ETHICAL CONSIDERATIONS IN AUTOMOBILE CASES

New York State Bar Association - April 1, 2015

I. Introduction

The New York Rules of Professional Conduct were formally adopted by the Appellate Division of the New York State Supreme Court effective April 1, 2009. These rules superceded the former Part 1200 (Disciplinary Rules of the Code of Professional Responsibility) govern the resolution of potential conflicts of interest. The rules are published as Part 1200 of the Joint Rules of the Appellate Division (22 NYCRR Part 1200). The Appellate Division has not enacted the Preamble, Scope and Comments set forth in the Rules. These portions are only for clarification purposes. The Rules always control in a conflict between a Preamble, Scope and Comments.

II. Conflict of Interest: Current Clients- Rule 1.7

A. Defendant's example- Graves Amendment

Vinokur v Raghunandan, 27 Misc.3D 1239 (A), June 25, 2010

Facts: Plaintiff sues Defendant driver (negligently entrustment) and owner (negligence operation) Defendant moves for summary judgment on behalf of owner based on Graves Amendment. The Graves Amendment (49 U.S.C. § 30106) which states that:

> "An owner of a motor vehicle that rents or leases the vehicle to a person .... shall not be liable under the law of any State...., by reason of being the owner of the vehicle....., for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if the..... the owner .... is engaged in the trade or business of renting or leasing motor vehicles; and... there is *no negligence* or criminal wrongdoing *on the part of the owner."*

Defendants claim that there is no conflict because the only theory of liability alleged is V.T.L.§388 which negates any independent theory of liability. Hence, no conflict exists.

Now let's example the above in relation to any potential conflict of interest.

Well let's look at Rule 1.7(a) of the Rules of Professional Conduct.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Let's examine the fact pattern with respect to the Rule. Is there a conflict? See a) above. Are there differing interests? Should have been aware of the potential conflict when the defendants received the summons and complaint? Courts have held that where the law firm represented both the driver of a leased vehicle and the leasing company and they move for summary judgment on behalf of the leasing company under the Graves Amendment that an inherent conflict exists because "if the case is dismissed pursuant to the Graves Amendment, the other driver is left bearing full liability for the claims alleged in the complaint. *Graca v Krasnik*, 20 Misc.3d 1127 [A] There is no one to oppose the motion. The Court also stated the Graves Amendment is only a defense to vicarious liability, so a defendant must also show no negligence on their part. Stated that consent would not cure the conflict.

My Court was faced with a situation regarding negligence maintenance.

However Courts have still disqualified law firms even though the law firm submitted an affidavit from the driver stating that there were no mechanical defects in the vehicle. The possibility that the leasing company may be negligent is where the inherent conflict exists. Driver not expert as a mechanic. *Meigel v Schulman*, 24 Misc.3d 1242 [A]. Maybe counsel would want discovery including the maintenance records.

A Federal Court held that no conflict exists where all discovery is complete and the only allegation of is vicarious liability. *Drake v Karahuta* (2010WL 376388)

So a conflict exists, Now let's turn to 1.7 (b) It states

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How is it possible to show (1) and (3)? What happens if driver gives "his informed consent in writing"

See Tavarez v Hill, 23 Misc.3d 377. (Even when consent given, the dual representation is fraught with the potential for irreconcilable conflict even after discovery and consent.)

Result- *Graca*- new counsel to driver, leasing company or both.
Meigel- only disqualified representing the driver.
Vinokur- only disqualified driver- no opinion as to owner.

B. Plaintiff's example-

1) Solicitation of business from Medical Offices

It is permissible for attorneys to accept clients referred from medical establishments and equally permissible for attorneys to pay the providers for the market price for coping of documents need to prosecute the claim. The Appellate Division in two matters highlighted the ethical problems inherent in this arrangement. Referring clients in exchange for payment of the narrative reports.

Meyerson, 46 AD3d 141 [2007] involved the sanction of a public censure of an attorney.. The attorney agreed to pay $800 for medical reports for clients referred to him by the medical provider. He paid for about 11 reports. When two clients did not purse claims, the monies were refunded to the attorney. Also when the referrals came from the attorney, no fee was charged for the reports. The Court commented on this "quid pro quo" arrangement as they put it which was merely a guise for the provider to refer clients and the attorney paying a fee in the form of a narrative report.

It should be noted that is not unethical to accept referrals and to pay market rates for the narrative reports, rather it's the real intent of the arrangement which imposed sanctions upon the attorney.

Rudgayzer, 2010 N.Y. Slip Op 9091 [First Department 2010] Attorney paid $500 for narrative reports which was really an inducement for the medical provider to refer additional clients to the attorney. The attorney agreed to handle 10-15 cases he did not want to and paid the fee for the narrative reports so that he would continue to get referrals from the provider. The Court stated that it was "akin to a bribe" and constituted solicitation. **Rule 7.3 for discussion of solicitation.** Two month suspension.

Referral paid by time

Prospective clients

See *Tavarez v Hill.*

C. Infant Compromise Orders

D. Lawyers' access to social networking websites.

A lawyer who represents a client in a pending litigation, and who has access to the Facebook or MySpace network used by another party in litigation, may access and review the public social network pages of that party to search for potential impeachment material. As long as the lawyer does not "friend" the other party or direct a third person to do so, accessing the social network pages of the party will not violate **Rule 8.4** (prohibits misleading or deceptive conduct) or **Rule 5.3(b)(1)** (imposing responsibility on lawyers for unethical conduct by nonlawyers acting at their discretion).

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RULE 7.2:

PAYMENT FOR REFERRALS

(a) 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, except that:

(1) a lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by Rule 5.8, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; and

(2) a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by Rule 1.5(g).

(b) A lawyer or the lawyer's partner or associate or any other affiliated lawyer may be recommended, employed or paid by, or may cooperate with one of the following offices or organizations that promote the use of the lawyer's services or those of a partner or associate or any other affiliated lawyer, or request one of the following offices or organizations to recommend or promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other affiliated lawyer as a private practitioner, if there is no interference with the exercise of independent professional judgment on behalf of the client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school;

(ii) operated or sponsored by a bona fide, non-profit community organization;

(iii) operated or sponsored by a governmental agency; or

(iv) operated, sponsored, or approved by a bar association;

(2) a military legal assistance office;
(3) a lawyer referral service operated, sponsored or approved by a bar association or authorized by law or court rule; or
(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) Neither the lawyer, nor the lawyer's partner, nor associate, nor any other affiliated lawyer nor any nonlawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer;

(ii) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization;

(iii) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter;

(iv) The legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved by the organization for the particular matter involved would be unethical, improper or inadequate under the circumstances of the matter involved; and the plan provides an appropriate procedure for seeking such relief;

(v) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court or other legal requirements that govern its legal service operations; and

(vi) Such organization has filed with the appropriate disciplinary authority, to the extent required by such authority, at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel and financial results of its legal service activities or, if it has failed to do so, the lawyer does

not know or have cause to know of such fail

Communication- Rule 1.4

(a) A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;

(ii) any information required by court rule or other law to be communicated to a client; and

(iii) material developments in the matter including settlement or plea offers.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client's reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Kushner v Eliopulos, 27 Misc.3d 1218 [A]

Although in context of a criminal matter, a good guide for attorneys handling motor vehicle cases. Defendants have guidelines to report to carriers but remember not the client. Plaintiff's attorneys should keep clients informed. Practical tips:

Send out notices; return calls promptly; memorialize everything.