

Three Important NYSBA Ethics Opinions

BY ROY SIMON

Now that the books are closed on 2003, we can step back and consider which ethics opinions are likely to have the greatest impact on the practice of law in New York in the coming years. In this article I focus on three opinions from the N.Y. State Bar ethics committee that I think will make a significant difference in the way lawyers in New York practice law. There were many other important opinions during the past year, but the ones discussed below strike me as having especially powerful potential to bring about change.

May you attend meetings between your client and represented adverse parties?

As nearly all lawyers are well aware, DR 7-104(A)(1) - the so-called "no contact" rule - prohibits you, in the course of representing a client, from communicating about the subject matter of your representation with another party in the same matter that you "know" is represented by counsel, unless the communication is authorized by law (which it hardly ever is unless you're a prosecutor's undercover agent or you are taking a deposition pursuant to valid notice) or you have the consent of the other party's lawyer (which you basically never get in litigation and seldom get in complex transactions). Your client, however, is free to meet with other represented parties on her own initiative. Moreover, under DR 7-104(B) - a rule unique to New York - you may even suggest to your client that she meet with other represented parties to discuss the matter, and you may counsel your client extensively about what to say during those meetings.

Well, wouldn't you love to sit in on some of those meetings between your client and the other parties? Your client might even ask you to sit in so that you can counsel her during the meeting.

Are you ethically allowed to sit in on client-to-client meetings despite the no contact rule?

The New York State Bar ethics committee recently addressed that question in N.Y. State Bar Op. 768 (2003). The inquiring lawyer was employed by a government agency to advise the agency on its dealings with government contractors. During negotiations about a government contract, the lawyer wanted to sit in on meetings with high ranking non-lawyer representatives of another party to the contract that the government lawyer knew to be represented by counsel, and wanted to know what he could ethically say and do at the meeting if he were allowed to attend.

The Committee began by reaffirming that in a purely commercial transaction, the word "party" in DR 7-104(A)(1) means any "person," including a party to a contract or other transaction. In other words, I may be permitted a pun, parties aren't just for litigators.

Next, the Committee zeroed in on the definition of the word "communicate." Would your silent attendance at a client-to-client meeting be a forbidden communication under DR 7-104(A)(1)? No, it

wouldn't be a communication at all, the Committee said. To "communicate," in common parlance, means to "impart," "convey," "inform," "transmit," or "make known." It presupposes some form of "transmission of information." Accordingly, DR 7-104(A)(1) proscribes only your transmission of information - such as your client's legal position or negotiating points - to a person you know to be represented by counsel. The no-contact rule as expressed in DR 7-104(A)(1) thus does not absolutely prohibit your silent attendance at meetings with represented parties notwithstanding the lack of consent from - or even despite objections from - the lawyers representing those opposing parties.

Nevertheless, you cannot ethically attend a client-to-client meeting with another represented party without reasonable advance notice. If the purpose of your attendance at the client-to-client meeting is to facilitate your post-meeting advice to your client about the matter - and why else would you bother to attend? - then you must comply with DR 7-104(B). That rule, which is unique to New York, requires you to give "reasonable advance notice" to the other party's lawyer that you have advised your client to meet directly with the other party.

Once you have given reasonable advance notice to opposing counsel, however, the opposing counsel no longer has veto power over his client's decision to communicate directly with your client. According to EC 7-18, the object of the advance notice requirement is to assure that the represented party's lawyer has the "opportunity to advise his or her own client with respect to the client-to-client communications before they take place." Because client-to-client communication removes a key danger addressed by the no-contact rule, however - namely, the danger that "lawyers generally are in a better position, by education and training, to overwhelm a non-lawyer and exploit legal knowledge in the course of communicating directly with the non-lawyer" - DR 7-104(B)'s reasonable advance notice requirement serves mainly to ensure that the client-to-client meeting is fair. In the Committee's words, it is "a guarantee of fairness" in the course of dealings between parties represented by counsel.

What if you want to counsel the client during the client-to-client meeting - maybe take the client aside for a quick conference, or hand notes to the client about what to say? No problem, the Committee said. As long as you have given the required "reasonable advance notice" to the lawyers for the other represented parties, you may attend the meeting and counsel your client. But there are limits. With respect to the represented parties who attend the meeting without counsel, you must remain truly silent. For example, absent express consent from the other lawyers, you may not communicate your client's legal position to the represented parties who show up without counsel, and you may not advise your client in a way that can be overheard (and is perhaps even intended to be overheard) by the represented parties. Those would be forbidden "communications" with parties known to be represented by counsel.

Of course, DR 7-104(A)(1) applies only if you "know" that the party is "represented by a lawyer in that matter." And the mere fact that you know that a corporation has an in-house legal staff does not necessarily mean that you 'know' that a member of the in-house staff is representing the corporation in your particular matter. But "when a lawyer has a reasonable basis to believe that a party may be represented by counsel, then the lawyer has a duty of inquiry to ascertain whether that party is in fact represented by counsel in connection with a particular matter." At a minimum, if you have a reasonable basis to believe that another party to a transaction may be represented by counsel, you must make a reasonable inquiry.

If it turns out that the other party is not represented by counsel, then the game changes and the applicable rule becomes DR 7-104(A)(2), which prohibits a lawyer from giving advice to an unrepresented party, except the advice to secure counsel, if the unrepresented party's interests "are or have a reasonable possibility of being in conflict with the interests of the lawyer's client." In that setting - attending a meeting with unrepresented parties to a transaction or proposed transaction - may you ethically state your client's legal position? Yes, the Committee said. The purpose of DR 7-104(A) (2) is "to protect parties lacking counsel from receiving legal advice from a lawyer whose client's interests are or may be adverse to those of the unrepresented party."

In our scenario, even assuming that your client's interests conflict with (or have a reasonable possibility of conflicting with) the interests of the unrepresented parties, you may state your client's legal position.

In sum, under N.Y. State Bar Op. 768: (a) you may silently attend a client-to-client meeting between your client and a represented party even if the other party's lawyer does not attend the meeting, provided you give reasonable advance notice to the other lawyer that you plan to attend; (b) you may counsel your client during the meeting, either silently or in writing, but not out loud; and (c) if you do not "know" that the other parties are represented by counsel, and have no reason to believe that they are represented by counsel, then you may state your client's legal position during the meeting without violating the no-contact rule.

Settling legal malpractice claims quietly

Now I turn to the implications of another significant recent opinion from the N.Y. State Bar ethics committee - **N.Y. State Bar Op. 772 (2003)**. Lazar Emanuel has summarized that opinion in these pages - see, Lazar Emanuel, *Threatening Criminal Charges to Obtain Civil Advantage*, NYPRR, January 2004, page 1. I will not repeat his discussion. Instead, I will look at the implications of the opinion for legal malpractice claims.

If your law firm commits legal malpractice, or is accused of committing legal malpractice, the same facts that support the underlying legal malpractice claim would often support disciplinary charges. May your firm ethically insist on a settlement term in which the malpractice plaintiff agrees not to file a grievance against your firm? If the malpractice plaintiff is aggressive and has already filed a grievance, is it ethical for you to insist that the plaintiff agree to withdraw his pending grievance as part of the settlement?

Conversely, is it ethical for the plaintiff's lawyer to say, "If you agree to pay my client \$140,000 to settle my malpractice claim, my client will agree not to file a grievance against you"? Or may the plaintiff's lawyer say, "If you settle on our terms, my client will withdraw his pending grievance against you"? May the plaintiff's lawyer ethically be even more aggressive and make a naked threat - e.g., "If you don't settle my client's malpractice claim for the amount we're demanding, he's going to file a grievance against you for conflicts of interest, neglect, incompetence, excessive fees, and whatever other Disciplinary Rules your firm violated when it breached its fiduciary duties and committed legal malpractice"?

Before N.Y. State Bar Op. 772, I thought all of this conduct was unethical because I thought that such provisions or threats violated DR 7-105, which provides that a lawyer "shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." The United States Supreme Court said years ago, in a case called *In re Ruffalo*, 390 U.S. 544 (1968), that lawyer

disciplinary proceedings are "quasi-criminal," and I thought that threatening to present "quasi-criminal charges" would violate DR 7-105, and perhaps be prejudicial to the administration of justice as well, in violation of DR 1-102(A)(5). Indeed, in Nassau County Bar Op. 98-12 (1998), the Committee stated that "[t]hreatening to file a grievance has been construed to constitute the same violation as to threaten to file criminal charges, and the Committee expressly concluded that a "threat to file a grievance if the adversary attorney would not offer a better settlement would...violate DR 7-105."

But N.Y. State Bar Op. 772 (2003) calls that logic into question. It points out that DR 7-105 refers only to "criminal charges, "not to allegations regarding the violation of administrative or disciplinary rules" New York's version of DR 7-105 thus differs from similar rules in some other jurisdictions, where the language of the analogous disciplinary rule also expressly refers to "administrative or disciplinary charges." These observations led the ethics committee to state:

[W]e concludes that the threatened or actual filing of complaints with or the participation in proceedings of, administrative agencies or disciplinary authorities lies outside the scope of DR 7-105(A). We recognize that there exist ethics opinions in this and other jurisdictions in which the threatened filing of a complaint with an administrative agency or disciplinary authority has been held to violate DR 7-105(A) or its analogue. These decisions rely at least in part on the similar purposes of the criminal justice system and the administrative law system - to protect society as a whole. However, we reject that general analogy in light of the specific language of DR 7-105(A), which concerns only "criminal charges." In our view, DR 7-105(A) is limited in scope to actions related to "criminal charges."...

If N.Y. State Bar Op. 772 is correct, then a lawyer may insist when settling a malpractice claim that the opposing client agree not to file a grievance with the disciplinary authorities based on the same conduct - and the lawyer for the plaintiff may dangle the promise that the plaintiff will not file a grievance as an inducement to the lawyer to agree to the plaintiff's demand for damages, or a promise to withdraw a grievance that has already been filed, or even threaten to file a grievance unless the lawyer settles the malpractice claim on the plaintiff's terms.

Nevertheless, N.Y. State Bar Op. 772 may not be the last word. For one thing, the State Bar ethics committee is totally independent of any grievance authority, and the opinions of the ethics committee, no matter how logical or well reasoned they may be, are not binding on courts or disciplinary authorities. Thus, threatening to file a grievance unless the lawyer meets a settlement demand, or including a "no grievance" clause or a promise to withdraw a pending grievance in a legal malpractice settlement agreement, still carries some risk, especially since several other jurisdictions prohibit such agreements.

Moreover, even if N.Y. State Bar Op. 772 is correct, threatening to file a grievance against a lawyer who refuses to settle a legal malpractice case, or demanding that a plaintiff withdraw a pending grievance (or agree not to file one) may violate DR 1-102(A)(5), which prohibits a lawyer from engaging in any conduct "prejudicial to the administration of justice." The purpose of the lawyer disciplinary system is to protect the public, not to create leverage for private parties in settlement negotiations, so a "no grievance" clause in a legal malpractice settlement agreement may violate DR 1-102(A)(5) even if it is permitted under DR 7-105.

In any event, I am confident that no view of DR 7-105 would allow a lawyer to condition a malpractice settlement on a client's promise not to cooperate with disciplinary authorities in an investigation of the defendant lawyer's conduct. A "no cooperation" clause might well violate DR 7-109 ("Contact with Witnesses"), which provides that a lawyer "shall not suppress any evidence that the lawyer or *the client* has a legal obligation to reveal or produce" (emphasis added), as well as the more general prohibition in DR 1-102(A)(5).

Reciprocal referral agreements with nonlegal professionals

In November of 2001, to ward off demands for integrated multidisciplinary practices between lawyers and nonlegal professionals such as accountants, New York's courts adopted a unique DR 1-107, entitled "Contractual Relationship Between Lawyers and Nonlegal Professionals." But the rule permits full-blown alliances -including expense sharing, joint advertising, and reciprocal referral relationships - only with nonlegal professionals or nonlegal professional service firms that appear on a list kept by the Appellate Divisions.

So far the Appellate Division list includes only accountants, engineers, architects, land surveyors, and social workers - not a very big menu of choices. Reciprocal referral agreements with accountants may be attractive to firms of all sizes, but many lawyers - especially lawyers in smaller law practices - are also interested in reciprocal referrals agreements with nonlegal professionals like insurance agents, stock brokers, doctors, and financial planners. Unfortunately, New York's Disciplinary Rules do not comfortably spell out the conditions under which lawyers may enter into reciprocal referral agreements with nonlegal professionals who are not on the Appellate Division list.

In **N.Y. State Bar Op. 765** (2003), the State Bar ethics committee attempted to fill that gap. [See, Lazar Emanuel, *NYSBA OK's Reciprocal Referral Arrangements with Brokers*, NYPRR, October 2003, page 1]. The opinion expressly addressed whether a lawyer may ethically enter into and maintain a reciprocal referral agreement with an insurance agent or a securities broker. The Committee noted that relationships consisting "solely of non-exclusive reciprocal referral agreements or understandings" between lawyers and nonlegal professionals are "carved out" of regulation by DR 1-107 and are instead regulated entirely by other rules, mainly DR 2-103(B), which provides that - except in the context of a DR 1-107(A) contractual relationship - a lawyer "shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client." Based on DR 2-103(B), the Nassau County Bar Association ethics committee had opined in Nassau County 97-8 (1997) that mutual referral arrangements were prohibited because even a nonexclusive undertaking to make referrals constitutes the giving of "value" prohibited by DR 2-103(B)(1).

In Op. 765, the State Bar ethics committee disagreed. Viewed in light of the relatively new DR 1-107, the Committee decided there was "no textual basis for restricting nonexclusive reciprocal referral arrangements" to the listed professions, and, similarly, "little policy basis for limiting a lawyer's mutual referral of business to architects, engineers, accountants, land surveyors and certified social workers." Accordingly, the Committee concluded that "a nonexclusive mutual referral arrangement between a lawyer and an insurance agent or securities broker is permitted by DR 1-107(C) and DR 2-103(B)(1)." However, the Committee cautioned that any reciprocal referral understanding, agreement or contract between a lawyer and nonlegal professional must be "nonexclusive." That is, "a lawyer can never agree to

refer all clients, or a specified quota, to the insurance or securities brokerage entity, because the lawyer must continue to exercise professional judgment on behalf of the client in making the referral." In addition, the Committee said that a reciprocal referral arrangement "would generally constitute a conflict of interest under DR 5-101(A) such that the relationship would need to be disclosed and consent obtained before the lawyer made the referral."

With the demise of Arthur Andersen and the continuing front page saga of corporate fraud on a grand scale, the public and the legal profession seem to have lost any yearning for truly integrated multidisciplinary practices, in which lawyers and accountants (or land surveyors, certified social workers, or other nonlegal professionals) could set up shop as equals, forming partnerships and sharing legal fees as freely as lawyers do with each other. But that makes reciprocal referral agreements all the more significant. I encourage law firms to take advantage of the opportunity outlined by N.Y State Bar Op. 765 to form new non-exclusive reciprocal referral agreements with nonlegal professionals. I urge lawyers to draw on their experience and imagination to determine how lawyers can work with nonlegal professionals to serve clients better, and that lawyers form networks of non-exclusive reciprocal referral agreements that bring the dream of "one-stop shopping" a few steps closer to reality.

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