole purpose of the deponent's abusive language was to intimidate and demean their opponent's counsel.

Turning its attention to deponent's counsel's conduct (or lack of action) during the deposition, the court acknowledged that an attorney can be "blindsided" by a client who engages in sanctionable conduct unexpectedly. However, the court stated unequivocally, the attorney faced with such a client:

> "cannot, however, simply sit back, allow the deposition to proceed, and then blame the client when the deposition process breaks down." Citing Redwood, 476 F.3d at 469-70 ("It is precisely when animosity runs high that playing by the rules is vital. . . Because depositions take place in law offices rather than courtrooms, adherence to professional standards is vital, for the judge has no direct means of control." [Memorandum, pp.32-33]

The court found that, in this case, the deponent's counsel was hardly blindsided, particularly that the offensive conduct began six minutes after the start of the deposition. The court opined:

> "Therefore, Ziccardi [deponent's counsel] was on notice at an early point during the deposition of his client's hostility toward opposing counsel and efforts to frustrate the deposition. Nonetheless, Ziccardi allowed the deposition to drag on for over two days and nearly twelve hours of testimony, much of which was an unmitigated waste of time and resources." [Memorandum, p.33]

While the defendants asserted that sanctions were not appropriate because counsel's actions were not taken in bad faith, because his actions were intended to "move the discovery process along by attempting to complete the deposition" [Memorandum, p.34], the court was persuaded. Finding first that a finding of bad faith is ***not*** required for

[26] See Plump, 2003 WL 23019166, at *1

sanctions, the court continued that, even if a finding of bad faith was required, the record provided for such a finding that counsel's conduct was undertaken in bad faith. The court awarded sanctions against the deponent and counsel, jointly and severally, in the amount of $13,026 for GMAC's attorney's fees related to the motion to compel, and $16,296.61 which represented the expenses and 75% of the fees incurred by GMAC's counsel in connection with the depositions taken.

CIVILITY AND THE FIRST AMENDMENT

Occasionally raised is the issue of how the First Amendment to the Constitution of the United States of America plays against the notion of sanctions imposed because of a party's speech or actions. Not being a constitutional law scholar or expert in any sense, this writer will not delve into too specific a case. However, a brief refresher is necessary. The First Amendment to the Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

On its face, the relevant text would appear to be "Congress shall make no law … abridging the freedom of speech." Not being a literalist, this writer accepts that this has been interpreted to mean any state or municipal entity, not just Congress. That's the easy part.

The difficulty comes when a person voluntarily seeks membership in an organization, which organization is not a function of the state. By accepting membership in the Bar, for example, one agrees to abide by the organization's rules and laws. Disagreeing with the interpretation of one of those rules or laws doesn't mean that the State is somehow abridging the individual's speech. Stepping back one level, an attorney voluntarily seeks admittance into the Federal courts – even if counsel is not admitted and is merely appearing *pro hac vice*, nobody dragged counsel there involuntarily. Part and parcel of admittance or appearance *pro hac vice* is an acknowledgment that the attorney knows, understands and agrees to abide by the Rules that apply to that court. Again, the attorney is agreeing, voluntarily, to be bound by those rules. It seems to this writer that the height of intellectual immaturity is for an attorney to state unambiguously that they understand and agree to adhere to the relevant rules and then, after sanctions are looming for their actions, claim that such rules constitute and improper stifling of free speech.

Again, while this writer is no expert in the field, it seems that common sense plays a large part in this situation. For even the most strident believer that the first amendment applies here, the following advice should provide guidance: there is a fundamental difference between the unencumbered freedom of expression and the ability to communicate anything and everything without impunity. The Constitution says that the State cannot keep you from saying it – *it does not say that you aren't responsible for what you communicate.*

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SDCBA Legal Ethics Opinion 2011-2

(Adopted by the San Diego County Bar Legal Ethics Committee May 24, 2011.)

I. FACTUAL SCENARIO

Attorney is representing Client, a plaintiff former employee in a wrongful discharge action. While the matter is in its early stages, Attorney has by now received former employer's answer to the complaint and therefore knows that the former employer is represented by counsel and who that counsel is. Attorney obtained from Client a list of all of Client's former employer's employees. Attorney sends out a "friending"[1] request to two high-ranking company employees whom Client has identified as being dissatisfied with the employer and therefore likely to make disparaging comments about the employer on their social media page. The friend request gives only Attorney's name. Attorney is concerned that those employees, out of concern for their jobs, may not be as forthcoming with their opinions in depositions and intends to use any relevant information he obtains from these social media sites to advance the interests of Client in the litigation.

II. QUESTION PRESENTED

Has Attorney violated his ethical obligations under the California Rules of Professional Conduct, the State Bar Act, or case law addressing the ethical obligations of attorneys?

III. DISCUSSION

A. Applicability of Rule 2-100

California Rule of Professional Conduct 2-100 says, in pertinent part: "(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer. (B) [A] "party" includes: (1) An officer, director, or managing agent of a corporation . . . or (2) an. . . employee of a . . .corporation . . . if the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." "Rule 2-100 is intended to control communication between a member and persons the member knows to be represented by counsel unless a statutory scheme or case law will override the rule." (Rule 2-100 Discussion Note.)

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[1] Quotation marks are dropped in the balance of this opinion for this now widely used verb form of the term "friend" in the context of Facebook.

Similarly, ABA Model Rule 4.2 says: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Comment 7 to ABA Model Rule 4.2 adds: "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."

1. Are the High-ranking Employees Represented Parties?

The threshold question is whether the high-ranking employees of the represented corporate adversary are "parties" for purposes of this rule.

In *Snider v. Superior Court* (2003) 113 Cal.App.4th 1187 (2003), a trade secrets action, the Court of Appeal reversed an order disqualifying counsel for the defendant-former sales manager for ex parte contact with plaintiff-event management company's current sales manager and productions director. The contacted employees were not "managing agents" for purposes of the rule because neither "exercise[d] substantial discretionary authority over decisions that determine organizational policy." Supervisory status and the power to enforce corporate policy are not enough. (*Id.* at 1209.) There also was no evidence that either employee had authority from the company to speak concerning the dispute or that their actions could bind or be imputed to the company concerning the subject matter of the litigation. (*Id.* at 1211.)

The term "high-ranking employee" suggests that these employees "exercise substantial discretionary authority over decisions that determine organizational policy" and therefore should be treated as part of the represented corporate party for purposes of Rule 2-100. At minimum, the attorney should probe his client closely about the functions these employees actually perform for the company-adversary before treating those high-ranking employees as unrepresented persons.

2. Does a Friend request Constitute Unethical Ex Parte Contact with the High-Ranking Employees?

Assuming these employees are represented for purposes of Rule 2-100, the critical next question is whether a friend request is a direct or indirect communication by the attorney to the represented party "about the subject of the representation." When a Facebook user clicks on the "Add as Friend" button next to a person's name without adding a personal message, Facebook sends a message to the would-be friend that reads: "[Name] wants to be friends with you on Facebook." The requester may edit this form request to friend to include additional information, such as information about how the requester knows the recipient or why the request is being made. The recipient, in turn, my send a message to the requester asking for further information about him or her before deciding whether to accept the sender as a friend.

A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A). The harder question is whether the statement Facebook uses to alert the represented party to the attorney's friend request is a communication "about the subject of the representation." We believe the context in which that statement is made and the attorney's motive in making it matter. Given what results when a friend request is accepted, the statement from Facebook to the would-be friend could just as accurately read: "[Name] wants to have access to the information you are sharing on your Facebook page." If the communication to the represented party is motivated by the quest for information about the subject of the representation, the communication with the represented party is about the subject matter of that representation.

This becomes clearer when the request to friend, with all it entails, is transferred from the virtual world to the real world. Imagine that instead of making a friend request by computer, opposing counsel instead says to a represented party in person and outside of the presence of his attorney: "Please give me access to your Facebook page so I can learn more about you." That statement on its face is no more "about the subject of the representation" than the robo-message generated by Facebook. But what the attorney is hoping the other person will say in response to that facially innocuous prompt is "Yes, you may have access to my Facebook page. Welcome to my world. These are my interests, my likes and dislikes, and this is what I have been doing and thinking recently."

A recent federal trial court ruling addressing Rule 2-100 supports this textual analysis. In *U.S. v. Sierra Pacific Industries* (E.D. Cal. 2010) 2010 WL 4778051, the question before the District Court was whether counsel for a corporation in an action brought by the government alleging corporate responsibility for a forest fire violated Rule 2-100 when counsel, while attending a Forest Service sponsored field trip to a fuel reduction project site that was open to the public, questioned Forest Service employees about fuel breaks, fire severity, and the contract provisions the Forest Service requires for fire prevention in timber sale projects without disclosing to the employees that he was seeking the information for use in the pending litigation and that he was representing a party opposing the government in the litigation. The Court concluded that counsel had violated the Rule and its reasoning is instructive. It was undisputed that defense counsel communicated directly with the Forest Service employees, knew they were represented by counsel, and did not have the consent of opposing counsel to question them. (2010 WL 4778051, *5.) Defense counsel claimed, however, that his questioning of the Forest Service employees fell within the exception found in Rule 2-100(C)(1), permitting "[c]ommunications with a public officer. . .," and within his First Amendment right to petition the government for redress of grievances because he indisputably had the right to attend the publicly open Forest Service excursion.

While acknowledging defense counsel's First Amendment right to attend the tour (*id.* at *5), the Court found no evidence that defense counsel's questioning of the litigation related questioning of the employees, who had no "authority to change a policy or grant some specific request for redress that [counsel] was presenting," was an exercise of his right to petition the government for redress of grievances. (*Id.* at *6.) "Rather, the facts show and the court finds that he was *attempting to obtain information for use in the litigation* that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery." (*Ibid.*, emphasis added.) Defense counsel's interviews of the Forest Service employees on matters his corporate client considered part of the litigation without notice to, or the consent of, government counsel "strikes at . . .

the very policy purpose for the no contact rule." (*Ibid.*) In other words, counsel's motive for making the contact with the represented party was at the heart of why the contact was prohibited by Rule 2-100, that is, he was "attempting to obtain information for use in the litigation," a motive shared by the attorney making a friend request to a represented party opponent.

The Court further concluded that, while the ABA Model Rule analog to California Rule of Professional Conduct 2-100 was not controlling, defense counsel's ex parte contacts violated that rule as well. "Unconsented questioning of an opposing party's employees on matters that counsel has reason to believe are at issue in the pending litigation is barred under ABA Rule 4.2 *unless the sole purpose of the communication* is to exercise a constitutional right of access to officials having the authority to act upon or decide the policy matter being presented. In addition, advance notice to the government's counsel is required." (*Id.* at *7, emphasis added.) Thus, under both the California Rule of Professional Conduct and the ABA Model Rule addressing ex parte communication with a represented party, the purpose of the attorney's ex parte communication is at the heart of the offense.

The Discussion Note for Rule 2-100 opens with a statement that the rule is designed to control communication between an attorney and an opposing party. The purpose of the rule is undermined by the contemplated friend request and there is no statutory scheme or case law that overrides the rule in this context. The same Discussion Note recognizes that nothing under Rule 2-100 prevents the parties themselves from communicating about the subject matter of the representation and "nothing in the rule precludes the attorney from advising the client that such a communication can be made." (Discussion Note to Rule 2-100). But direct communication with an attorney is different.

3. Response to Objections

a) Objection 1: The friend request is not about the subject of the representation because the request does not refer to the issues raised by the representation.

It may be argued that a friend request cannot be "about the subject of the representation" because it makes no reference to the issues in the representation. Indeed, the friend request makes no reference to anything at all other than the name of the sender. Such a request is a far cry from the vigorous ex parte questioning to which the government employees were subjected by opposing counsel in *U.S. v. Sierra Pacific Industries.*[2]

[2] *Sierra Pacific Industries* also is factually distinguishable from the scenario addressed here because it involved ex parte communication with a represented *government* party opponent rather than a private employer. But that distinction made it harder to establish a Rule 2-100 violation, not easier. That is because a finding of a violation of the rule had to overcome the attorney's constitutional right to petition government representatives. Those rights are not implicated where an attorney makes ex parte contact with a private represented party in an analogous setting, such as a corporate – or residential – open house.

The answer to this objection is that as a matter of logic and language, the subject of the representation need not be directly referenced in the query for the query to be "about," or concerning, the subject of the representation. The extensive ex parte questioning of the represented party in *Sierra Pacific Industries* is different in degree, not in kind, from an ex parte friend request to a represented opposing party. It is not uncommon in the course of litigation or transactional negotiations for open-ended, generic questions to impel the other side to disclose information that is richly relevant to the matter. The motive for an otherwise anodyne inquiry establishes its connection to the subject matter of the representation.

It is important to underscore at this point that a communication "about the subject of the representation" has a broader scope than a communication relevant to the issues in the representation, which determines admissibility at trial. (*Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, 1392.) In litigation, discovery is permitted "regarding any matter, not privileged, that is relevant to the subject matter of the pending matter. . . ." (Cal. Code Civ. Proc. § 2017.010.) Discovery casts a wide net. "For discovery purposes, information should be regarded as 'relevant to the subject matter' if it might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (Weil & Brown, Cal. Prac. Guide: Civ. Pro. Before Trial (The Rutter Group 2010), 8C-1, ¶8:66.1, emphasis in the original, citations omitted.) The breadth of the attorney's duty to avoid ex parte communication with a represented party about the subject of a representation extends at least as far as the breadth of the attorney's right to seek formal discovery from a represented party about the subject of litigation. Information uncovered in the immediate aftermath of a represented party's response to a friend request at least "might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* thereof." (*Ibid.*) Similar considerations are transferable to the transactional context, even though the rules governing discovery are replaced by the professional norms governing due diligence.

In *Midwest Motor Sports v. Arctic Cat Sales, Inc.* (8th Cir. 2003) 347 F.3d 693, Franchisee A of South Dakota sued Franchisor of Minnesota for wrongfully terminating its franchise and for installing Franchisee B, also named as a defendant, in Franchisee A's place. A "critical portion" of this litigation was Franchisee A's expert's opinion that Franchisee A had sustained one million dollars in damages as a result of the termination. (*Id.* at 697.) Franchisor's attorney sent a private investigator into both Franchisee A's and Franchisee B's showroom to speak to, and surreptitiously tape record, their employees about their sales volumes and sales practices. Among others to whom the investigator spoke and tape-recorded was Franchisee B's president.

The Eighth Circuit affirmed the trial court's order issuing evidentiary sanctions against Franchisor for engaging in unethical ex parte contact with represented parties. The Court held that the investigator's inquiry about Franchisee B's sales volumes of Franchisor's machines was impermissible ex parte communication about the subject of the representation for purposes of Model Rule 4.2, adopted by South Dakota. "Because every [Franchisor machine] sold by [Franchisee B] was a machine not sold by

[Franchisee A], the damages estimate [by Franchisee A's expert] could have been challenged in part by how much [Franchisor machine] business [Franchisee B] was actually doing." (*Id.* at 697-698.) It was enough to offend the rule that the inquiry was designed to elicit information about the subject of the representation; it was not necessary that the inquiry directly refer to that subject.

Similarly, in the hypothetical case that frames the issue in this opinion, defense counsel may be expected to ask plaintiff former employee general questions in a deposition about her recent activities to obtain evidence relevant to whether plaintiff failed to mitigate her damages. (BAJI 10.16.) That is the same information, among other things, counsel may hope to obtain by asking the represented party to friend him and give him access to her recent postings. An open-ended inquiry to a represented party in a deposition seeking information about the matter in the presence of opposing counsel is qualitatively no different from an open-ended inquiry to a represented party in cyberspace seeking information about the matter outside the presence of opposing counsel. Yet one is sanctioned and the other, as *Midwest Motors* demonstrated, is sanctionable.

b) Objection 2: Friending an represented opposing party is the same as accessing the public website of an opposing party

The second objection to this analysis is that there is no difference between an attorney who makes a friend request to an opposing party and an attorney suing a corporation who accesses the corporation's website or who hires an investigator to uncover information about a party adversary from online and other sources of information.

Not so. The very reason an attorney must make a friend request here is because obtaining the information on the Facebook page, to which a user may restrict access, is unavailable without first obtaining permission from the person posting the information on his social media page. It is that restricted access that leads an attorney to believe that the information will be less filtered than information a user, such as a corporation but not limited to one, may post in contexts to which access is unlimited. Nothing blocks an attorney from accessing a represented party's public Facebook page. Such access requires no communication to, or permission from, the represented party, even though the attorney's motive for reviewing the page is the same as his motive in making a friend request. Without ex parte communication with the represented party, an attorney's motivated action to uncover information about a represented party does not offend Rule 2-100. But to obtain access to *restricted* information on a Facebook page, the attorney must make a request to a represented party outside of the actual or virtual presence of defense counsel. And for purposes of Rule 2-100, that motivated communication with the represented party makes all the difference .[3]

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[3] The Oregon Bar reached the same conclusion, but with limited analysis. Oregon State Bar Formal Opinion No. 2005-164 concluded that a lawyer's ex parte communications

The New York State Bar Association recently has reached the same conclusion. (NYSBA Ethics Opinion 843 (2010).) The Bar concluded that New York's prohibition on attorney ex parte contact with a represented person does not prohibit an attorney from viewing and accessing the social media page of an adverse party to secure information about the party for use in the lawsuit as long as "the lawyer does not 'friend' the party and instead relies on public pages posted by the party that are accessible to all members in the network." That, said the New York Bar, is "because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither "friends" the other party nor directs someone else to do so."

c) Objection 3: The attorney-client privilege does not protect anything a party posts on a Facebook page, even a page accessible to only a limited circle of people.

The third objection to this analysis may be that nothing that a represented party says on Facebook is protected by the attorney-client privilege. No matter how narrow the Facebook user's circle, those communications reach beyond "those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the [Facebook user's] lawyer is consulted. . . ." (Evid. Code §952, defining "confidential communication between client and lawyer." Cf. *Lenz v. Universal Music Corp.* (N.D. Cal. 2010) 2010 WL 4789099, holding that plaintiff waived the attorney-client privilege over communications with her attorney related to her motivation for bringing the lawsuit by e-mailing a friend that her counsel was very interested in "getting their teeth" into the opposing party, a major music company.)

That observation may be true as far as it goes[4], but it overlooks the distinct, though overlapping purposes served by the attorney-client privilege, on the one hand, and the

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with represented adversary via adversary's website would be ethically prohibited. "[W]ritten communications via the Internet are directly analogous to written communications via traditional mail or messenger service and thus are subject to prohibition pursuant to" Oregon's rule against ex parte contact with a represented *person.* If the lawyer knows that the person with whom he is communicating is a represented person, "the Internet communication would be prohibited." (*Id.* at pp. 453-454.)

[4] There are limits to how far this goes in the corporate context where the attorney-client privilege belongs to, and may be waived by, only the corporation itself and not by any individual employee. According to section 128 and Comment c of the Restatement

prohibition on ex parte communication with a represented party, on the other. The privilege is designed to encourage parties to share freely with their counsel information needed to further the purpose of the representation by protecting attorney-client communications from disclosure. "[T]he public policy fostered by the privilege seeks to insure the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599, citation and internal quotation marks omitted.)

The rule barring ex parte communication with a represented party is designed to avoid disrupting the trust essential to the attorney-client relationship. "The rule against communicating with a represented party without the consent of that party's counsel shields a party's substantive interests against encroachment by opposing counsel and safeguards the relationship between the party and her attorney. . . . [T]he trust necessary for a successful attorney-client relationship is eviscerated when the client is lured into clandestine meetings with the lawyer for the opposition." (*U.S. v. Lopez* (9th Cir. 1993) 4 F.3d 1455, 1459.) The same could be said where a client is lured into clandestine communication with opposing counsel through the unwitting acceptance of an ex parte friend request.

d) Objection 4: A recent Ninth Circuit ruling appears to hold that Rule 2-100 is not violated by engaging in deceptive tactics to obtain damaging information from a represented party.

Fourth and finally, objectors may argue that the Ninth Circuit recently has ruled that Rule 2-100 does not prohibit outright deception to obtain information from a source. Surely, then, the same rule does not prohibit a friend request which states only truthful information, even if it does not disclose the reason for the request. The basis for this final contention is *U.S. v. Carona* (9th Cir. 2011) 630 F.3d 917, 2011 WL 32581. In that case, the question before the Court of Appeals was whether a prosecutor violated Rule 2-100 by providing fake subpoena attachments to a cooperating witness to elicit pre-indictment, non-custodial incriminating statements during a conversation with defendant, a former county sheriff accused of political corruption whose counsel had notified the government that he was representing the former sheriff in the matter. "There was no direct communications here between the prosecutors and [the defendant]. The indirect communications did not resemble an interrogation. Nor did the use of fake subpoena attachments make the informant the alter ego of the prosecutor." (*Id.* at *5.) The Court ruled that, even if the conduct did violate Rule 2-100, the district court did not abuse its discretion in not suppressing the statements, on the ground that state bar discipline was available to address any prosecutorial misconduct, the tapes of an incriminating conversation between the cooperating witness and the defendant obtained by using the fake documents. "The fact that the state bar did not thereafter take action against the prosecutor here does not prove the inadequacy of the remedy. It may, to the contrary,

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(Third) of the Law Governing Lawyers, the corporate attorney-client privilege may be waived only by an authorized agent of the corporation.

suggest support for our conclusion that there was no ethical violation to begin with." (*Id.* at *6.)

There are several responses to this final objection. First, *Carona* was a ruling on the appropriateness of excluding evidence, not a disciplinary ruling as such. The same is true, however, of *U.S. v. Sierra Pacific Industries*, which addressed a party's entitlement to a protective order as a result of a Rule 2-100 violation. Second, the Court ruled that the exclusion of the evidence was unnecessary because of the availability of state bar discipline if the prosecutor had offended Rule 2-100. The Court of Appeals' discussion of Rule 2-100 therefore was dicta. Third, the primary reason the Court of Appeals found no violation of Rule 2-100 was because there was no direct contact between the prosecutor and the represented criminal defendant. The same cannot be said of an attorney who makes a direct ex parte friend request to a represented party.

4. Limits of Rule 2-100 Analysis

Nothing in our opinion addresses the discoverability of Facebook ruminations through conventional processes, either from the user-represented party or from Facebook itself. Moreover, this opinion focuses on whether Rule 2-100 is violated in this context, not the evidentiary consequences of such a violation. The conclusion we reach is limited to prohibiting attorneys from gaining access to this information by asking a represented party to give him entry to the represented party's restricted chat room, so to speak, without the consent of the party's attorney. The evidentiary, and even the disciplinary, consequences of such conduct are beyond the scope of this opinion and the purview of this Committee. (See Rule 1-100(A): Opinions of ethics committees in California are not binding, but "should be consulted by members for guidance on proper professional guidance." See also, Philadelphia Bar Association Professional Guidance Committee, Opinion 2009-02, p. 6: If an attorney rejects the guidance of the committee's opinion, "the question of whether or not the evidence would be usable either by him or by subsequent counsel in the case is a matter of substantive and evidentiary law to be addressed by the court." But see Cal. Prac. Guide Fed. Civ. Proc. Before Trial, Ch. 17-A, ¶17:15: "Some federal courts have imposed sanctions for violation of applicable rules of professional conduct." (citing *Midwest Motor Sports*, *supra*.))

B. Attorney Duty Not To Deceive

We believe that the attorney in this scenario also violates his ethical duty not to deceive by making a friend request to a represented party's Facebook page without disclosing why the request is being made. This part of the analysis applies whether the person sought to be friended is represented or not and whether the person is a party to the matter or not.

ABA Model Rule 4.1(a) says: "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. . ." ABA Model Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." In *Midwest Motor Sports, supra*, the Eighth Circuit found that the violations of the rule against ex parte contact with a represented party alone would have justified the evidentiary sanctions that the district court imposed. (*Midwest Motor Sports, supra,* 347 F.3d at 698.) The Court of Appeals also concluded, however, that Franchisor's attorney had violated 8.4(c) by sending a private investigator to interview Franchisees' employees "under false and misleading pretenses, which [the investigator] made no effort to correct. Not only did [the investigator] pose as a customer, he wore a hidden device that secretly recorded his conversations with" the Franchisees' employees. (*Id.*, at 698-699.)[5]

Unlike many jurisdictions, California has not incorporated these provisions of the Model Rules into its Rules of Professional Conduct or its State Bar Act. The provision coming closest to imposing a generalized duty not to deceive is Business & Professions Code section 6068(d), which makes it the duty of a California lawyer "[t]o employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never seek to mislead the judge . . . by an artifice or false statement of fact or law." This provision is typically applied to allegations that an attorney misled a judge, suggesting that the second clause in the provision merely amplifies the first. (See e.g., *Griffith v. State Bar of Cal.* (1953) 40 Cal.2d 470.) But while no authority was found applying the provision to attorney deception of anyone other than a judicial officer, its language is not necessarily so limited. The provision is phrased in the conjunctive, arguably setting forth a general duty not to deceive *anyone* and a more specific duty not to mislead a judge by any false statement or fact or law. We could find no authority addressing the question one way or the other.

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[5] The New York County Bar Association approached a similar issue differently in approving in "narrow" circumstances the use of an undercover investigator by non-government lawyers to mislead a party about the investigator's identity and purpose in gathering evidence of an alleged violation of civil rights or intellectual property rights. (NYCLA Comm. On Prof. Ethics Formal Op. 737, p. 1). The Bar explained that the kind of deception of which it was approving "is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful." (*Id.* at p. 2.) The opinion specifically "does not address whether a lawyer is ever permitted to make dissembling statements himself or herself." (*Id.* at p. 1.) The opinion also is limited to conduct that does not otherwise violate New York's Code of Professional Responsibility, "(including, but not limited to DR 7-104, the 'no-contact' rule)." (*Id.* at p. 6.) Whatever the merits of the opinion on an issue on which the Bar acknowledged there was "no nationwide consensus" (*id.* at p. 5), the opinion has no application to an ex parte friend request made by an attorney to a party where the attorney is posing as a friend to gather evidence outside of the special kind of cases and special kind of conduct addressed by the New York opinion.

There is substantial case law authority for the proposition that the duty of an attorney under the State Bar Act not to deceive extends beyond the courtroom. The State Bar, for example, may impose discipline on an attorney for intentionally deceiving opposing counsel. "It is not necessary that actual harm result to merit disciplinary action where actual deception is intended and shown." (*Coviello v. State Bar of Cal.* (1955) 45 Cal.2d 57, 65. See also *Monroe v. State Bar of Cal.* (1961) 55 Cal.2d 145, 152; *Scofield v. State Bar of Cal.* (1965) 62 Cal.2d 624, 628.) "[U]nder CRPC 5-200 and 5-220, and BP 6068(d), as officers of the court, attorneys have a duty of candor and not to mislead the judge by any false statement of fact or law. These same rules of candor and truthfulness apply when an attorney is communicating with opposing counsel." (*In re Central European Industrial Development Co.* (Bkrtcy. N.D. Cal. 2009) 2009 WL 779807, *6, citing *Hallinan v. State Bar of Cal.* (1948) 33 Cal.2d 246, 249.)

Regardless of whether the ethical duty under the State Bar Act and the Rules of Professional Conduct not to deceive extends to misrepresentation to those other than judges, the *common law* duty not to deceive indisputably applies to an attorney and a breach of that duty may subject an attorney to liability for fraud. "[T]he case law is clear that a duty is owed by an attorney not to defraud another, even if that other is an attorney negotiating at arm's length." (*Cicone v. URS Corp.* (1986) 183 Cal.App.3d 194, 202.)

In *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 74, the Court of Appeal ruled that insured's judgment creditors had the right to sue insurer's coverage counsel for misrepresenting the scope of coverage under the insurance policy. The *Shafer* Court cited as authority, *inter alia, Fire Ins. Exchange v. Bell by Bell* (Ind. 1994) 643 N.E.2d 310, holding that insured had a viable claim against counsel for insurer for falsely stating that the policy limits were $100,000 when he knew they were $300,000.

Similarly, in *Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282, the Court of Appeal held that an attorney, negotiating at arm's length with an adversary in a merger transaction was not immune from liability to opposing party for fraud for not disclosing "toxic stock" provision. "A fraud claim against a lawyer is no different from a fraud claim against anyone else." (*Id.* at 291.) "Accordingly, a lawyer communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient." (*Ibid.*, citation omitted.) While a "casual expression of belief" that the form of financing was "standard" was not actionable, active concealment of material facts, such as the existence of a "toxic stock" provision, is actionable fraud. (*Id.* at 291-294.)

If there is a duty not to deceive opposing counsel, who is far better equipped by training than lay witnesses to protect himself against the deception of his adversary, the duty surely precludes an attorney from deceiving a lay witness. But is it impermissible deception to seek to friend a witness without disclosing the purpose of the friend request, even if the witness is not a represented party and thus, as set forth above, subject to the prohibition on ex parte contact? We believe that it is.

Two of our sister Bar Associations have addressed this question recently and reached different conclusions. In Formal Opinion 2010-02, the Bar Association of the City of New York's Committee on Professional and Judicial Ethics considered whether "a lawyer, either directly or through an agent, [may] contact an unrepresented person through a social networking website and request permission to access her web page to obtain information for use in litigation." (*Id.*, emphasis added.) Consistent with New York's high court's policy favoring informal discovery in litigation, the Committee concluded that "an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request." In a footnote to this conclusion, the Committee distinguished such a request made to a party known to be represented by counsel. And the Committee further concluded that New York's rules prohibiting acts of deception are violated "whenever an attorney 'friends' an individual under false pretenses to obtain evidence from a social networking website." (*Id.*)

In Opinion 2009-02, the Philadelphia Bar Association Professional Guidance Committee construed the obligation of the attorney not to deceive more broadly. The Philadelphia Committee considered whether a lawyer who wishes to access the restricted social networking pages of an adverse, unrepresented witness to obtain impeachment information may enlist a third person, "someone whose name the witness will not recognize," to seek to friend the witness, obtain access to the restricted information, and turn it over to the attorney. "The third person would state only truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness." (Opinion 2009-02, p. 1.) The Committee concluded that such conduct would violate the lawyer's duty under Pennsylvania Rule of Professional Conduct 8.4 not to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . . ." The planned communication by the third party

> omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the [attorney] and the true purpose of the access was to obtain information for the purpose of impeaching her testimony.

(*Id.* at p. 2.) The Philadelphia opinion was cited approvingly in an April 2011 California Lawyer article on the ethical and other implications of juror use of social media. (P. McLean, "Jurors Gone Wild," p. 22 at 26, California Lawyer, April 2011.)

We agree with the scope of the duty set forth in the Philadelphia Bar Association opinion, notwithstanding the value in informal discovery on which the City of New York

Bar Association focused. Even where an attorney may overcome other ethical objections to sending a friend request, the attorney should not send such a request to someone involved in the matter for which he has been retained without disclosing his affiliation and the purpose for the request.

Nothing would preclude the attorney's client himself from making a friend request to an opposing party or a potential witness in the case. Such a request, though, presumably would be rejected by the recipient who knows the sender by name. The only way to gain access, then, is for the attorney to exploit a party's unfamiliarity with the attorney's identity and therefore his adversarial relationship with the recipient. That is exactly the kind of attorney deception of which courts disapprove.

IV. CONCLUSION

Social media sites have opened a broad highway on which users may post their most private personal information. But Facebook, at least, enables its users to place limits on who may see that information. The rules of ethics impose limits on how attorneys may obtain information that is not publicly available, particularly from opposing parties who are represented by counsel.

We have concluded that those rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have "friends" like that and no one – represented or not, party or non-party – should be misled into accepting such a friendship. In our view, this strikes the right balance between allowing unfettered access to what is public on the Internet about parties without intruding on the attorney-client relationship of opposing parties and surreptitiously circumventing the privacy even of those who are unrepresented.

Regulating Lawyer Solicitation of Strangers: Does it Violate the First Amendment?

By: Michael P. Richman and Darren Luft[1]

Every jurisdiction regulates lawyer solicitation of business in some manner. Over the years, many lawyers have attempted to challenge the constitutionality of some of the restrictions: many have argued that such restrictions run afoul of the First Amendment. While some have had success in the district courts arguing against the constitutionality of such restrictions, the circuit courts and the Supreme Court of the United States have been reluctant to find that solicitation regulations violate the First Amendment and have permitted states and state bar associations to regulate an attorney's solicitation of business from strangers. Nevertheless, recent advances in communications technology, such as blogs, social networking, instant messaging and chat rooms, are giving rise to increased challenges to the solicitation boundaries, and may necessitate a further examination of solicitation speech regulation by the courts and bar associations.

Rules and Regulations Regarding Direct Solicitation

The ABA Model Rules of Professional Conduct regulate the type of direct, real-time contact a lawyer may have with a stranger when soliciting business.[2] Under Model Rule 7.3(a), a lawyer may not contact a prospective client by "in-person, live telephone, or real-time electronic contact" unless the prospective client is another lawyer or that person has "a family, close personal, or prior professional relationship with the lawyer."[3]

Regardless of whether a jurisdiction has adopted Model Rule 7.3 exactly as written, almost all jurisdictions directly regulate when a lawyer may directly solicit business from a stranger.[4] Seven jurisdictions have adopted the Model Rule 7.3 verbatim.[5] Many others have adopted Model Rule 7.3 with some slight local variations.[6] Almost every jurisdiction save a select few, such as Maine, Virginia, and the District of Columbia, in some manner prohibits

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[2] MODEL RULES OF PROF'L CONDUCT R. 7.3.

[3] MODEL RULES OF PROF'L CONDUCT R. 7.3(a).

[4] *See* ABA VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, RULE 7.3 DIRECT CONDUCT WITH PROSPECTIVE CLIENTS http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/7_3.authcheckdam.pdf (last visited February 3, 2012).

[5] *See id.* (Alaska, Delaware, Idaho, Illinois, Kansas, Oklahoma, and Vermont).

[6] *See id.* (e.g., Florida and Kentucky).

direct, real-time solicitation of strangers as potential clients.[7] Virginia and the District of Columbia only prohibit solicitations if:

> (1) the lawyer knows that the target could not exercise reasonable judgment; (2) the target has made known a desire not to receive communication from the lawyer; or (3) the lawyer's overture involves coercion or duress.[8]

While the ABA included similar broad provisions in its Discussion Draft of 1980, these efforts were abandoned by 1981 and were not adopted in the Model Code.[9]

The Constitutionality of Regulating Direct Solicitation

Direct and indirect solicitation was not prohibited by the organized bar until the American Bar Association prohibited solicitation in its 1908 Cannon of Professional Ethics.[10] These early rules treated advertising and direct, real-time solicitation of strangers as conduct to be regulated in the same manner for many decades—blanket prohibitions. Only after several decades did the Supreme Court ease the prohibitions on advertising by finding that blanket prohibitions violated the First Amendment.[11] Even then, the Supreme Court has permitted restrictions to remain on attorney advertising, just not blanket prohibitions.[12] Overall, however, the sphere of permissible advertising has generally increased over time.[13]

While permitting regulation of solicitation, the Supreme Court has repeatedly rejected First Amendment challenges to such restrictions.[14] In upholding the constitutionality of

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[7] Maine replaces 7.3(a) with language that adopts a more holistic approach considering the totality of the circumstances. *See id*. The District of Columbia relies upon a broader rule that prohibits coercion, duress, or harassment during solicitation. District of Columbia Rules of Professional Conduct Rule 7.1(b)(1)(B).

[8] Anita Bernstein, *Sanctioning the Ambulance Chaser*, 41 LOY. L.A. L. REV. 1545, 1551(2007-08).

[9] *Id.* at 1552.

[10] *Id.* at 1546.

[11] *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977). Interestingly, some have identified *Bates* as facilitating the decline of the legal profession through the ravaging of attorney's credibility, image, and veracity and have called for its repeal. *See, e.g.,* William G. Hyland Jr., *Attorney Advertising and the Decline of the Legal Profession*, 35 J. Legal Prof. 339, 339 (2011). Such advocates have suggested that advertising be regulated by rules that consider whether the advertisement creates an unjustified expectation of results rather than utilizing the framework established by *Bates*. *See, e.g., id.* at 380.

[12] *See id.*; *see also Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 635 (1995) (permitting a prohibition of writing to accident victims by attorneys within 30 days of the accident).

[13] *See* Alexander Schwab, *In Defense of Ambulance Chasing: A Critique of Model Rule of Professional Conduct 7.3*, 29 YALE L. & POL'Y REV. 603, 605 (2010-11).

[14] *See id.* ("Forced to retreat, the organized bar still holds sway over direct solicitation of prospective clients.").

restrictions on attorney direct solicitation, the Supreme Court, in *Ohralik v. Ohio State Bar Ass'n*, upheld the right to restrict commercial speech and offered numerous examples including: "the exchange of information about securities," "corporate proxy statements," and "the exchange of price and production information among competitors."[15] In permitting rules and regulations that restrict attorney direct solicitation, the Supreme Court argued that in-person solicitation may "provide a one-sided presentation and … encourage speedy and perhaps uninformed decision making."[16] In this case, the Supreme Court held:

> Under our view of the State's interest in averting harm by prohibiting solicitation in circumstances where it is likely to occur, the absence of explicit proof or findings of harm or injury is immaterial. The facts in this case present a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment. They also demonstrate the need for prophylactic regulation in furtherance of the State's interest in protecting the lay public. We hold that the application of DR2-103(A) and 2-104(A) to appellant does not offend the Constitution.[17]

While the Supreme Court held that regulations of solicitation by professionals did not require the regulators to demonstrate actual harm, the Supreme Court still relied heavily on the "undisputed facts of record."[18] These facts included an attorney who solicited business from an 18-year-old stranger in traction in the hospital and another 18-year-old who had just been released from the hospital.[19] Consequently, *Ohralik* has often been cited as affirming the constitutionality of the prohibition of direct oral communications with prospective clients by state bar associations.[20]

Ohralik, however, predates modern decisions on commercial speech. For instance, in *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, the Supreme Court created a four-part analysis for evaluating the constitutionality of regulations on commercial speech:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial

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[15] *Ohralik v. Ohio State Bar Ass'n* , 436 U.S. 447, 456 (1978).

[16] *See id.* at 457.

[17] *Id.* at 468.

[18] *Id.* at 467.

[19] *Id.* at 449-452.

[20] *See In re Universal Building Prods.*, No. 10-12453, 2010 WL 4642046, *7 (Bankr. D. Del. Nov. 4, 2010).

> speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.[21]

Thus, *Central Hudson Gas & Elec. Corp.* introduces a new and important consideration when evaluating regulations of commercial speech: "whether it is not more extensive than is necessary to serve that interest." Courts have characterized this set of criteria as an intermediate scrutiny test rather than an overbreadth test.[22]

While the regulations upheld in *Ohralik* would likely have satisfied the first three criteria elucidated in *Central Hudson Gas & Elec. Corp.*, the Supreme Court may have struggled with assessing whether the regulation was more extensive than necessary. While the regulations in *Ohralik* as crafted were aimed to prevent the very type of manipulative solicitation practiced by the attorney challenging the regulation, it is not clear that such a restriction, which also prohibits the direct solicitation of other entities and individuals that have demonstrated some degree of sophistication and would be unlikely to be harmed by direct solicitation, would satisfy the last criterion established by *Central Hudson Gas & Elec. Corp.* as it is so extensive as to prohibit a great deal of direct solicitation that yields none of the harms that the regulation was seeking to prevent.

Recent Developments

The relatively recent decision in the bankruptcy case, *Universal Building Products*,[23] re-emphasizes that the rules of professional conduct regarding direct solicitation affect attorneys in almost all practice areas including bankruptcy. In *Universal Building Products*, the Applications of the Official Unsecured Creditors' Committee were denied in part because the court ruled that the actions of Arent Fox LLP and Elliot Greenleaf & Siedzikowski, P.C. did not comport with rules of professional conduct on direct solicitation and were sufficient to disqualify the firms from serving as counsel to the Committee. Both firms acted in concert with a third party to cold-call Asian unsecured creditors.

In defense of their actions, the law firms argued that the rules of professional conduct restricting cold calling should be ruled inapplicable to "sophisticated business entities" because such restrictions ran "afoul of the First Amendment."[24] In rejecting this line of argument, the court in *Universal Building Products* characterizing the Supreme Court case, *Ohralik v. Ohio*

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[21] 447 U.S. 557, 566 (1980).

[22] *McKinley v. Abbott*, 643 F.3d 403, 407 (5th Cir 2011).

[23] *In re Universal Building Prods.*, No. 10-12453, 2010 WL 4642046 (Bankr. D. Del. Nov. 4, 2010).

[24] *See id.* at *6.

State Bar Ass'n[25] as "upholding states' right to prohibit direct solicitation by attorneys given states' compelling interest in preventing abuses and significant potential harm to prospective clients by attorneys 'trained in the art of persuasion.'"[26] The Court went on to note that this precedent still applied in the business context and had not been altered over the years. The Court refused to make an exception to this well-established precedent, as the Court concluded that "the prospective clients who were solicited were foreign creditors unfamiliar with our bankruptcy laws and particularly with the system of forming creditors' committees."[27]

Even in *Universal Building Products*, which rejected the argument that direct solicitation regulations ran afoul of the First Amendment, the court recognized that the regulation was protecting "foreign creditors unfamiliar with our bankruptcy laws and particularly with the system of forming creditors' committees.[28] The court recognized that they were "no less vulnerable to direct solicitation by someone on behalf of an attorney than an individual."[29] Thus, one could argue that it is an open question whether the solicitation regulations would be unconstitutional under the First Amendment if the prospective clients were in fact sophisticated. Model Rule 7.3 seems to recognize at least one such distinction by permitting cold-calling to other lawyers. Cold-calling to a sophisticated potential client may permit an argument under *Central Hudson Gas & Elec. Corp.* that regulation in that context is unconstitutional for failing to satisfy the fourth criterion, "not more extensive than is necessary to serve that interest."

In 2009, Texas passed new state restrictions on attorneys contacting in writing people who had been arrested or received a summons within 30 days of either event.[30] An attorney was one of the parties that brought a pre-enforcement challenge to the new restrictions. In early 2010, the United States District Court of the Western District of Texas struck down these restrictions as being unconstitutional under the First Amendment.[31] At the Fifth Circuit, the attorney's case was dismissed as moot because a prior incarnation of the law with similar wording had been ruled unconstitutional in 1994 and the county and district attorney vowed to never attempt to enforce the restriction.[32]

Because the Texas restrictions also applied to chiropractors, the Fifth Circuit considered whether a restriction on chiropractors' ability to contact people injured in accidents within 30

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[25] 436 U.S. 447, 464-66 (1978).

[26] *In re Universal Building Prods.*, No. 10-12453, 2010 WL 4642046, *7 (Bankr. D. Del. Nov. 4, 2010).

[27] *Id.*

[28] *See In re Universal Building Prods.*, No. 10-12453, 2010 WL 4642046, *7 (Bankr. D. Del. Nov. 4, 2010).

[29] *Id.*

[30] *See McKinley v. Abbott*, 643 F.3d 403, 404 (5th Cir 2011).

[31] *See id.*

[32] *See id.* at 406-07.

days of the accident.[33] The Fifth Circuit interpretation of the prevailing case law, including *Central Hudson Gas & Elec. Corp.*, suggests that courts will continue to consider restrictions on direct solicitation by professionals to be constitutional for some time. The Fifth Circuit required the party challenging the restriction on First Amendment grounds to demonstrate "that no set of circumstances exists under which … [the restriction] would be valid."[34] In addition, the court stated plainly that the test was "not a least restrictive means test. The state's means … must be reasonable in proportion to the interest served."[35]

Calls for Reform

While no case has meaningfully eased the restrictions on direct solicitation, particularly with regard to First Amendment concerns, the academic literature reflects some desire for a loosening of the restrictions on direct solicitation. For some, the prohibition of direct solicitation entrenches the "interests of a favored elite."[36] Others have argued that rather than protect the vulnerable from manipulation, the prohibition on direct solicitation allows veteran practitioners to hoard quality legal business and wealthy claimants to have access to the best attorneys.[37] Still others have characterized the current state of the prohibition as reflective of an overall concern for appearances rather than the real harms.[38] Because the courts have been reluctant to strike down prohibitions of direct solicitation on First Amendment grounds, it appears that the most effective path to reform—having the Model Code revised—will only be possible if academic and professional clamor for reform grow.

Increased adoption of new technologies by attorneys including blogs and social networking may exhibit pressure on the courts and the ABA to reevaluate the framework for regulation solicitation in general. Many of these new technologies blur the line between pure advertising and direct, real-time solicitation. Services, such as Google AdWords, permit attorneys to have their ads displayed when users search for certain terms or certain terms appear in users' email.[39] Such systems seem to straddle the line between advertising and direct solicitation since attorneys may have their advertisements appear in the presence of certain words such as "accident," "crash," "debt," or other terms that might single out a user as a potential client.

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[33] *See generally id.*

[34] *Id.*at 409.

[35] *Id.*

[36] Alexander Schwab, *In Defense of Ambulance Chasing: A Critique of Model Rule of Professional Conduct 7.3*, 29 YALE L. & POL'Y REV. 603, 632 (2010-11).

[37] *Id. at 631.*

[38] Anita Bernstein, *Sanctioning the Ambulance Chaser*, 41 LOY. L.A. L. REV. 1545, 1574(2007-08).

[39] Graham H. Ryan, *What Went Wrong on the World Wide Web: The Crossraods of Emerging Internet Technologies and Attorney Advertising in Louisiana*, 71 LA. L. REV. 749, 756-57 (2011).

Another impetus for reform may occur when the first courts address where attorney blogs fall on the spectrum of solicitation.[40] While attorney blogs are widely used, no court has yet to rule on where such communication tools fall on the spectrum and, thus, how they will be regulated. Given the popularity of legal blogs, one can imagine that any ruling placing legal blogs closer to direct solicitation will draw the ire of practicing attorneys nationwide and increase the clamor for reform of the current prohibitions of direct solicitation.

The ABA has taken some limited steps to address the problems created by the proliferation of the internet and the widespread adoption by attorneys of new technologies. With Ethics 2000, the ABA identified many of the shortcomings of solicitation rules in light of technological advances.[41] In addition, the ABA actually reformed Model Rule 7.3 to restrict solicitation through "real-time electronic contact."[42] Unfortunately, the ABA has failed to offer solutions or reforms to address many of the issues with regulating solicitation in the internet era beyond merely indentifying some of the emerging issues.[43]

As technology continues to advance and attorneys continue to adopt new technologies for contacting and soliciting clients, pressure will continue to grow on the ABA and the states to address the issues with the rules regulating solicitation.

Conclusion

At present, the case law regarding direct solicitation and the First Amendment has been relatively stable. Although some courts have hinted that exceptions might exist to direct solicitation prohibitions, no court has explicitly ruled as such. While there appears to be academic and professional dissent against the prohibition, no significant reform attempt of the Model Code has occurred since the 1980s. It is possible, however, that a new ruling placing the wildly popular attorney blogs—or any of the other new technologies adopted by attorneys—closer to direct solicitation on the solicitation spectrum might spur an uproar against the Model Code's prohibition on direct solicitation and ultimately force its reform.

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[40] *See generally* Danielle A. Curtis, *Lawyer blogs: Man in suit on doorstep or flyer in mailbox?*, *available at* http://legalethicsandsocialmedia.blogspot.com/2011/02/lawyer-blogs-man-in-suit-on-doorstep-or.html (last visited February 8, 2012); Danielle A. Curtis, *Lawyer blogs banging down the door of potential clients*, *available at* http://legalethicsandsocialmedia.blogspot.com/2011/02/lawyer-blogs-banging-down-door-of.html (last visited on February 8, 2012).

[41] Graham H. Ryan, *What Went Wrong on the World Wide Web: The Crossraods of Emerging Internet Technologies and Attorney Advertising in Louisiana*, 71 LA. L. REV. 749, 763 (2011).

[42] *Id. at* 762.

[43] *See id. at* 763.