New Jersey Law Journal

VOL. 215 - NO 3 MONDAY, JANUARY 20, 2014 ESTABLISHED 1878

Professional Malpractice

Ethics for Transactional Attorneys: Developments in 2013

Eight important items relevant to legal malpractice

By Gianfranco A. Pietrafesa

Lawyers should be aware of several significant developments that took place in the area of legal ethics over the past year. Although they apply to all attorneys, this article is written from the perspective of a lawyer representing clients in transactional matters.

• *Conflict of interest results in suspension.* We know the old saying that bad facts make bad law. Well, bad facts in an ethics matter result in discipline. In *In re Michael A. Casale*, 213 N.J. 379 (2013), an attorney prepared a new will for an elderly woman that left most of her assets to the attorney's long-time client and friend and that named the attorney as the executor (resulting in $70,000 in commissions). The attorney represented his client-friend in 30 matters over 15 years and had a close, personal relationship with him. The attorney also represented the woman in the sale of her Spring Lake oceanfront home to his client-friend for inadequate consideration; namely, a purchase price that was $1.3 million less than the value of the home, with $50,000 payable at closing and a $1.25 million mortgage. Further, the new will included a clause forgiving the mortgage upon the woman's death.

The Supreme Court found that the attorney did not fully disclose his relationship with his client-friend to the elderly woman, did not inform her of the risks and disadvantages of representing her while representing the client-friend, and did not obtain the woman's informed consent. It held that the attorney violated the conflicts of interest rules in RPC 1.7(a)(1) and (2), and suspended him for three years. See also *In re Michael A. Casale*, DRB 12-143 (Nov. 1, 2012).

• *Attorney discipline for conduct outside the law.* Attorneys are supposed to be honest and trustworthy, so that the public views them as persons with good character. In this regard, RPC 8.4 (Misconduct) provides in part:

> It is professional misconduct for a lawyer to:…(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; [and] (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;…

These Rules of Professional Conduct (RPCs) apply to an attorney's private life as well as to the practice of law. If an attorney is a dishonest and untrustworthy person, it is likely that he or she is a dishonest and untrustworthy lawyer. The public, and the profession, must be protected from such attorneys.

In *In re Vincent Paragano*, 213 N.J. 248 (2013), the Supreme Court disbarred an attorney for dishonest acts outside the practice of law. The misconduct included repeated misrepresentations to business partners to conceal his purchase of property, misrepresentations on loan documents to obtain financing, and creation of fictitious documents to cover his misconduct. See also *In Re Vincent Paragano*, DRB 12-186 (Dec. 5, 2012).

• *No obligation to nonclients.* It is difficult, but not impossible, for a nonclient to prevail in a lawsuit against an attorney. In *Lawrence v. Schenck Price Smith & King,* 2013 N.J. Super. Unpub. LEXIS 1922 (App. Div. July 30, 2013), the Appellate Division confirmed that an attorney has no obligation to nonclients to explain legal documents. There, a mother personally guaranteed her daugh-

Pietrafesa is a partner in Archer & Greiner and the immediate past chairman of the NJSBA Business Law Section. He is also the moderator of the annual NJICLE seminar on Ethics for Transactional Attorneys.

ters' bank loan, which would be used to buy a business. The mother was not represented by counsel at the closing. The daughters' attorney handed a document to the mother for signature, stating it was "just the guarantee." The attorney did not make any other statements, nor did he ask the mother whether she was represented by counsel or wished to consult with an attorney. When things went south with her daughters' business, the mother sued the attorney for legal malpractice, claiming that the attorney should have explained the guarantee and its legal significance. The Appellate Division held that the attorney had no affirmative duty to the mother, who was not his client.

• *Client indemnification of attorney for third-party claims.* Clients often ask their attorneys to provide opinion letters to a third party, including in loan transactions and, to a lesser extent, in mergers and acquisitions. In a New York matter, an attorney asked his client for indemnification in the event that the third party filed a claim against the attorney.

RPC 1.8 (Conflict of Interest: Current Clients; Specific Rules) provides in pertinent part:

> (h) A lawyer shall not: (1) *make an agreement prospectively limiting the lawyer's liability to a client for malpractice* unless the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request. Notwithstanding the existence of those two conditions, the lawyer shall not make such an agreement unless permitted by law and the client is independently represented in making the agreement;…(Emphasis added.)

The New York State Bar Association Committee on Professionalism stated that a client may indemnify an attorney for third-party claims. Although RPC 1.8(h) prohibits agreements limiting an attorney's liability to a *client*, it does not apply to a client's indemnification of an attorney against claims by a *nonclient*. See NYSBA Committee on Professionalism Ethics Opinion 969 (6-12-13). It remains to be seen whether the same result would occur in New Jersey.

• *No more retaining liens.* A retaining lien is when a lawyer retains a client's file until the client pays his legal fees. A retaining lien is asserted when an attorney has withdrawn or has been terminated by the client. RPC 1.16(d) has been amended to eliminate retaining liens:

> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. *No lawyer shall assert a common law retaining lien*. (Emphasis added.)

• *Trade names.* The RPCs do not presently allow the use of a trade name in a firm name, but change is coming. The New Jersey Supreme Court has amended RPC 7.5(e) to allow a law firm to use a trade name, so long as the trade name: (a) describes the nature of the legal practice in terms that are accurate, descriptive and informative; (b) is not misleading, comparative or suggestive of an ability to obtain results; and (c) is accompanied by the name of the attorney responsible for managing the firm. For example, "Millburn Tax Law Associates, John Smith, Esq." is permissible, but "Best Tax Lawyers" is not. Amended RPC 7.5(e) will not be effective until after a special committee "address[es] the various aspects to the introduction of the use of trade names into our legal community." See *In the Matter of the Letter Decision of the Committee on Attorney Advertising*, 213 N.J. 171 (2013).

• *Ethics and technology.* Technology has become important in the practice of law—email, texts, e-filing, PDFs, paperless files, metadata, etc. Lawyers and their staff are more prone to make inadvertent disclosures of client confidential information using email and other technology, for example, by sending an email to the wrong addressee or attaching the wrong document to an email. Confidential information is contained in smartphones, tablets and laptops, which leave the office and may be lost, stolen or misplaced. The ABA has proposed revisions to the Model Rules of Professional Conduct that require lawyers to know about and keep up to date with technology and data security. See www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html. The New Jersey Supreme Court has recently appointed a committee to review the ABA's amendments to the Model Rules of Professional Conduct; therefore, it is reasonable to believe that similar amendments will be adopted in New Jersey.

• *Revisions to principles of professionalism.* Finally, the New Jersey Commission on Professionalism revised its Principles of Professionalism to clarify that they apply to nonlitigation matters, such as transactional work and counseling of clients. See www.njsba.com/resources/njcop/njcop-principle-prof.html. See also Gianfranco A. Pietrafesa, "In Pursuit of Professionalism among Business Lawyers," *New Jersey Lawyer Magazine* (June 2012) (proposing supplemental principles of professionalism for transactional lawyers).■