

Lazar Emanuel on Professional Responsibility: A Brief Sampler

[Roy Simon's note: Lazar Emanuel wrote more than 200 articles for NYPRR. He covered the full spectrum of topics regarding professional responsibility in New York, always with clarity, keen insight, and practical wisdom. In this section we have collected excerpts from a small sampling of his many articles. They remind us how much we have lost with Lazar's passing.]

NYSBA Committee Urges End to Mandatory Retirement (March 2007)

[Roy Simon's note: Lazar was an avid reader and kept abreast of every new development in the New York legal ethics world. The following article is especially fitting for this issue because Lazar never retired and remained vibrant and productive until his death at age 87.]

Who among us does not know personally a number of lawyers in their 70's or 80's who complain bitterly about their forced retirement from a law firm to which they devoted a lifetime of loyalty and dedication?

Now, a special committee created by NYSBA President Mark H. Alcott has concluded that mandatory retirement of older lawyers ("gray lawyers") is "unacceptable," "unwarranted," and "unwise." "A lawyer's age, standing alone, is not an appropriate criterion for determining professional capacity or employment status." The committee was chaired by Mark C. Zauderer of Flemming Zulack Williamson Zauderer LLP

The committee was asked to study and report on all practices in the legal profession that disadvantage lawyers on account of age, including hiring and firing practices. However, responding to the wide range and complexity of the prevailing issues, it decided to limit its report to the issue of mandatory retirement of law firm partners. Although the report specifically avoids advising whether mandatory retirement practices in law firms are legally enforceable – an issue that will be decided by the courts – it does discuss "the extensive legal developments" that have taken place in the area of age discrimination.

The legal profession has undergone many dramatic changes in the years since World War II. Several factors have contributed to make the issue of retirement more urgent: 1) the median age of practicing lawyers has increased from a median of 46 in the year 1960 to the point at which, by the year 2018, there will be a large number of lawyers who, "within a narrow span of years, will all reach the age at which most Americans retire;" 2) the number of lawyers in the U.S. has increased from 300,000 in 1960 to more than 1 million; 3) the number of lawyers in most firms has grown exponentially; 4) the practice has become more demanding, both physically and intellectually; and 5) changes in social attitudes have created a greater variety of retirement expectations and goals.

A study by the American Bar Foundation reported by the *National Law Journal* in May, 2005 disclosed the following:

- 1) 37% of all law firms have a mandatory retirement age;
- 2) 57% of law firms with more than 100 lawyers have a mandatory retirement age;
- 3) only 13% of firms with fewer than 10 lawyers have a mandatory retirement age;
- 4) the common age for mandatory retirement is 70;
- 5) 57 is the average age for early retirement by lawyers. Somewhat surprisingly, the committee reported that law firms with fewer than 100 lawyers do not usually have written partnership agreements, "or if they do have one, it does not include retirement provisions." In firms with written

provisions, retirement is linked to the lawyer's age, usually between 65 and 70. The provisions usually fall into two categories. In one, the lawyer must give up his equity interest at the mandated age; in the other, a lawyer who reaches the prescribed age remains in the partnership, but for a limited term and, usually, at a declining rate of compensation; at the end of the term, the lawyer leaves the partnership.

A lawyer who retires can expect to receive a variety of treatments. She is sometimes permitted to continue working as a non-equity "partner" or "special counsel," either without pay or at an hourly rate. In some firms, she is not permitted to remain at all. Those firms which permit the lawyer to remain sometimes provide the lawyer with an office and secretary.

Many firms condition non-vested monetary retirement payments on the retired partner's agreement not to compete with the firm by practicing with another law firm; in most cases, the condition does not extend to employment which is not law-related, and, even, to employment as corporate general counsel.

The issues surrounding restrictive covenants affecting lawyers are still in flux. They are affected by provisions in the New York Code of Professional Responsibility and by federal and state statutes and regulations prohibiting age discrimination. Generally, the central question is: is a law partner an "employee" of the firm as that term is defined in the statutes? ...

In rejecting the concept of mandatory retirement, the special committee reached the following consensus:

- age-based retirement is inconsistent with generally accepted employment practices in the U.S.;
- the practice compels the law firm to lose the benefit of productive partners simply because of their age;
- firms which make a more substantive, individualized and qualitative analysis of a partner's performance, instead of relying solely on her age, find that this is an important factor in the firm's well being.
- many lawyers achieve their greatest value to clients as they age – their years of experience give them a perspective and judgment which cannot be matched by younger lawyers.

Personal Reassessment In a Hardscrabble Time (April 2009)

[Roy Simon's note: As noted in the tributes above, Lazar was a man of many talents who was involved in many businesses. He was also constantly reassessing himself. Appropriately, one of his main business interests in later life was The Highlands Company, the publisher and sole distributor of the Highlands Ability Battery, an objective assessment of individual abilities.]

Hundreds of lawyers are suffering the anguish and trauma of job loss or lay-off. If you're among them, you are justifiably angry and frustrated. Caught in a swirl of events you did not cause or shape, you are searching for ways to regain your footing and your pride. What's the best way to fight your way back? Back to school to train for a related career? Cram course in a new career? Net-work? Invest in a tutored resume? Register with a professional employment service?

May I suggest another step first? Why not pause long enough to take stock of yourself?

If you've never had an assessment of your abilities, or your personal style, or your interests and values – especially under the supervision of a trained career coach or counselor – you will be pleasantly surprised and invigorated by the results. You may even find your way to a new and more satisfying career that may or may not build on your legal training. ...

Some assessments measure the style with which you respond to people and work environments. If you're a specialist, for example, you will prefer to work alone and develop your "own thing." If you're a generalist, on the other hand, you will prefer to work as part of a group. If you're an extrovert, you will be gregarious, outgoing and uninhibited; if an introvert, you may be introspective, reserved or even distant. Again, a good assessment can tell you how these qualities combine in you. There are many possible and subtle combinations on the generalist-specialist scale. You will find it helpful to know where you fit. The practice of law draws on all possible combinations on the scale, but in different ways. An introvert/specialist may be drawn to tax work, for example, while an extrovert/generalist will prefer the role of firm rain-maker and client manager. ...

However you go about it, a personal reassessment may be vital at this point in your life when everything appears so grim and challenging. For an investment of about \$500, you can purchase every assessment you need and discuss your results with a coach or counselor trained in interpreting assessment results. It's the best investment you can make at this turning point in your life, and it gives you the tools to make a proactive decision toward a fulfilling and satisfying career.

A Lawyer's Obligation To Disclose His Own Mistake (March 2004)

[Roy Simon's note: As a founding partner of the firm today known as Cowan, Liebowitz & Latman – originally called Cowan, Liebowitz & Emanuel – Lazar fully understood the heavy weight of a lawyer's duties of honesty and candor to clients, even when the lawyer's own interests might suffer. This article provides a good example of Lazar's insistence that client interests come first.]

During the NYSBA meetings in New York City last month, I participated in a panel of lawyers which considered, among other issues, the obligations of a lawyer to disclose to his client a mistake or error which may give rise to the client's claim of malpractice. I was impressed by the fact that the issue seemed not even to occur to the majority of lawyers present, although it was clearly raised by the fact patterns with which they were presented. Specifically, does a lawyer have the obligation to notify his own client of a prejudicial mistake? And, following the disclosure, may he continue to represent the client in the matter? Is the client's consent relevant to the continued representation? These questions were considered by the NYSBA Committee on Professional Ethics in Opinion 734 (11/01/00).

The Opinion was prompted by an inquiry of the Legal Aid Society. The Committee determined that the Society was governed by the same ethical standards as any law firm.

When a lawyer makes a prejudicial error, the specter of a malpractice claim looms immediately, and the lawyer is usually the first to know it. Obviously, his first reaction is to consider his own potential liability. The interests of the client may suddenly seem less important. ...

If the lawyer's error is one which cannot be remedied, the conflict between the lawyer and his client is probably also incapable of resolution. The lawyer's principal interest will consist of avoiding, or lessening the impact of, a suit for malpractice and/or a disciplinary complaint. This interest encompasses all four of the interests contemplated by DR 5-101(A) [essentially the same as today's Rule 1.7(a) (2)] – financial, business, property and personal.

The primary question, therefore, is: how substantial is the error. Can it be remedied without injury to the client? If the mistake can be remedied, the lawyer is still required to disclose the mistake, but he may then proceed to remedy it and to continue the representation. The Committee said:

Of course, not every possible error creates a possible claim for malpractice. Some errors can be corrected during the course of the representation. Others are not particularly harmful to the client's cause. In some cases, it may be questionable whether the lawyer acted erroneously at all. Therefore,

when a lawyer makes a mistake in the representation of a client, the likelihood that the lawyer's representation will be affected adversely because of the lawyer's interest in avoiding civil liability will depend upon all the relevant facts.

But some mistakes are irremediable. The most obvious of these is the failure to comply with a controlling statute of limitations or other time-sensitive mandate. ...

The only real issue for the lawyer is: How serious is my mistake? Can I fairly and reasonably suggest to the client when I disclose my mistake that I can remedy it without any injury to him? In any event, disclosure is the only wise course. It's for the client to decide what will follow.

An Overall View of the Litigation Funding Industry (Feb. 2011)

[Roy Simon's note: Lazar was deeply troubled by the litigation funding industry, especially by companies that provide non-recourse loans to personal injury plaintiffs at astronomical interest rates. Lazar wrote three separate articles about litigation funding – "Litigation Funding and The Law of Champerty" (July 2010), "A Review of the City Bar's Opinion on Litigation Financing" (October 2011), and the article that follows, which examines and amplifies a New York Times article entitled "The Steep Price of Funding."]

Because the lender faces the possibility that it will recover nothing, litigation loans come at steep prices. Arguments to support these prices are the backbone of the litigation financing industry. The New York Times expresses it this way:

Companies...say that they must charge high prices because betting on law suits is very risky. Borrowers can lose, or win, less than expected, or cases can simply drag on, delaying payment until the profit is drained from the investment. To fortify its position, the industry has started volunteering to be regulated – but on its own terms. The companies, and lawyers who support the industry, have lobbied state legislatures to establish rules like licensing and disclosure requirements, but also to make clear that some rules, like price caps, do not apply.

We of the New York Bar have not ventured into the fray to understand and assess the benefits and detriments of litigation funding. In the meantime, other states have attempted to show us the way. In Ohio, for example, the funding industry faced an adverse decision in *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St. 3d 121 (2003). The Supreme Court of Ohio held:

We are asked to address whether a nonrecourse advance of funds secured solely by an interest in a pending lawsuit and at a contracted return exceeding 180 percent per year is permissible under Ohio law. We hold that it is not. Such an agreement constitutes champerty and maintenance and thus is void under Ohio law.

The Court reasoned:

Equally troubling is a champertor's earning a handsome profit by speculating in a lawsuit and by potentially manipulating a party to the suit. ...However, a lawsuit is not an investment vehicle. Speculating in lawsuits is prohibited by Ohio law. An intermeddler is not permitted to gorge upon the fruits of litigation.

Ultimately, the Ohio legislature acted to soften the impact of the *Rancman* decision. In 2008, it passed HB 248, a bill stating that litigation financing could proceed, but that the contract with the lender had to include the following: the dollar amount of the advance; the total amount to be repaid in each six month interval; the

annual percentage rate; a five day right-to-cancel clause; and an acknowledgment by the litigant's attorney that he had reviewed the contract. Similar legislation was passed in Connecticut in 2008 and in Maine in 2009.

If other states can move to regulate the litigation finance business, why can't we? Why do we have to rely instead on an exchange of confusing questions and answers by our Courts?

Commentary: Lawyer Advertising - A Simpler Way (November 2006)

[Roy Simon's note: In June of 2006, the Presiding Justices of the Appellate Divisions circulated proposed amendments to the rules governing lawyer advertising and solicitation. As usual, Lazar displayed common sense and a feel for the rigorous demands of day-to-day law practice.]

We offer our contribution to the stream of comments which have undoubtedly been directed to the Presiding Justices of the Appellate Divisions on the proposed new rules governing lawyer advertising and solicitation. Generally, we suggest the much more simple approach of the American Bar Association (ABA), especially at this time when COSAC has proposed adoption of the format and much of the content of the ABA Model Rules.

A system for controlling lawyer advertising should be as clear and precise as possible. It should concentrate on the lawyer's commitment to truth and integrity. What more emphatic statement of this commitment can there be than Model Rule 7.1?

Communications Concerning A Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

The Rule revolves around the word "communication", a simple umbrella covering anything written or spoken. Use of this word makes superfluous the three new definitions proposed by the Judges for the terms "Advertisement", "Solicitation", and "Computer-accessed communication". . . .

With respect to those proposals of the Judges regarding labeling, filing and record keeping – we think these are unnecessarily burdensome. So long as the public is aware that the communication is in fact an advertisement, and the facts in the communication are true and not misleading, why require anything more than the word "Advertisement" on the screen - either on TV or on a computer - or on the first page of any written communication? Any why designate it "Attorney Advertising" or "an advertisement for legal services"?

Why not simply "Advertisement"? No other advertiser is required to remind the reader or the viewer that what he's seeing or hearing is an advertisement. The content tells the story. . . .