AMERICAN BANKRUPTCY INSTITUTE

Mid-Atlantic Bankruptcy Workshop

"40 Under 40" Panel: Practical & Ethical Pitfalls in a Post-COVID World

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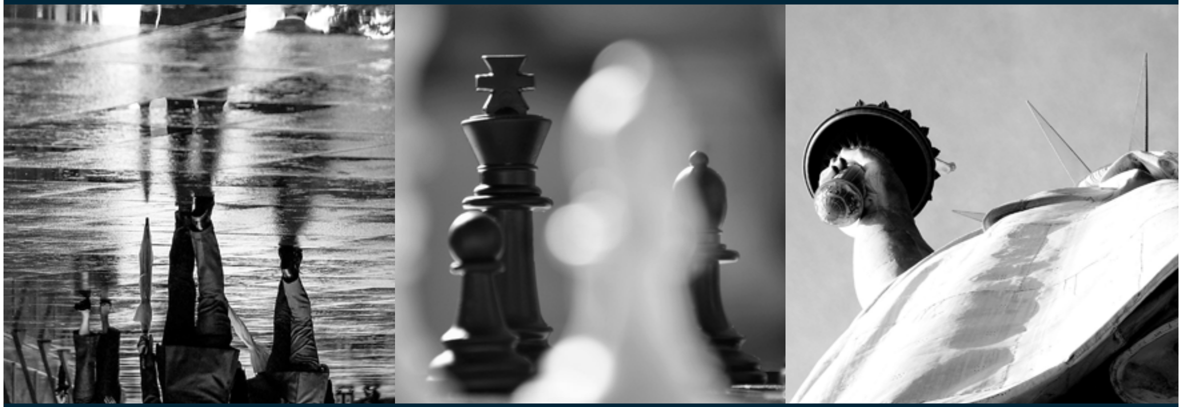

2022 Mid-Atlantic Bankruptcy Workshop

40 Under 40 Panel

Practical & Ethical Pitfalls in the Post-COVID World

August 4, 2022

AGENDA

1. How COVID-19 Has Changed the Practice
2. Ethical Implications of Post-Pandemic Practice
3. Professional & Business Development Post-Pandemic
4. Mentorship & Development of Junior Attorneys in Remote/Hybrid Office Environments

THIS PRESENTATION DOES NOT CONSTITUTE LEGAL ADVICE. LEGAL ADVICE CAN ONLY BE GIVEN AFTER RETENTION AND DUE DILIGENCE.

How COVID-19 Has Changed the Practice

- **Does it matter where I sit?**
  - March 2020: an abrupt halt to "business as usual"
  - "Work From Home"
  - "Digital Nomads" -- "work anywhere, together"

  - Am I complying with the Attorney Ethics Rules??

How COVID-19 Has Changed the Practice

- **Implications of "in-state" versus "out-of-state" practice**

- **ABA Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice**

  - (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

  - (b) ***A lawyer who is not admitted to practice in this jurisdiction*** shall not:
    - (1) except as authorized by these Rules or other law, ***establish an office or other systematic and continuous presence in this jurisdiction for the practice of law***; or
    - (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

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How COVID-19 Has Changed the Practice

- **ABA Formal Opinion 495: Lawyers Working Remotely (Dec. 16, 2020)**

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction.

This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules

- ***Purpose of ABA Model Rule 5.5: "***protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed."

How COVID-19 Has Changed the Practice

- *Cf*. Delaware SBA Committee on Professional Ethics, Formal Opinion 2021-1
  - Question: whether an attorney licensed in Delaware may practice Delaware law while working remotely from another jurisdiction in which the lawyer is not licensed, such as from a home office, without engaging in the unauthorized practice of law in violation of Rule 5.5(a) of the Delaware Lawyers' Rules of Professional Conduct ("DLRPC")?
  - Conclusion: [L]awyers licensed in Delaware (the "licensing jurisdiction") may ethically engage in the practice of Delaware law, for clients with Delaware matters, while physically present in another jurisdiction in which they are not admitted ("local jurisdiction") unless a statute, rule, case law, or opinion of the local jurisdiction prohibits the conduct, provided that such lawyers may not hold themselves out as being licensed to practice in the local jurisdiction and may not advertise or otherwise hold themselves out as having an office in the local jurisdiction, or provide or offer to provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.
- *Cf*. Pennsylvania/Philadelphia, Joint Formal Opinion 2021-100
  - Adopts ABA Formal Opinion 495
  - "[A] lawyer licensed in Pennsylvania, may work remotely from another jurisdiction even if the lawyer is not licensed in that jurisdiction, so long as appropriate steps are taken as more fully set forth in the ABA Formal Opinion."

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How COVID-19 Has Changed the Practice

- **BACK TO THE BEACH?!? ...NOT SO FAST.**
  - Only if *"the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law"*

- Virginia, Legal Ethics Opinion 1896,
  Out-Of-State Lawyers Working Remotely in VA

  - Citing to Utah Ethics Opinion 19-03 (2019) ("what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same – none.")

  - The committee endorses the position expressed by the Utah State Bar and agrees that ***Virginia has no interest in restricting the practice of a lawyer whose only connection to Virginia is a physical location within the state***. (emphasis added)

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How COVID-19 Has Changed the Practice

- New Hampshire, RPC 5.5(d)(3)
  - **(d)** A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence] in this jurisdiction that:
    (3) relate solely to the law of a jurisdiction in which the lawyer is admitted.

- Minnesota, RPC 5.5(d)
  - **(d)** A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services Minnesota that exclusively involve federal law, tribal law or the other law of another jurisdiction in which the lawyer is licensed to practice law, provided the lawyer advises the lawyer's client's that the lawyer is not licensed to practice in Minnesota.

- **BOTTOM LINE:** ***MUST COMPLY WITH LOCAL AND LICENSING JURISDICTIONS WHEN SEEKING TO PRACTICE LAW FROM A "REMOTE" LOCATION.***

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QUESTIONS?

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gibbonslaw.com NJ NY PA DE DC FL

April 17, 2019

Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law

Share:

Law Firms And Associations

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,

(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].

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AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 495 **December 16, 2020**

Lawyers Working Remotely

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.[1]

Introduction

Lawyers, like others, have more frequently been working remotely: practicing law mainly through electronic means. Technology has made it possible for a lawyer to practice virtually in a jurisdiction where the lawyer is licensed, providing legal services to residents of that jurisdiction, even though the lawyer may be physically located in a different jurisdiction where the lawyer is not licensed. A lawyer's residence may not be the same jurisdiction where a lawyer is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a jurisdiction in which they are not licensed to practice. Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances enumerated in this opinion.

Analysis

ABA Model Rule 5.5(a) prohibits lawyers from engaging in the unauthorized practice of law: "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so" unless authorized by the rules or law to do so. It is not this Committee's purview to determine matters of law; thus, this Committee will not opine whether working remotely by practicing the law of one's licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction. If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

Absent such a determination, this Committee's opinion is that a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the "licensing jurisdiction") even from a physical location where the lawyer is not licensed (the "local jurisdiction") under specific parameters. Authorization in the licensing jurisdiction can be by licensure of the highest court of a state or a federal court. For purposes of this opinion, practice of the licensing jurisdiction law may include the law of the licensing jurisdiction and other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. In other words, the lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction. As recognized by Rule 5.5(d)(2), a federal agency may also authorize lawyers to appear before it in any U.S. jurisdiction. The rules are considered rules of reason and their purpose must be examined to determine their meaning. Comment [2] indicates the purpose of the rule: "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." A local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction. A local jurisdiction, however, does have an interest in ensuring lawyers practicing in its jurisdiction are competent to do so.

Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis."[2] A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence.[3] Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subparagraph (b)(2) prohibits a lawyer from "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in [the] jurisdiction" in which the lawyer is not admitted to practice. A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is "holding out" as practicing law in the local jurisdiction. If the lawyer's website,

[2] DICTIONARY.COM, https://www.dictionary.com/browse/establish?s=t (last visited Dec. 14, 2020).
[3] To avoid confusion of clients and others who might presume the lawyer is regularly present at a physical address in the licensing jurisdiction, the lawyer might include a notation in each publication of the address such as "by appointment only" or "for mail delivery."

letterhead, business cards, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not "held out" as prohibited by the rule.

A handful of state opinions that have addressed the issue agree. Maine Ethics Opinion 189 (2005) finds:

> Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

Similarly, Utah Ethics Opinion 19-03 (2019) states: "what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none."

In addition to the above, Model Rule 5.5(c)(4) provides that lawyers admitted to practice in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in the local jurisdiction that arise out of or reasonably relate to the lawyer's practice in a jurisdiction where the lawyer is admitted to practice. Comment [6] notes that there is no single definition for what is temporary and that it may include services that are provided on a recurring basis or for an extended period of time. For example, in a pandemic that results in safety measures—regardless of whether the safety measures are governmentally mandated—that include physical closure or limited use of law offices, lawyers may temporarily be working remotely. How long that temporary period lasts could vary significantly based on the need to address the pandemic. And Model Rule 5.5(d)(2) permits a lawyer admitted in another jurisdiction to provide legal services in the local jurisdiction that they are authorized to provide by federal or other law or rule to provide. A lawyer may be subject to discipline in the local jurisdiction, as well as the licensing jurisdiction, by providing services in the local jurisdiction under Model Rule 8.5(a).

Conclusion

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2021-1
July 9, 2021

This opinion ("Opinion") is merely advisory and is not binding on any attorney, court, or any other tribunal.

Nature of the Inquiry

Members of the Delaware State Bar Association have asked the Committee on Professional Ethics ("the Committee") to address whether an attorney licensed in Delaware may practice Delaware law while working remotely from another jurisdiction in which the lawyer is not licensed, such as from a home office, without engaging in the unauthorized practice of law in violation of Rule 5.5(a) of the Delaware Lawyers' Rules of Professional Conduct ("DLRPC"). This Opinion addresses only the application of Rule 5.5(a) of the DLRPC.

Conclusion

The Committee concludes that lawyers licensed in Delaware (the "licensing jurisdiction") may ethically engage in the practice of Delaware law, for clients with Delaware matters, while physically present in another jurisdiction in which they are not admitted ("local jurisdiction") unless a statute, rule, case law, or opinion of the local jurisdiction prohibits the conduct, provided that such lawyers may not hold themselves out as being licensed to practice in the local jurisdiction and may not advertise or otherwise hold themselves out as having an office in the local jurisdiction, or provide or offer to provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

Background

In light of the COVID-19 pandemic, it has been increasingly common for lawyers to practice remotely. The emergency restrictions that the Governor of the State of Delaware and the Chief Justice of the Delaware Supreme Court have imposed have led many Delaware law offices to require their lawyers and staff to work from home over the past year or more. Lawyers who are working remotely have sought clarification as to whether and under what conditions they may work remotely on matters of Delaware law, from other jurisdictions, without engaging in the unauthorized practice of law in violation of Rule 5.5(a) of the DLRPC.

Discussion

The American Bar Association Standing Committee on Ethics and Professional Responsibility addressed this issue in Formal Opinion 495, Lawyers Working Remotely (December 16, 2020). The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility, together with the Philadelphia Bar Association Professional Guidance Committee, adopted the reasoning and conclusion of the ABA Formal Opinion 495 in a joint opinion, Ethical Considerations for Lawyers Practicing Law from Physical Locations Where They Are Not Licensed, Joint-Formal Opinion 2021-100 (March 2, 2021).

ABA Formal Opinion 495, as well as the Pennsylvania and Philadelphia Bar Associations' Joint Formal Opinion 2021-100, concluded that a lawyer who is admitted in one jurisdiction may practice the law of that licensing jurisdiction while working remotely in a local jurisdiction, with certain conditions. We agree with the reasoning of these opinions as set forth herein and conclude that a Delaware-licensed lawyer may practice Delaware law, for clients with Delaware matters, while in a local jurisdiction, even if not licensed in such jurisdiction, subject to the conditions discussed herein.

This Opinion does not address whether and in what circumstances a lawyer who is *not* licensed in Delaware may represent Delaware clients from an office located outside of Delaware. *See generally, In re Tonwe*, 929 A. 2d 774 (Del. 2007); *In re Nadal*, 82 A. 3d 716 (Del. 2013).

ABA Formal Opinion 495 concluded:

> The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. The [ABA] Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while

> physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

Rule 5.5 of the DLRPC is substantially similar to Model Rule 5.5. We conclude that the analysis of Model Rule 5.5 applies as well to Rule 5.5 of the DLRPC.

ABA Formal Opinion 495 addressed the question of establishing an office in a local jurisdiction in which a lawyer is not licensed as follows:

> Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis." A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence. Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subject to any contrary law of the local jurisdiction in which a Delaware lawyer may be practicing remotely, the Committee adopts the reasoning above with respect to Model Rule 5.5(b)(1) as applicable to lawyers licensed in Delaware who are providing legal services remotely in a local jurisdiction.[1] The purpose of Rule 5.5

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[1] Rule 5.5(b)(1) states that "A lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish

of the DLRPC is to protect the public from unlicensed and unqualified practitioners of law.[2] This purpose is not served by barring Delaware-licensed lawyers from practicing the law of Delaware, for clients with matters in Delaware, just because such lawyers are physically located in a local jurisdiction where they are not licensed, provided that the law of the local jurisdiction does not prohibit such conduct, and such lawyers do not hold themselves out publicly as a lawyer in that jurisdiction or offer to or accept representation of clients in that jurisdiction.[3] Finally, for the avoidance of any doubt, this Opinion does not address any applicable court or similar rule, including Delaware Supreme Court Rule 12(a) and the requirement stated therein regarding the maintenance of a *bona fide* office for the practice of law in the State of Delaware.

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an office or other systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction." This Opinion addresses only the permissibility under Rule 5.5(a) of Delaware lawyers working remotely in a different, local jurisdiction. This Opinion does not address the permissibility under Rule 5.5(b)(1) of lawyers who are not admitted to practice in Delaware working remotely from Delaware.

2 Other issues of legal ethics that may be raised by remote lawyering, but are not addressed in this Opinion, include Rule 1.6 (confidential information) and Rules 5.1, 5.2 and 5.3 (supervision of attorney and non-attorney staff). *See generally,* Rule 8.4(a) (one cannot attempt to violate the DLRPC through the acts of another.)

3 ABA Formal Opinion 495 opines that: "[i]f a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so." We adopt that view with respect to Rule 5.5(a) of the DLRPC as well.

PENNSYLVANIA BAR ASSOCIATION
COMMITTEE ON LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY

PHILADELPHIA BAR ASSOCIATION PROFESSIONAL GUIDANCE COMMITTEE

JOINT FORMAL OPINION 2021-100

ETHICAL CONSIDERATIONS FOR LAWYERS PRACTICING LAW FROM PHYSICAL LOCATIONS WHERE THEY ARE NOT LICENSED

March 2, 2021

I. Introduction

This Formal Opinion clarifies the ethical guidance provided in American Bar Association Standing Committee On Ethics And Professional Responsibility Formal Opinion 495: "Lawyers Working Remotely" (December 16, 2020), as it applies to Pennsylvania-licensed lawyers who practice while physically located in a state where they are not licensed to practice. Some attorneys have expressed a concern during the pandemic whether, under Pa.R.P.C. 5.5, a lawyer who lives in one state may practice remotely in another state, such as a Pennsylvania-licensed lawyer who lives in New Jersey but is not licensed there practicing from a home office physically located in New Jersey.

In this Opinion, the Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and the Philadelphia Bar Association Professional Guidance Committee adopt ABA Formal Opinion 495 and further conclude that a lawyer licensed in Pennsylvania, may work remotely from another jurisdiction even if the lawyer is not licensed in that jurisdiction, so long as appropriate steps are taken as more fully set forth in the ABA Formal Opinion.

II. Discussion

The practice of law has been transformed in recent years from a traditional office-based model to one in which lawyers practice remotely and virtually, often from outside of Pennsylvania. The COVID-19 pandemic further transformed the practice of law forcing many lawyers to work remotely from various locations, including residences in states where they are not licensed to practice law.

The shift to a predominantly remote-based practice model has raised concerns whether a Pennsylvania lawyer practicing law from a physical location outside of Pennsylvania engages in the unauthorized practice of law even though the attorney's practice is limited to practicing Pennsylvania law for clients in Pennsylvania.

To address these concerns, ABA Formal Opinion 495 concluded:

> The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

Thus, ABA Formal Opinion 495 provides an answer to the question raised frequently to our Committees, *i.e.,* Does Pa.R.P.C. 5.5 permit a lawyer who lives in one state to remotely practice in another, such as a Pennsylvania-licensed lawyer who lives in New Jersey but is not licensed there practicing from a home office physically located in New Jersey? Upon review of Pa.R.P.C. 5.5, the Committees conclude that a Pennsylvania-licensed lawyer who lives outside of Pennsylvania in a state where he or she is not licensed may practice from a home office physically located in the other state provided that the other state does not treat such remote practice as the unauthorized practice of law.[1]

Opinion 495 addresses this concern by concluding that:

> Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis." A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence. Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established

[1] Opinion 495 cautions that "[i]f a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so."

> an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Pa.R.P.C. 5.5 ("Unauthorized Practice of Law; Multijurisdictional Practice of Law") is identical to the Model Rule. Rule 5.5(a) states that "A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." Further, Rule 5.5(b) states that "A lawyer who is not admitted to practice in this jurisdiction shall not… establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction."

As noted in ABA Opinion 495, the purpose of the Rule is to protect the public from unlicensed and unqualified practitioners of law, a purpose that "is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed." Our Committees agree.[2]

III. <u>Conclusion</u>

Lawyers licensed in Pennsylvania may ethically engage in the remote practice of law for clients with Pennsylvania matters while being physically present in a jurisdiction in which they are not admitted unless a statute, rule, case law, or opinion of that jurisdiction prohibits the conduct. Although the lawyers may not hold themselves out as being licensed to practice in the local jurisdiction and may not advertise or otherwise hold themselves out as having an office in the local jurisdiction, or provide or offer to provide legal services in the local jurisdiction, the fact that they are physically located there does not bar them from working remotely for the same clients.

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[2] *See, e.g., Estate of Condon v. McHenry*, 76 Cal. Rptr.2d 922 (Cal. Ct. App. 1998), in which a California appellate court held that a Colorado lawyer and the lawyer's Colorado law firm representing a Colorado client in a California probate proceeding did not engage in the unauthorized practice of law and, therefore, could recover attorneys' fees for legal services rendered, including work performed in California. In its decision, the California court found that the location of the client and the greater disciplinary interest of Colorado – the state of predominant impact of the legal services - to be key in its analysis. In addition, in *Florida Bar Standing Committee on the Unlicensed Practice of Law,* FAO # 2019-4 (Aug. 2020), the Committee found that a lawyer who resides in Florida and provides legal services that do not involve Florida law to clients outside of Florida, and who refrains from having or creating a public presence or profile in Florida, does not engage in the unauthorized practice of law under the Florida Rules of Professional Conduct merely because the lawyer is working remotely from home in Florida.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it.

Board of Overseers of the Bar

Opinion #189: Unauthorized Practice of Law in Maine by Admittees of Foreign Jurisdiction

Issued by the Professional Ethics Commission

Date Issued: November 15, 2005

Question

The Professional Ethics Commission has been asked by Bar Counsel for an opinion concerning whether two scenarios violate Maine Bar Rule 3.2(a) prohibiting the unauthorized practice of law.[1]

Scenario One:

Attorney A is admitted in State X. A seeks admission to the Maine bar. A described himself on his most recent application for admission to the Maine bar as "President and General Counsel of the A Group." A has a website for the "A Group" that describes it as follows: "The A Group is a Maine based boutique litigation law firm" with offices in several states in the northeast region. Over 20 different practice areas are listed as the firm's areas of concentration. These are not limited to federal practice areas. The website provides a primary address for the A Group in Maine and its only telephone number is a Maine number. The website contains an identifiable picture of a Maine coastal scene. The website also contains a brief personal description of A in which A explains that after practicing elsewhere, he returned to reside with his family in his home state of Maine. A describes his educational and employment background, states that he is admitted in State X, and describes himself as a member of the state bar associations in Maine and State X. His description is silent about his bar admission status in Maine. Only one other attorney is described as being a member of the firm, in an "of counsel" role. That other attorney is described as being admitted in two northeastern states' jurisdictions. There is nothing on the website that in any way suggests that the other attorney is admitted in Maine.

Scenario Two:

Attorney B is admitted to practice law only in State Z. For the last five years, B has resided in Maine and been an equity member of a law firm organized as a Maine LLC, having law offices in two locations in Maine. There are a total of 20 individuals whose names appear on the law firm letterhead, some equity, some non-equity members. Beside B's name on that firm letterhead, there appears a reference and a note that B is admitted only in State Z.

B provides legal services to clients of the firm for an hourly fee. B also performs managerial and administrative duties at the firm, including supervision of lawyer associates and non-lawyer employees. B himself, an equity member, is not subject to any other lawyer's supervision.

B's law practice is limited to legal services concerning international and domestic energy and utility law. B typically has only one or two large corporate clients. B is considering an offer from a multi-national company incorporated in Maine with subsidiaries in several locations in the United States and Canada to serve as "Outside General Counsel and Chief Legal Officer." B has disclosed to that company that he is licensed only in State Z and has further explained that consequently there are limitations upon the representation he can offer in Maine and other jurisdictions. B has informed the company that it will be necessary to employ licensed attorneys in Maine and other jurisdictions to complement his services when the company requires legal advice about the laws of these jurisdictions. The company has consented to the limitations of the engagement as outlined in writing by B to the company. B perceives the company as a sophisticated consumer of legal services that has the wherewithal to obtain independent review of the proposed engagement by other counsel. B does not believe that the proposed engagement could cause harm to the client, the legal profession, or any member of the public.

Discussion

First, we note that the Maine Bar Rules govern any attorney who practices law in Maine, regardless of whether that attorney is admitted to practice law in Maine. Rule 1(a) states:

These rules govern the practice of law by attorneys within this State and the conduct of attorneys with respect to their professional activities and as officers of the Court. Any attorney admitted to, or engaging in, the practice of law in this State shall be subject to the Court's supervision and disciplinary jurisdiction and the provisions of these rules, including Maine Bar Rule 1(b). (Emphasis added.)

Maine Bar Rule 1(b) is the "Choice of Law" provision of the Bar Rules, which deals specifically with conduct before a tribunal and other conduct where the lawyer is licensed to practice either only in Maine or in both Maine and another jurisdiction. The two fact situations that have been presented for consideration by Bar Counsel do not fit into either of these choice of law categories because they involve "other conduct" of attorneys who are not admitted to practice in Maine. By default, however, Maine 's Code of Professional Responsibility governs the conduct of these two attorneys to the extent that they are practicing law in Maine. If they are practicing law in Maine without the authority to do so, they are in violation of Maine Bar Rule 3.2(a).

Second, Rule 3.2(a) does not actually delineate the parameters of the unauthorized practice of law. It merely states that "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of law or court rule." In construing Rule 3.2(a), we must opine on what it means to "practice law in a jurisdiction where to do so would be in violation of law or court rule." In other words, we must resolve the parameters of permissible multijurisdictional practice and impermissible unauthorized practice of law.

Neither of the two scenarios leaves any doubt as to whether the attorney involved is engaged in the practice of law.[2] The statute which renders the unauthorized practice of law a Class E crime, 4 M.R.S.A. §807,[3] prohibits persons who are not admitted in Maine from either practicing law or professing to practice law within the State and therefore potentially reaches both Attorneys A and B regardless of whether they actually obtained any clients within the State. The Law Court, in interpreting this statute, has made it clear that the term "unauthorized practice of law" applies even to persons who merely hold themselves out to practice law, regardless of whether they actively have a client. See Board of Overseers of the Bar v. MacKerron, 581 A.2d 424, 425 (Me. 1990) (use of attorney letterhead is sufficient to establish unauthorized practice of law).

Likewise, neither scenario leaves any doubt about whether the attorney is practicing law "in [the] jurisdiction" of Maine. Given the extra-jurisdictional effects of modern legal practice, this concept can be viewed in a number of different ways. Questions can arise whether presence through the Internet, association with referral attorneys and other scenarios constitute practice in Maine. We need not grapple with issues created by these kinds of situations, however, because the two scenarios before us involve relatively clear circumstances where the attorneys have, or at a minimum suggest they have, a physical presence in Maine rendering legal services in Maine to Maine clients.

In assessing what it means to practice law in a jurisdiction, particularly without being admitted in that jurisdiction, we find the ABA Model Rules of Professional Conduct, specifically Rule 5.5, and the Restatement (Third) of the Law Governing Lawyers § 3, to be helpful. These sources aid us in identifying some of the critical factors relevant to determining whether a lawyer is practicing law in a particular jurisdiction in an unauthorized way. The factors we discern as important include:

1. Whether the attorney has established an office in the jurisdiction;
2. Whether the attorney has established some other systematic and continuous presence in the jurisdiction;
3. Whether the attorney holds out to the public or otherwise represents that the attorney is admitted to practice law in the jurisdiction;
4. Whether the attorney is providing legal services in the jurisdiction on more than a temporary basis in connection with some matter or proceeding for which the attorney is properly admitted to practice either by another jurisdiction or a tribunal; and
5. Whether the attorney is providing services that fall within some exception to the usual unauthorized practice of law rules, such as the "federal practice" exception.

Indeed, we find that ABA Model Rule 5.5, as a whole, quite accurately reflects historical and widely accepted notions of the limits of multijurisdictional practice and the parameters of the unauthorized practice of law.[4]

Utilizing these factors, we conclude that the mere fact that an attorney, not admitted in Maine, is working in Maine does not automatically mean that the attorney is engaged in the unauthorized practice of law. For example, an out-of-state lawyer who has a vacation home in Maine might bring work to Maine to complete while on vacation. Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine. As another example, an out-of-state lawyer who is a member of a law firm with offices in a number of states, including Maine , may occasionally work in the Maine office providing legal services to Maine clients in association with other lawyers in the firm who are admitted to practice in Maine. When this is done on a temporary basis, we would conclude that the lawyer is not engaged in the unauthorized practice of law.[5]

Opinion

We now turn to the two scenarios posed by Bar Counsel.

Scenario One

We find this scenario relatively easy to assess. In analyzing this situation, that of Attorney A licensed only in State X, we evaluate A's practice in light of the factors outlined above. First, A's office is located in Maine ("a Maine based boutique litigation law firm") with a primary mailing address in Maine and a telephone number in Maine . Second, A through his website has clearly established a systematic and continuous presence in Maine. Third, A holds himself out as being willing and available to provide legal services in his "home state of Maine," which taken together with his reference to being a member of the Maine State Bar Association, suggests that he is admitted to practice in Maine.[6]

These factors, in and of themselves, make it clear to us that Attorney A is engaged in the unauthorized practice of law in Maine, by at least professing to practice law within Maine without having been admitted to the Maine Bar.[7] Attorney A's conduct therefore violates Maine Bar Rule 3.2(a).

Scenario Two

The second fact scenario requires greater analysis. As presented by Bar Counsel, the facts involve a partner in a Maine-based firm who limits his practice to international and national regulatory work. This potentially brings into question the application of the "federal law" exception to unauthorized practice.

Once again using the factors identified above, we first note that Attorney B's law office is physically located in Maine and apparently nowhere else. Accordingly, he has established an office in Maine, indeed only in Maine, and his law firm likewise has an office only in Maine. Second, B has clearly established a systematic and continuous presence in Maine. He appears to practice in Maine full time, he is an equity member of a Maine law firm, and he appears to use his locus in Maine to appeal to potential clients. Third, concerning whether Attorney B holds himself out to the public or otherwise represents that he is admitted to practice law in Maine , the firm letterhead states that he is only admitted in State Z. Accordingly, B does not appear to hold himself out to the public as admitted in Maine.[8] Fourth, it appears likely that B is performing legal services in Maine for Maine clients on a regular rather than a temporary basis, although we recognize the possibility that a majority of his legal services may be performed in connection with a licensing issue or some other process in one or more other jurisdictions.

In our view, the third factor produces little weight against the force of factors one, two and four.[9] Lawyer B has established an office and a systematic and continuous presence in Maine through which he provides legal services. Even though his practice is apparently self-limited to legal services concerning “international and domestic energy and utility law,” he does so from a law firm having an office only in Maine. There does not appear to be any restriction against his working for Maine clients. The scenario states specifically that he provides “legal services to clients of the firm” and also indicates that he is considering an offer from a multi-national company incorporated in Maine. This suggests that Lawyer B is promoting his ongoing presence in Maine.

Giving due consideration to these four factors, it is our opinion that Attorney B is clearly practicing law in Maine without being admitted in Maine, and that this is not negated by the fact that the firm letterhead states he is only admitted in State Z. In order to resolve whether B is engaged in the unauthorized practice of law, however, we must also consider factor 5 and the “federal practice” exception on which we assume B relies.

B’s practice arrangement appears to presume that a lawyer, not licensed in Maine , may practice law in Maine so long as that lawyer’s practice is limited to international, federal or multi-state issues. We believe such a presumption, taken alone, goes too far. We receive guidance, once again, from the Restatement and the ABA Model Rules. The Restatement recognizes an explicit exception to the unauthorized practice rule where the lawyer provides legal services “before a tribunal or administrative agency of another jurisdiction or the federal government in compliance with requirements for temporary or regular admission to practice before that tribunal or agency.” The Model Rules permit “services that the lawyer is authorized to provide by federal law . . . .” ABA Model Rule 5.5(d)(2). Accordingly, the otherwise unauthorized practice is permissible if it occurs “before” a tribunal or agency in compliance with its rules or if authorized by federal law. Comment 18 to Model Rule 5.5 makes it clear, however, that such authorization to practice will usually be derived from statute, court rule, regulation or judicial precedent.

We do not have sufficient facts to determine whether B’s practice is limited to matters before federal or international tribunals or whether his authorization to practice is otherwise derived from any statute, court rule, regulation or judicial precedent. Accordingly, we cannot opine whether his practice squarely falls within any “federal law” exception to the unauthorized practice. We have concerns, however, as to whether B is appropriately limiting his practice, i.e., whether he is in a position where his legal services occasionally drift into other areas. We add that we do not believe Lawyer B insulates himself from unauthorized practice concerns by employing “licensed attorneys in Maine and other jurisdictions to complement his services when [his clients] require legal advice about the laws of other jurisdictions.” The real question is whether despite this, B’s practice extends outside the strict boundaries of any “federal law” exception to unauthorized practice. If so, then B is engaging in the unauthorized practice of law and is in violation of Maine Bar Rule 3.2(a)(1). Moreover, any lawyers who aid B in this regard stand in violation of Maine Bar Rule 3.2(a)(2).

Regarding B's engaging, as a client, the multi-national corporation incorporated in Maine., the same factors and analysis stated above apply. We see no discernable difference between B's current practice and B's taking on representation of the multi-national corporation as outside general counsel.[10]

Footnotes

[1] M. Bar R. 3.2(a)(1) states that "[a] lawyer shall not practice law in a jurisdiction where to do so would be in violation of law or court rule. M. Bar R. 3.2(a)(2) prohibits a lawyer from aiding any person, association or corporation in the unauthorized practice of law.

[2] The Law Court has had occasion to define the practice of law in Board of Overseers of the Bar v. Mangan, 2001 ME 7, ¶¶ 13-14, 763 A.2d 1189, 1193 (2001), where it stated:

- The term "practice of law" is a "'term of art connoting much more than merely working with legally-related matters.'" Attorney Grievance Commission of Maryland v. Shaw, 354 Md. 636, 732 A.2d 876, 882 (1999) (quoting In re Application of Mark W., 303 Md. 1, 491 A.2d 576, 585 (1985)). "The focus of the inquiry is, in fact, 'whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent.'" Id. (quoting In re Discipio, 163 Ill.2d 515, 206 Ill. Dec. 654, 645 N.E.2d 906, 910 (1994)). Even where "'trial work is not involved but the preparation of legal documents, their interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity, is involved, these activities are still the practice of law.'" Shaw, 732 A.2d at 883 (quoting Lukas v. Bar Ass'n of Montgomery County, 35 Md. App. 442, 448, 371 A.2d 669, 673, cert. denied, 280 Md. 733 (1977)).
- In Shaw, 354 Md. 636, 732 A.2d 876, 882 (1999), the court noted that the practice of law includes "'utilizing legal education, training, and experience [to apply] the special analysis of the profession to a client's problem.'" (quoting Kennedy v. Bar Ass'n of Montgomery County, Inc., 316 Md. 646, 662, 561 A.2d 200, 208 (1989)). The Shaw court further noted that "the Hallmark of the practicing lawyer is responsibility to clients regarding their affairs, whether as advisor, advocate, negotiator, as intermediary between clients, or as evaluator by examining a client's legal affairs." Shaw, 732 A.2d at 883 (quoting In re Application of R.G.S., 312 Md. 626, 632, 541 A.2d 977, 980 (1988)).

[3] 4 M.R.S.A. § 807 states in subsection 1: "No person may practice law or profess to practice law within the State or before its courts, or demand or receive any remuneration for those services rendered in this State, unless that person has been admitted to the bar of this State and has complied with section 806-A, or unless that person has been admitted to try cases in the courts of this State under section 802.

[4] Model Rule 5.5, in its entirety, states:

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

[5] We do not opine at this time on other possible situations involving law firms with offices in several jurisdictions, including Maine, such as the lawyer who, while not admitted in Maine, has a more continuous presence in Maine. A resolution of the issues presented by the multitude of other practice situations that one might envision is not necessary for our opinion on the two scenarios presented by Bar Counsel.

[6] We also have concern about Attorney A’s potential violation of Rule 3.9 relating to false, misleading or deceptive advertising. As stated above, the statements by Attorney A about his

connection with Maine, particularly his self-description as a member of the State Bar Association in Maine, leave the impression that he is licensed to practice in Maine. Although lawyers not licensed in Maine may become members of the Maine State Bar Association, this fact is neither well known to the public nor made clear by A on his website. Our conclusion is that this advertising contains material misrepresentations of fact as well as omissions of material facts that are necessary to make his statements, in the light of all of the circumstances, not misleading.

[7] Attorney A's superfluous reference to having a second lawyer in an "of counsel" relationship with his firm, which lawyer is admitted in two northeastern states' jurisdictions, neither of which appears to be Maine, is without consequence to our opinion.

[8] We render no opinion at this time on whether this reference, "admitted only in State Z," adequately comports with Maine Bar Rule 3.9(e), which states:

A multi-jurisdictional partnership shall disclose, in all public communications containing the names of affiliated lawyers, jurisdictional limitations of those lawyers not licensed to practice in the jurisdiction in which the communication is published.

The obvious issue is whether this adequately discloses to the average consumer of legal services the jurisdictional limitations on Attorney B, particularly where B maintains a systematic and continuous presence in Maine.

[9] We add that factors one, two and four are very significant when one considers the purposes of local licensure. Besides testing for competence in substantive Maine law, local licensure fulfills at least two other purposes: to insure that the applicant meets minimal standards of character and fitness and to provide the Board of Overseers of the Bar with unfettered oversight over those practicing law within the State. The ultimate goal is the protection of the public, the courts, the legal system and the profession. This cannot be accomplished when an attorney has an office or other "systematic and continuous" presence in the state and may be altogether unknown to the authority charged with these protective duties.

[10] We differentiate Attorney B's prospective employment as "outside general counsel" from employment of a lawyer as in-house counsel. The case of the in-house lawyer involves considerations that are of no consequence to Attorney B as an outside counsel.

Enduring Ethics Opinion

Credits

N.H. R. Prof'l. Cond. 5.5

Rule 5.5 - Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:
(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of the law of this jurisdiction; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice the law of this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:
(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence] in this jurisdiction that:
(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized to provide by federal law or other law or rule to provide in this jurisdiction; or

(3) relate solely to the law of a jurisdiction in which the lawyer is admitted.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.
Ethics Committee Comment

1. New Hampshire has adopted ABA Model Rule 5.5.

2. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult Supreme Court Rule 60, which governs the provision of legal services following determination of major disaster.
ABA Comment to the Model Rules

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a U.S. or foreign lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. Paragraph (d) also applies to lawyers admitted in a foreign jurisdiction. The word "admitted" in paragraphs (c), (d) and (e) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice

law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult the Model Court Rule on Provision of Legal Services Following Determination of Major Disaster.
[Editor's Note: The Model Court Rule on Provision of Legal Services Following Determination of Major Disaster has been adopted in New Hampshire as Supreme Court Rule 60.]

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction or a foreign jurisdiction, and is not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this Rule, a lawyer admitted in any U. S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. See also *Model Rules on Temporary Practice by Foreign Lawyers*. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another United States or foreign jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a U.S. or foreign lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work. To further decrease any risk to the client, when advising on the domestic law of a United States jurisdiction, or on the law of the United States, the foreign lawyer authorized to practice under paragraph (d)(1) of this Rule needs to base that advice on the advice of a lawyer licensed and authorized by the jurisdiction to provide it.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education. See *Model Rules for Registration of In-House Counsel.*

[18] Paragraph (d)(2) recognizes that a U.S. or foreign lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent. See, e.g., *The ABA Model Rule on Practice Pending Admission*.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a)

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

N.H. R. Prof'l. Cond. 5.5

Amended Nov.10, 2015., eff. 1/1/2016; amended Oct. 17, 2016, eff. 1/1/2017; amended April 19, 2018, effective 7/1/2018.

Ethics Committee Comment

1. New Hampshire has adopted ABA Model Rule 5.5.

2. Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult Supreme Court Rule 60, which governs the provision of legal services following determination of major disaster.

3. Prior versions of Rule 5.5 and prior interpretations of the Rule assumed that attorneys practice in fixed physical offices and only deal with legal issues related to the States in which their offices are located. The increased mobility of attorneys, and, in particular, the ability of attorneys to continue to communicate with and represent their clients from anywhere in the world, are circumstances that were never contemplated by the Rule. The adoption of Rules 5.5(b) and (c) in 2008 reflected the State's growing recognition that multi-jurisdictional practice is a modern reality that must be accommodated by the Rules.

The assumption that a lawyer must be licensed in New Hampshire simply because he or she happens to be present in New Hampshire no longer makes sense in all instances. Rather than focusing on where a lawyer is physically located, New Hampshire's modifications of Rule 5.5(b)(1) and (2) and adoption of new Rule 5.5(d)(3) clarify that a lawyer who is licensed in another jurisdiction but does not practice New Hampshire law need not obtain a New Hampshire license to practice law solely because the lawyer is present in New Hampshire.

Notwithstanding the New Hampshire amendments to Rule 5.5(b)(1) and (2) and the adoption of new Rule 5.5(d)(3), Rule 8.5(a) still provides that a lawyer who is admitted in another jurisdiction, but not in New Hampshire, "is also subject to the disciplinary authority of . [New Hampshire] if the lawyer provides or offers to provide any legal services in" New Hampshire. In particular, such a lawyer will be subject to the provisions of Rules 7.1 through 7.5 regarding the disclosure of the jurisdictional limitations of the lawyer's practice. In addition, Rule 5.5(b)(2) continues to prohibit such a lawyer from holding out to the public or otherwise representing that the lawyer is admitted to practice New Hampshire law.

Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so, except that a lawyer admitted to practice in Minnesota does not violate this rule by conduct in another jurisdiction that is permitted in Minnesota under Rule 5.5(c) and (d) for lawyers not admitted to practice in Minnesota.

(b) A lawyer who is not admitted to practice in Minnesota shall not:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of Minnesota law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice Minnesota law.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction which:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and involve the representation of a family member or arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. Such reasonably related services include services that are within the lawyer's recognized expertise in an area of law, developed through the regular practice of law in that area in a jurisdiction in which the lawyer is licensed to practice law.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in Minnesota that exclusively involve federal law, tribal law or the law of another jurisdiction in which the lawyer is licensed to practice law, provided the lawyer advises the lawyer's client that the lawyer is not licensed to practice in Minnesota.

(Amended effective October 1, 2005; amended effective July 1, 2019.)

Comment

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional misconduct in that person's jurisdiction. The exception is intended to permit a Minnesota lawyer, without violating this rule, to engage in practice in another jurisdiction as Rule 5.5(c) and (d) permit a lawyer admitted to

practice in another jurisdiction to engage in practice in Minnesota. A lawyer who does so in another jurisdiction in violation of its law or rules may be subject to discipline or other sanctions in that jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants, and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1 and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraph (d), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia, and any state, territory, or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant

to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraph (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services either involve the representation of a family member or arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise in an area of law, developed through the regular practice of law on behalf of clients in a jurisdiction in which the lawyer is licensed. For purposes of paragraph (c)(4) of this rule, "family member" means a person related to the lawyer, including by marriage, as a parent, child, sibling, spouse, grandparent or grandchild.

[15] Paragraph (d) identifies circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any

jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law. Pursuant to paragraph (c) of this rule, a lawyer admitted in any U.S. jurisdiction may also provide legal services in this jurisdiction on a temporary basis. Except as provided in paragraph (d), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d) recognizes that a lawyer who is not licensed in Minnesota may provide legal services in Minnesota if the services exclusively involve federal law, tribal law, or the law of another jurisdiction in which the lawyer is licensed to practice, provided the lawyer specifically advises the client that the lawyer is not licensed to practice law in Minnesota.

[17] A lawyer who practices law in this jurisdiction pursuant to paragraph (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[18] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraph (c) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, such notice may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[19] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

Approved by the Supreme Court of Virginia
January 11, 2022

LEGAL ETHICS OPINION 1896 **OUT-OF-STATE LAWYERS WORKING REMOTELY IN VIRGINIA**

In Legal Ethics Opinion 1856 (approved by the Supreme Court of Virginia November 2, 2016), the committee addressed several questions about multijurisdictional practice under Rule of Professional Conduct 5.5; specifically, what types of practice foreign lawyers may engage in while located in Virginia. This opinion reiterates that guidance to conclude that a foreign lawyer may work remotely in Virginia (from home or otherwise), for any length of time, with or without an emergency justification to do so, as long as the work done involves the practice of the law of the foreign lawyer's licensing jurisdiction or exclusively federal law that does not require Virginia licensure. The foreign lawyer must avoid holding out or implying licensure in Virginia but otherwise may have a public presence in Virginia and is not required to be "invisible" within the state.

The COVID-19 pandemic brought a renewed focus on work from home/remote work, and several states issued ethics opinions addressing the permissible scope of practice for out-of-state lawyers working outside their licensing jurisdiction. Many of those opinions limit the lawyer's ability to engage in this practice to emergency situations like the COVID-19 pandemic, and/or require that the lawyer be "invisible" in the jurisdiction where they are not licensed. For example, DC UPL Opinion 24-20 (2020) concludes that:

> an attorney who is not a member of the District of Columbia bar may practice law from the attorney's residence in the District of Columbia under the "incidental and temporary practice" exception of Rule 49(c)(13) if the attorney (1) is practicing from home due to the COVID-19 pandemic; (2) maintains a law office in a jurisdiction where the attorney is admitted to practice; (3) avoids using a District of Columbia address in any business document or otherwise holding out as authorized to practice law in the District of Columbia, and (4) does not regularly conduct in-person meetings with clients or third parties in the District of Columbia.

ABA Formal Opinion 495 (2020) holds that practice from another jurisdiction would generally be permissible under Model Rule 5.5, "if the lawyer is for all intents and purposes invisible *as a*

Approved by the Supreme Court of Virginia
January 11, 2022

lawyer to a local jurisdiction where the lawyer is physically located, but not licensed." *See also* Pennsylvania Bar Association and Philadelphia Bar Association Joint Formal Opinion 2021-100 (2021) (endorsing conclusion of ABA Formal Opinion 495). *But see* Wisconsin Formal Ethics Opinion EF-21-02 (2021) (concluding that an out-of-state lawyer may represent clients from his licensing jurisdiction from a private location in Wisconsin, but must not establish a public office or solicit Wisconsin business unless authorized by law); Utah Ethics Opinion 19-03 (2019) ("what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same – none.")

The committee endorses the position expressed by the Utah State Bar and agrees that Virginia has no interest in restricting the practice of a lawyer whose only connection to Virginia is a physical location within the state. As the committee concluded in LEO 1856, Rule 5.5 and other applicable law leads to only one conclusion:

> Foreign lawyers who limit their practice exclusively to federal practices in which admission to the Virginia State Bar is not required may maintain an office or practice systematically and continuously in Virginia. Likewise, if their practice is limited to matters involving the law of the state or country in which they are admitted to practice, foreign lawyers may practice in Virginia on a systematic and continuous basis.

To specifically extend this application of the rule to remote work, a lawyer who is not licensed in Virginia may work from a location in Virginia on a continuous and systematic basis, as long as that practice is limited to exclusively federal law and/or the law of the lawyer's licensing jurisdiction, regardless of the reason for being in Virginia. The out-of-state lawyer must comply with Rules 5.5(d)(3) and 7.1 and UPL Op. 196 (2006) by disclosing that the lawyer is not licensed to practice in Virginia when disclosure is necessary to avoid the misleading implication that the lawyer is authorized to practice in Virginia. The lawyer may engage in temporary and occasional practice in Virginia as permitted by Rule 5.5(d)(4) and LEO 1856.

DRAFT OPINION – May 17, 2021

LEGAL ETHICS OPINION 1896 OUT-OF-STATE LAWYERS WORKING REMOTELY IN VIRGINIA

In Legal Ethics Opinion 1856 (approved by the Supreme Court of Virginia November 2, 2016), the committee addressed several questions about multijurisdictional practice under Rule of Professional Conduct 5.5; specifically, what types of practice foreign lawyers may engage in while located in Virginia. This opinion reiterates that guidance to conclude that a foreign lawyer may work remotely in Virginia (from home or otherwise), for any length of time, with or without an emergency justification to do so, as long as the work done involves the practice of the law of the foreign lawyer's licensing jurisdiction or exclusively federal law that does not require Virginia licensure. The foreign lawyer must avoid holding out or implying licensure in Virginia but otherwise may have a public presence in Virginia and is not required to be "invisible" within the state.

The COVID-19 pandemic brought a renewed focus on work from home/remote work, and several states issued ethics opinions addressing the permissible scope of practice for out-of-state lawyers working outside their licensing jurisdiction. Many of those opinions limit the lawyer's ability to engage in this practice to emergency situations like the COVID-19 pandemic, and/or require that the lawyer be "invisible" in the jurisdiction where they are not licensed. For example, DC UPL Opinion 24-20 (2020) concludes that:

> an attorney who is not a member of the District of Columbia bar may practice law from the attorney's residence in the District of Columbia under the "incidental and temporary practice" exception of Rule 49(c)(13) if the attorney (1) is practicing from home due to the COVID-19 pandemic; (2) maintains a law office in a jurisdiction where the attorney is admitted to practice; (3) avoids using a District of Columbia address in any business document or otherwise holding out as authorized to practice law in the District of Columbia, and (4) does not regularly conduct in-person meetings with clients or third parties in the District of Columbia.

ABA Formal Opinion 495 (2020) holds that practice from another jurisdiction would generally be permissible under Model Rule 5.5, "if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed." *See also* Pennsylvania Bar Association and Philadelphia Bar Association Joint Formal Opinion 2021-100 (2021) (endorsing conclusion of ABA Formal Opinion 495). *But see* Wisconsin Formal Ethics Opinion EF-21-02 (2021) (concluding that an out-of-state lawyer may represent clients from his licensing jurisdiction from a private location in Wisconsin, but must not establish a public office or solicit Wisconsin business unless authorized by law); Utah Ethics Opinion 19-03 (2019) ("what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same – none.")

The committee endorses the position expressed by the Utah State Bar and agrees that Virginia has no interest in restricting the practice of a lawyer whose only connection to Virginia is a physical location within the state. As the committee concluded in LEO 1856, Rule 5.5 and other applicable law leads to only one conclusion:

> Foreign lawyers who limit their practice exclusively to federal practices in which admission to the Virginia State Bar is not required may maintain an office or practice systematically and continuously in Virginia. Likewise, if their practice is limited to matters involving the law of the state or country in which they are admitted to practice, foreign lawyers may practice in Virginia on a systematic and continuous basis.

To specifically extend this application of the rule to remote work, a lawyer who is not licensed in Virginia may work from a location in Virginia on a continuous and systematic basis, as long as that practice is limited to exclusively federal law and/or the law of the lawyer's licensing jurisdiction, regardless of the reason for being in Virginia. The out-of-state lawyer must comply with Rules 5.5(d)(3) and 7.1 and UPL opinion 196 (2006) by disclosing that the lawyer is not licensed to practice in Virginia when disclosure is necessary to avoid the misleading implication that the lawyer is authorized to practice in Virginia. The lawyer may engage in temporary and occasional practice in Virginia as permitted by Rule 5.5(d)(4) and LEO 1856.

708 F.Supp.2d 524
United States District Court, D. Maryland.

In the Matter of the APPLICATION OF Cedar P. CARLTON for Renewal of her Membership in the Bar.

Miscellaneous Case No. 10–mc–160.
|
April 26, 2010.

Synopsis
Background: Attorney submitted application for renewal of membership to the bar of United States District Court for the District of Maryland.

Holding: The District Court, Deborah K. Chasanow, Chief Judge, held that attorney's principal law office was located in Washington, D.C.

Application approved.

West Headnotes (1)

[1] **Attorneys and Legal Services** Admission in federal court

Attorney's principal law office was located in Washington, D.C., as required for renewal of her membership in the bar of United States District Court for the District of Maryland, even though attorney resided in and spent most of her time working from home in Cambridge, Massachusetts; attorney's firm was located in Washington, attorney worked for the firm remotely by accessing a computer in Washington designated for her use, all her correspondence and phone calls were sent to Washington and forwarded to her, attorney only met clients while in Washington, all filing was done from Washington unless she filed electronically, which she was able to do from home, and she did not practice or have any clients in Massachusetts.

2 Cases that cite this headnote

525** ***MEMORANDUM OPINION

DEBORAH K. CHASANOW, Chief Judge.

On April 28, 2008, Cedar P. Carlton, an attorney who was originally admitted to the bar of this Court on April 4, 2005, submitted an application for renewal of her membership. On her application, she listed as her address 1775 K Street, N.W., Suite 600, Washington, D.C. 20006, the address of the firm by which she is employed, Webster, Fredrickson, Henrichsen, Correia & Puth, PLLC. In response to question 5 concerning circumstances that might prevent her from accepting appointment in a pro bono case, she responded that "[w]hile I continue to practice in the District of Columbia Metropolitan area, and I am employed by a law firm located in Washington, D.C., I personally reside in Cambridge, MA. As a result, there could be times wherein geographically it would be difficult to take on a pro bono case in Maryland."

Upon review of her application, Judge Peter J. Messitte, Chair of the Disciplinary and Admissions Committee, wrote a letter to Ms. Carlton in which he noted that Local Rule 701.1(a) provides that "in order for an attorney to be qualified for admission to the bar of this district, the attorney must be, and continuously remain, a member in good standing of the highest court of any state (or the District of Columbia) *in which the attorney maintains his or her principal law office,* or the Court of Appeals of Maryland." (emphasis added). Judge Messitte went on to note that since she is "not a member of the Maryland bar, this means that you must be a member in good standing of the highest court of the jurisdiction in which you maintain your principal law office." Because she indicated in her renewal application that she personally resides in Cambridge, Massachusetts and that she spends most of her time working from home or from an office space in Boston, he advised Ms. Carlton that "[i]t does not appear that you are a member of the bar of the Commonwealth of Massachusetts." Judge Messitte then requested that she advise "how her office in Washington, D.C. can be her principal office if she is spending the majority of her time in Massachusetts either at home or in an office in Massachusetts."

In response to Judge Messitte's letter, Ms. Carlton stated that her law firm's Washington, D.C. office is her principal office and that she essentially has a telecommuting arrangement with the firm. She stated that she has worked for the firm since September 2002 but in August of 2007 she relocated to Cambridge, Massachusetts for family reasons, but has continued to work for the Washington, D.C. firm remotely. While physically living in Massachusetts she does not practice in Massachusetts, does not have any clients based in Massachusetts or with claims in Massachusetts, and while she utilized rented office space in downtown Boston during the first year, she only used that office to practice law in the District of Columbia, this Court, and before the United States Court of Federal Claims. As of July 15, 2008, her firm stopped renting the office and thereafter she worked only from her home office in Cambridge.

***526** Ms. Carlton advised that from her home in Cambridge, she accesses a computer in the Washington, D.C. office of the firm that is designated for her use. She is thus able to use the firm's computer network and access all programs used by the firm's attorneys, including the internal firm email and firm time-keeping program. Thus, even though she is physically located in Cambridge, Massachusetts, she works off of a computer and server located in Washington, D.C., and, just as when she physically worked in Washington, D.C., all of her correspondence is sent to the Washington, D.C. address and forwarded to her by the firm's office staff. Clients communicate with her by calling the firm's Washington, D.C. phone number which forwards those calls to her in Cambridge in the same manner as would be the case at an extension in the District of Columbia office. All of her outgoing client correspondence is sent from the D.C. office, and all court pleadings are also prepared for filing and filed from the District of Columbia office, unless she is filing a pleading electronically which she can do from Cambridge. Finally, she stated that she only meets with clients when she is in Washington, D.C., and that she has traveled there several times over the past year to complete large projects and meet with clients.

Local Rule 701.1 provides a detailed definition of the term “principal law office.” It is defined as the “the chief or main office in which an attorney usually devotes a substantial period of his or her time to the practice of law during ordinary business hours in the traditional work week.” Six non-exclusive factors are enumerated in making a determination of the principal law office of an attorney:

i. The attorney's representations of his or her “principal law office” or “law office” for purposes of malpractice insurance coverage, tax obligations and client security trust fund obligations.

ii. The address utilized in pleadings, correspondence with clients, applications for malpractice insurance and bar admissions, advertising, letterhead and other business matters.

iii. The location of meetings with clients, conduct of depositions, research and employment of support staff and associates.

iv. Location of client files, accounting records, and other business records, library and communication facilities such as telephone and fax service.

v. Whether the attorney has other offices, their locations and their relative utilization.

vi. The laws under which the law practice is organized, such as the place of incorporation.

In recent years, the concept of a “principal law office” has evolved somewhat as a result of significant advances in technology which provide an attorney with the flexibility to carry out a variety of activities at different locations and under varying circumstances. The term does not necessarily mean continuous physical presence but, at a minimum, it requires some physical presence sufficient to assure accountability of the attorney to clients and the court. Under the circumstances described by Ms. Carlton, there can be no question that for purposes of malpractice insurance coverage, tax obligations and client security trust fund obligations, her office is the office of her employer. In addition, the address utilized in pleadings, correspondence with clients, letterhead and other matters is also the address of her employer, which maintains a substantial physical presence in Washington, D.C. When meetings with clients are required, Ms. Carlton does meet with them in Washington, D.C. Her client files, accounting records and ***527** other business records, library and communication facilities such as telephone and fax service are all located in Washington, D.C. although, by virtue of advances in technology, she is able to access them remotely from Cambridge, Massachusetts.

The circumstances of Ms. Carlton are markedly different than those of other lawyers that have come to the attention of the Disciplinary and Admissions Committee of this Court in which there was no physical presence whatsoever, and the address utilized by the attorney was a mere “mail drop” with no intention or expectation of any presence of the attorney within the jurisdiction so as to assure accountability of the lawyer to the court and to clients. The circumstances involving Ms. Carlton are no different than that of any attorney who may telecommute from home, but who maintains a physical presence in the jurisdiction of licensure consistent with the letter of the factors set forth in Rule 701.1(e).

There is a an important public interest in requiring that the attorney be a member in good standing of the highest court of the jurisdiction in which the attorney maintains his or her principal law office. The principal office requirement assures the effective regulation of the conduct of that attorney, including any necessary discipline. Where the principal law office is not located where the attorney is a member of the bar, essential public oversight of the attorney's practice is diminished. *Ramirez v. England,* 320 F.Supp.2d 368, 375 (D.Md.2004).

Taking into consideration all of the circumstances described above, the Disciplinary and Admissions Committee has concluded that Ms. Carlton meets the requirements of Rule 701.1(a) and that her principal law office is in Washington, D.C. in accordance with the letter and spirit of Rule 701.1(e).

Accordingly, the renewal application of Cedar Carlton was approved by the committee on September 11, 2008, for reasons to be set forth in an opinion to be issued at a later date, and this Memorandum Opinion now provides the reasons for approval of her renewal application.

/s/
Peter J. Messitte

Senior United States District Judge

Chair, Disciplinary and Admissions Committee

/s/
Roger W. Titus

United States District Judge

Member, Disciplinary and Admissions Committee

All Citations

708 F.Supp.2d 524

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477 Md. 174
Court of Appeals of Maryland.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND
v.
Dawn R. JACKSON

Misc. Docket AG No. 9, Sept. Term, 2020
|
January 31, 2022

Synopsis

Background: In attorney discipline proceeding in Maryland, relating to attorney who not licensed in Maryland but was admitted to the District of Columbia Bar, and who established law firm's office in Maryland, the Circuit Court, Prince George's County, No. CAE20-12284, Lawrence V. Hill, J., concluded that attorney violated professional conduct rules governing unauthorized practice of law.

Holdings: The Court of Appeals, Booth, J., held that:

[1] attorney engaged in unauthorized practice of law by signing two forms submitted to Maryland court;

[2] federal practice exception to Maryland disciplinary rule prohibiting unauthorized practice of law does not apply to all attorneys who are not licensed in Maryland but who are licensed in District of Columbia;

[3] attorney engaged in unauthorized practice of law by establishing office in Maryland for law firm in which she was partner; and

[4] no disciplinary sanction was warranted, in light of mitigating circumstances.

Case dismissed.

Procedural Posture(s): Proceeding on Attorney Discipline.

West Headnotes (25)

[1] **Attorneys and Legal Services** Court of last resort; Supreme Court

Attorneys and Legal Services Scope, Standard, and Extent of Review

The Court of Appeals has original and complete jurisdiction in attorney discipline proceedings and conducts an independent review of the record.

[2] **Attorneys and Legal Services** Evidence, verdict, and findings

The Court of Appeals reviews the hearing judge's findings of fact in an attorney discipline proceeding under the clearly erroneous standard.

[3] **Pretrial Procedure** Right to take and use depositions in general

Civil procedure rule, permitting deposition of unavailable out-of-state witness to be used by a party, against another party who was present or represented at taking of deposition or who had due notice thereof, is applicable even if a web-based conferencing application could be used to question the out-of-state witness in the proceeding in which the deposition testimony is offered. Md. Rule 2-419(a)(3)(B).

[4] **Attorneys and Legal Services** Particular cases

Hearing judge's finding, in Maryland attorney discipline proceeding alleging unauthorized practice of law by law firm partner who was not licensed in Maryland, that partner signed two forms requesting reissuance of summons, filed in Maryland court in uncontested divorce case in which wife was represented by attorneys from firm who were licensed in Maryland, was not clearly erroneous; partner admitted that signatures on forms, which had been executed eight years earlier, appeared to be her signature, while explaining that forms were signed during chaotic period in her life, which chaos had not been of her own making. Md. R. Attorneys, Rule 19-305.5(a).

[5] **Attorneys and Legal Services** Time for proceedings; limitations and laches

Attorneys and Legal Services Mitigating factors

Assuming that equitable doctrine of laches could be applied in attorney discipline proceedings, Court of Appeals would not apply laches as basis for dismissing charges alleging unauthorized practice of law by law firm partner who was not licensed in Maryland, though case involved partner having signed, eight years earlier, two forms filed in Maryland court requesting reissuance of summons in uncontested divorce case in which wife was represented by attorneys from firm who were licensed in Maryland; instead, Court of Appeals would consider Bar Counsel's extraordinary delay in pursuing charges against partner as part of mitigating factors in the case, and would exercise its discretion to impose no sanction. Md. R. Attorneys, Rule 19-305.5(a).

[6] **Attorneys and Legal Services** Engaging or aiding in unauthorized practice of law

Law firm partner, who was not licensed in Maryland, engaged in "practice of law," in violation of attorney professional conduct rule prohibiting unauthorized practice of law, by signing two forms filed in Maryland court requesting reissuance of summons in uncontested divorce case in which wife was represented by attorneys from firm who were licensed in Maryland; Maryland's civil rules required every pleading and paper of party represented by an attorney to be signed by at least one attorney who had been admitted to practice law in State. Md. Rule 1-202(t), 1-311(a); Md. R. Attorneys, Rule 19-305.5(a).

[7] **Constitutional Law** Regulation of practice of law

Under the constitutional system of separation of powers, the determination of what constitutes the practice of law and the regulation of the practice and of its practitioners is, and essentially and appropriately should be, a function of the judicial branch of the government.

[8] **Attorneys and Legal Services** Engaging or aiding in unauthorized practice of law

Law firm partner, who was not licensed in Maryland, did not engage in "practice of law," for purposes of attorney professional conduct rule prohibiting unauthorized practice of law, by preparing in firm's Maryland office settlement sheets for firm's clients; a settlement sheet typically would be prepared using basic bookkeeping functions, i.e., deducting expenses and fees from gross recovery number, and such administrative or bookkeeping functions did not require applying legal knowledge or skill, or providing legal advice, or applying legal principles to problems of any complexity. Md. R. Attorneys, Rule 19-305.5(a).

1 Cases that cite this headnote

[9] **Attorneys and Legal Services** Engaging or aiding in unauthorized practice of law

When an attorney engages in settlement discussions with another party or his or her client, such conduct is the "practice of law," for purposes of attorney professional conduct rule prohibiting unauthorized practice of law; settlement discussions necessarily involve analyzing legal issues, including assessing the strengths and weaknesses of a client's particular position, and providing advice to the client concerning settlement options. Md. R. Attorneys, Rule 19-305.5(a).

1 Cases that cite this headnote

[10] **Attorneys and Legal Services** Engaging or aiding in unauthorized practice of law

Law firm partner, who was not licensed in Maryland, did not engage in "practice of law," for purposes of attorney professional conduct rule prohibiting unauthorized practice of law, by attending Maryland settlement conferences and mediations, where conferences and mediations were also attended by lawyers from firm who were licensed in Maryland and who represented firm's clients, and partner did not hold herself out as counsel to any party. Md. R. Attorneys, Rule 19-305.5(a).

[11] **Attorneys and Legal Services** Engaging or aiding in unauthorized practice of law

Law firm partner, who was not licensed in Maryland, did not engage in "practice of law," for purposes of attorney professional conduct rule prohibiting unauthorized practice of law, by attending Maryland settlement conferences with her mentor, a Maryland attorney who represented crime victims, to shadow or learn from mentor within the legal practice area of negligent security claims. Md. R. Attorneys, Rule 19-305.5(a).

1 Cases that cite this headnote

[12] **Attorneys and Legal Services** Engaging or aiding in unauthorized practice of law

While attorney, who was not licensed in Maryland, violated attorney professional conduct rule prohibiting unauthorized practice of law by establishing an office in Maryland for law firm in which she was partner, attorney's physical presence in Maryland, standing alone, did not constitute the attorney holding herself out to the public or otherwise representing that she was a Maryland lawyer, as would violate professional conduct rules prohibiting unauthorized practice of law. Md. R. Attorneys, Rule 19-305.5(b).

[13] **Attorneys and Legal Services** Engaging or aiding in unauthorized practice of law

Law firm partner, who was not licensed in Maryland but established an office in Maryland for law firm, held herself out to the public or otherwise represented that she was a Maryland lawyer, in violation of attorney professional conduct rule prohibiting unauthorized practice of law, by failing to place jurisdictional limitations on her letterhead, business card, email signature, and website. Md. R. Attorneys, Rule 19-305.5(b)(2).

[14] **Attorneys and Legal Services** Engaging or aiding in unauthorized practice of law

Law firm partner, who was not licensed in Maryland, did not hold herself out to the public or otherwise represent that she was a Maryland lawyer, for purposes of attorney professional conduct rule prohibiting unauthorized practice of law, though signage for firm's office in Maryland did not contain partner's jurisdictional limitation; law firm employed three lawyers licensed in Maryland, and thus, a client or prospective client who visited the office could meet with a Maryland lawyer to discuss Maryland legal matters. Md. R. Attorneys, Rule 19-305.5(b)(2).

[15] **Attorneys and Legal Services** Engaging or aiding in unauthorized practice of law

Attorney, who was not licensed in Maryland but established an office in Maryland for law firm in which she was partner, did not hold herself out to the public or otherwise represent that she was a Maryland attorney, for purposes of professional conduct rule prohibiting unauthorized practice of law, though third-party website, which provided ratings and reviews for lawyers, did not specify attorney's jurisdictional limitation, where attorney did not create the website's profile for attorney. Md. R. Attorneys, Rule 19-305.5(b)(2).

[16] **Attorneys and Legal Services** Engaging or aiding in unauthorized practice of law

District of Columbia In general; establishment and organization

Federal practice exception to Maryland attorney disciplinary rule prohibiting unauthorized practice of law, which exception applies to services that an attorney is authorized to provide by federal law, does not apply to all attorneys who are not licensed in Maryland but who are licensed in District of Columbia, though District of Columbia courts were authorized by Congress, they are funded entirely by federal government, and they are staffed with judges appointed by the President. Md. R. Attorneys, Rule 19-305.5(d)(2).

[17] **Attorneys and Legal Services** 🔑 Engaging or aiding in unauthorized practice of law

Attorney, who was not licensed in Maryland, violated attorney professional conduct rule prohibiting unauthorized practice of law, by establishing an office in Maryland for law firm in which she was partner. Md. R. Attorneys, Rule 19-305.5(b)(1).

[18] **Attorneys and Legal Services** 🔑 Engaging or aiding in unauthorized practice of law

The purpose of the attorney professional conduct rules prohibiting the unauthorized practice of law is to protect the public from being preyed upon by those not competent to practice law, i.e., to protect against incompetent, unethical, or irresponsible representation. Md. R. Attorneys, Rule 19-305.5.

[19] **Attorneys and Legal Services** 🔑 Conduct as to Courts and Administration of Justice in General

Attorneys and Legal Services 🔑 Criminal Conduct, Violations Premised on

While attorney, who was not licensed in Maryland, violated attorney professional conduct rule prohibiting unauthorized practice of law by establishing an office in Maryland for law firm in which she was partner, she did not violate professional conduct rules prohibiting knowing violations of the rules, or prohibiting commission of criminal acts that reflected adversely on attorney's honesty, trustworthiness, or fitness, or prohibiting conduct prejudicial to administration of justice; attorney's presence in Maryland was undertaken with knowledge of Office of Bar Counsel and its express recommendations concerning how to maintain her office in a manner that purported to comply with the rules. Md. Code Ann., Bus. Occ. & Prof. § 10-601(a); Md. R. Attorneys, Rule 19-305.5(a, b), 19-308.4(a, b, d).

[20] **Attorneys and Legal Services** 🔑 Other particular disposition, punishment, or sanction

No disciplinary sanction was warranted for attorney who was not licensed in Maryland but who engaged in unauthorized practice of law, by establishing office in Maryland for law firm in which she was partner, and by signing two forms filed in Maryland court requesting reissuance of summons in uncontested divorce case, where sole aggravating factor was attorney's substantial experience in practice of law, and mitigating factors included prejudice from substantial delay in disciplinary proceedings, prejudice from Bar Counsel's actions in giving her recommendations on how to maintain office in Maryland and then waiting more than three years to raise its concerns, and fact that attorney signed forms filed in Maryland court during tumultuous time in attorney's life, which made an accident understandable. Md. R. Attorneys, Rule 19-305.5(a), (b)(1).

[21] **Attorneys and Legal Services** 🔑 Nature and purpose

The purpose of a sanction in an attorney discipline case is not so much to punish the attorney as to protect the public and the public's confidence in the legal profession.

[22] **Attorneys and Legal Services** 🔑 Factors Considered

The attorney disciplinary sanction should be commensurate with the nature and gravity of the violations and the intent with which they were committed.

[23] **Attorneys and Legal Services** Factors Considered

When fashioning the appropriate attorney disciplinary sanction, the Court of Appeals evaluates each case on its own merits, taking into consideration the particular facts and circumstances.

[24] **Attorneys and Legal Services** Aggravating factors
Attorneys and Legal Services Mitigating factors

When considering the attorney disciplinary sanction to be imposed in a particular case, the Court of Appeals typically consults the list of aggravating and mitigating factors developed by the American Bar Association (ABA), and considers any aggravating or mitigating factors that are peculiar to the attorney or the facts of the particular case.

[25] **Attorneys and Legal Services** Other factors

When determining the appropriate attorney disciplinary sanction in cases involving the unauthorized practice of law, the Court of Appeals primarily considers deterrence, whether attorney's conduct was willful and deliberate, and whether attorney cooperated with Bar Counsel's investigation. Md. R. Attorneys, Rule 19-305.5.

****256** Circuit Court for Prince George's County, Case No.: CAE20-12284

Attorneys and Law Firms

Argued by Lydia E. Lawless, Bar Counsel (Attorney Grievance Commission of Maryland), for Petitioner.

Argued by Irwin R. Kramer, Esquire (Kramer & Connolly), Reisterstown, MD, for Respondent.

Getty, C.J., McDonald, Watts, Hotten, Booth, Biran, Irma S. Raker (Senior Judge, Specially Assigned), JJ.

Opinion

Booth, J.

***181** In this attorney grievance proceeding, the Respondent, Dawn Jackson, is a lawyer admitted to the District of Columbia Bar who is not licensed in Maryland. She is a partner in a law firm, Jackson & Associates. In addition to Ms. Jackson, the law firm also employs Maryland attorneys. In 2014, the law firm relocated from the District of Columbia to Maryland. In 2015, Senior Assistant Bar Counsel Dolores Ridgell met with Ms. Jackson in Ms. Jackson's Maryland office. During that meeting, Ms. Ridgell made specific recommendations to Ms. Jackson concerning how to maintain her Maryland office in accordance with the Maryland rules of professional conduct. Ms. Jackson incorporated Ms. Ridgell's recommendations and continued to practice law from her Maryland office. She limited her own practice to matters arising under District of Columbia laws, where she was barred, while also performing administrative matters for the law firm.

Three and one-half years after Ms. Ridgell's visit to Ms. Jackson's law office, Bar Counsel commenced this investigation on September 19, 2018, after receiving material from an anonymous source. On April 7, 2020, the Attorney Grievance Commission ("Commission"), through Bar Counsel, filed a Petition for Disciplinary or Remedial Action, pursuant to Maryland Rule 19-721, against Ms. Jackson, alleging that she violated numerous provisions of the rules of professional conduct. ***182** [1] These included alleged violations of Rule 1.1 (competence); Rule 1.3 (diligence); Rule 1.4 (communication); Rule 1.16 (declining or terminating representation); Rule 3.3 (candor toward the tribunal); Rule 3.4 (fairness to opposing party and attorney); Rule 5.1 (responsibilities regarding non-attorney assistants); Rule 5.5 (unauthorized practice of law; multi-jurisdictional practice of law); Rule 8.1(a) (bar admission and disciplinary matters); and Rule 8.4(a), (b), (c), and (d) (misconduct). Bar Counsel also charged Ms. Jackson with violating sections 10-206 and 10-601 of the Business Occupations and Professions Article ("BOP") of the Maryland Code. Bar Counsel later withdrew the charges related to competence and diligence.

1 During much of the period relevant to this case, the ethical rules governing attorneys were entitled the Maryland Lawyers' Rules of Professional Conduct ("MLRPC") and were codified in an appendix to Maryland Rule 16-812. Effective July 1, 2016, the MLRPC were renamed the Maryland Attorneys' Rules of Professional Conduct ("MARPC") and recodified in Title 19 of the Maryland Rules without substantive changes. *See* Maryland Rules 19-300.1 *et seq*. We shall use the current codification of those rules in this opinion. Additionally, for readability, we will use shortened references – *i.e.*, Maryland Rule 19-301.1 will be referred to as Rule 1.1.

****257** Pursuant to Rule 19-722(a), we designated Judge Lawrence V. Hill, Jr. of the Circuit Court for Prince George's County ("the hearing judge") to conduct a hearing concerning the alleged violations and to provide findings of fact and conclusions of law. Following a hearing in January 2021, the hearing judge concluded that Ms. Jackson violated Rule 5.5 by engaging in the unauthorized practice of law in Maryland. The hearing judge further concluded that there was insufficient evidence to establish violations of Rule 1.4, Rule 1.16, Rule 3.3, Rule 3.4, Rule 5.1, Rule 5.3, Rule 8.1(a), Rule 8.4(a)–(d), BOP § 10-206 and BOP § 10-601.

[1] **[2]** This Court has original and complete jurisdiction in attorney discipline proceedings and conducts an independent review of the record. *Attorney Grievance Comm'n v. Ambe,* 425 Md. 98, 123, 38 A.3d 390 (2012) (internal citations omitted). We review the hearing judge's findings of fact under the ***183** clearly erroneous standard. *Id.* When no exceptions are filed to a hearing judge's findings of fact, we accept them as established. Md. Rule 19-740(b)(2)(A). Additionally, we "may confine [our] review to the findings of fact challenged by the exceptions." Md. Rule 19-740(b)(2)(B). In this case, Bar Counsel did not file any exceptions to the hearing judge's findings of fact, and Ms. Jackson excepts to only one factual finding. We summarize below the hearing judge's findings of fact and other undisputed matters in the record, as they relate to the alleged violations, and we address the one factual exception as part of our discussion.

I

Facts

Ms. Jackson's Bar Admissions

Ms. Jackson was admitted to the New Jersey Bar in 2001 and the District of Columbia Bar in 2004. She is not, and never has been, licensed to practice law in Maryland.

Ms. Jackson's Law Practice with Brynee Baylor – Baylor & Jackson

From 2001 through 2011, Ms. Jackson and Brynee Baylor were partners in the law firm of Baylor & Jackson, PLLC ("the Baylor & Jackson law firm"), which maintained an office for the practice of law in the District of Columbia. Ms. Baylor was licensed to practice in both Maryland and the District of Columbia. The law firm also employed associate-attorneys, Chervonti Jones and Tiffany Sims, both of whom were licensed to practice law in Maryland. Ms. Jackson's practice focused on clients and legal matters arising in the District of Columbia, and Ms. Baylor handled cases in both jurisdictions where she was licensed, with the assistance of the associate-attorneys who were also licensed in Maryland.

Ms. Jackson and Ms. Baylor supervised the associate-attorneys. Ms. Jackson was also responsible for the firm's administrative responsibilities, including maintaining the firm's trust account, entering leases and other contracts on behalf of the law firm, hiring staff, and other administrative functions. Ms. ***184** Jackson also served as a key resource for other members of the law firm. The attorneys in the firm would consult her on an as needed basis to calculate case expenses and the clients' net recovery on contingency fee cases. Ms. Jackson assisted with the preparation of settlement sheets, itemizing the deductions from the clients' gross recovery.

SEC Case Against Brynee Baylor

At some point prior to November 2011, the Securities and Exchange Commission ("SEC") commenced an investigation of Ms. Baylor for securities fraud. According to the SEC, Ms. Baylor helped perpetrate a securities fraud scheme in which Ms. ****258** Baylor posed as counsel to one of her co-defendants to lend an air of legitimacy to the scheme and masked some of her proceeds of the fraudulent funds as attorney's fees, which she laundered through the Baylor & Jackson law firm. After unsealing a complaint against Ms. Baylor on November 30, 2011, the SEC contacted Ms. Jackson via telephone and advised her of the case that it had filed against her partner. The SEC informed Ms. Jackson that it had seized the law firm's operating account and her personal account, thus making it impossible for Ms. Jackson to pay staff or support her family.

Ms. Jackson was named as a "relief defendant" in the SEC fraud litigation against Ms. Baylor, and spent the next few years helping the agency recover money for Ms. Baylor's victims. The SEC case resulted in the entry of a judgment in 2013 against Ms. Baylor, the Baylor & Jackson law firm, and other co-defendants for over $2.6 million, which was upheld on appeal that concluded in 2015.[2]

2 The SEC sued Ms. Baylor, the Baylor & Jackson law firm, the Milan Group, Inc., and other individuals as "Principal Defendants" for conducting an alleged securities fraud from which victims suffered losses amounting to millions of dollars. *See* *S.E.C. v. Milan Group*, 962 F. Supp. 2d 182 (D.D.C. 2013), *aff'd in part, vacated in part,* 595 Fed. Appx. 2 (D.C. Cir. 2015). Ms. Jackson was named as a "Relief Defendant," which the District Court described as a "person[ ] who allegedly received money resulting from the fraudulent activities but who [is] not charged with personally engaging in the fraud." *Milan Group*, 962 F. Supp. 2d at 186. During the pendency of the case and trial, the SEC required that Ms. Jackson keep the Baylor & Jackson law firm intact as "a going concern" to preserve the law firm's accounts and assets that would eventually contribute toward the monetary judgment to satisfy the victims' monetary losses. The District Court entered summary judgment against Ms. Baylor, the Baylor & Jackson law firm, and other defendants jointly and severally liable for over $2.6 million in ill-gotten profits. *Id.* at 211. The money judgment was affirmed by the United States Court of Appeals for the District of Columbia Circuit in 2015. *Milan Group*, 595 Fed. Appx. at 2.

The hearing judge found that, in the aftermath of the SEC's November 2011 telephone call, Ms. Jackson was overwhelmed ***185** with obligations to her family, her staff, the SEC, and attorney disciplinary authorities in Washington, D.C. and Maryland (who had opened disciplinary investigations into Ms. Baylor). After being told that federal officials had frozen her firm's operating account, Ms. Jackson testified that she became "emotionally [ ] distraught," describing herself as a "zombie trying to keep everything together." Ms. Jackson testified about the physical and emotional toll that Ms. Baylor's scandal had on her personal and professional life. Portions of Ms. Jackson's medical records were admitted into evidence. As part of our consideration of the mitigating factors found by the hearing judge in this case, we shall discuss in more detail the personal and emotional problems that Ms. Jackson suffered as a result of Ms. Baylor's fraudulent actions.

Despite the SEC's civil and criminal investigation into Ms. Baylor, she remained licensed in Maryland and in the District of Columbia for years after the complaints and indictment were unsealed. Ms. Jackson testified that, during the initial transition period in 2011 and 2012, she had no way to deny Ms. Baylor access to the office or to client files because Ms. Baylor was licensed to practice law, and Ms. Jackson was required by the SEC to maintain the Baylor & Jackson law firm as a going concern. Ms. Baylor continued to have keys to the office and could access her desktop computer by logging in remotely.

Ms. Jackson's Formation of a New Firm – Jackson & Associates

During this transition period—beginning in late 2011 or early 2012, as Ms. Jackson ****259** was cooperating with the SEC to ***186** preserve the Baylor & Jackson law firm as a going concern, and ultimately winding it down to satisfy the judgment—Ms. Jackson formed a new law firm, Jackson & Associates Law Firm, PLLC ("Jackson & Associates"). From 2011 until sometime in 2014, Ms. Jackson operated her new law firm from the same office space in the District of Columbia, where she continued to perform the same administrative responsibilities, with the same attorneys (except Ms. Baylor) and staff that had previously been employed at the Baylor & Jackson law firm.

Jackson & Associates Moves Its Office from the District of Columbia to Maryland

When their lease expired, in the spring of 2014, Jackson & Associates moved its office from its District of Columbia location to an office in Upper Marlboro, Maryland. Ms. Jackson continued to focus on cases arising in the District of Columbia, while the Maryland lawyers who were employed by the firm, Tiffany Sims, Pamela Ashby, and Victoria Adegoke, handled Maryland cases. After the office relocated from the District of Columbia to Maryland, Ms. Jackson continued to perform the same administrative responsibilities for the law firm that she always had—such as maintaining the trust account, entering contracts, overseeing the hiring of staff, and computing clients' recoveries in contingency cases.

Bar Counsel's Investigation into Brynee Baylor and Site Visit to Ms. Jackson's Maryland Office

After a lengthy investigation, Bar Counsel filed disciplinary charges against Ms. Baylor on November 24, 2014.[3] Ms. Baylor was ultimately disbarred by order of this Court pursuant to a joint petition for disbarment. Attorney Grievance Comm'n v. Baylor, 443 Md. 229, 115 A.3d 1261 (2015). In preparation for the disciplinary case against Ms. Baylor, Senior Assistant Bar Counsel Dolores Ridgell ("Senior Assistant Bar Counsel" or "Ms. Ridgell") met with Ms. Jackson on two occasions. These meetings occurred on March 13, 2015 at Bar ***187** Counsel's office in Crownsville, and on June 5, 2015 at Ms. Jackson's office in Upper Marlboro, Maryland. Although the purpose of the second meeting was to prepare for the Commission's disciplinary case against Ms. Baylor, in the context of that meeting, Senior Assistant Bar Counsel and Ms. Jackson discussed the fact that Ms. Jackson was operating her law practice from an office in Maryland. Ms. Jackson's attorney, Stephan Brennan, was also present at the meeting, and corroborated Ms. Jackson's recollection of the substance of the discussion between Ms. Ridgell and Ms. Jackson concerning Ms. Jackson's practice of law from the Maryland office.

3 Bar Counsel never charged Ms. Jackson with professional misconduct in connection with the facts and circumstances leading to Ms. Baylor's disbarment.

During this June 5, 2015 meeting, Ms. Jackson and Ms. Ridgell discussed the proper safeguards for Ms. Jackson to put into place in order to maintain an office in Maryland since she was not a Maryland attorney. Ms. Jackson testified that she recalled Ms. Ridgell stating "[t]hat we always had to have a Maryland attorney on staff" and that her "business cards and letterhead needed to reflect that I was not licensed in Maryland ... but licensed in D.C." Ms. Jackson testified that she took Ms. Ridgell's advice, and promptly placed this disclaimer on her firm's letterhead, website profile, email signature, and her ****260** business card. The hearing judge determined that Ms. Jackson made these changes in response to her discussion with Bar Counsel. The signs in the lobby and outside the office door of the Maryland office, however, did not disclose that Ms. Jackson was not barred in Maryland.

In 2020 (after Bar Counsel initiated this investigation), Ms. Jackson opened a second office for Jackson & Associates in the District of Columbia. The hearing judge found that, after establishing this second office, Ms. Jackson continued to work in both the District of Columbia office and the Maryland office in Upper Marlboro.

Bar Counsel's Investigation and Disciplinary Charges Against Dawn Jackson

In September 2018—over three and one-half years after Senior Assistant Bar Counsel Ridgell's visit to Ms. Jackson's Maryland law office—Bar Counsel opened an investigation ***188** into Ms. Jackson's law practice after receiving an anonymous complaint. On October 17, 2018, Bar Counsel wrote to Ms. Jackson advising her that "[i]t has come to the attention of this office that you may be engaged in the unauthorized practice of law." In the letter, Bar Counsel directed Ms. Jackson to "respond in writing indicating" why she believed that the establishment of Jackson & Associates' Maryland office location complied with Rule 5.5(b)(1). In addition to Bar Counsel's general concern related to the law firm's office location, Bar Counsel asked Ms. Jackson to explain her alleged participation in two Maryland cases. Bar Counsel's letter advised Ms. Jackson that Bar Counsel, as well as the Maryland Attorney General, was authorized to investigate, and, if necessary, seek injunctive relief against "anyone engaged in the unauthorized practice of law." Bar Counsel also pointed out that "there are criminal penalties for such conduct."

On December 3, 2018, Ms. Jackson, through her counsel, Mr. Brennan, submitted a detailed seven-page response to Bar Counsel, which attempted to address Bar Counsel's general concerns related to Ms. Jackson's Maryland office location, as well as Bar Counsel's specific inquiries related to the two client matters.

With respect to general concerns related to Jackson & Associates' office location in Maryland, Mr. Brennan recounted the SEC investigation and disciplinary proceeding against Ms. Baylor, and Ms. Jackson's full cooperation with Bar Counsel. Mr. Brennan reminded Bar Counsel's office that he had represented Ms. Jackson throughout the proceedings involving Ms. Baylor, including his representation of Ms. Jackson as a witness in Bar Counsel's case against Ms. Baylor, and pointed out that he had personal knowledge of much of the information contained in the letter.

Mr. Brennan described the relocation of Jackson & Associates' office from the District of Columbia to Maryland in 2014, pointing out that the firm employed three lawyers licensed to practice in Maryland. Mr. Brennan enclosed documentation ***189** confirming that the Jackson & Associates website, Ms. Jackson's letterhead, business cards, and email contact information reflected that Ms. Jackson was not admitted to practice law in Maryland, but that she is admitted in the District of Columbia and New Jersey.

As for the two client matters raised by Bar Counsel in its letter, Mr. Brennan explained that the clients represented in those cases were not represented by Ms. Jackson but were instead represented by other members of the law firm who were licensed in Maryland. Mr. Brennan enclosed copies of the pleadings that had been filed in each case, which confirmed that Ms. Jackson was not counsel in either case. In one case that we will discuss below—the "Yenchochic case"—Mr. Brennan ****261** acknowledged that two lines had been filed in that case seeking the reissuance of a summons, which appeared to bear Ms. Jackson's signature. However, Mr. Brennan stated that Ms. Jackson had no recollection of signing them. Mr. Brennan pointed out that the lines were filed in 2012 after the SEC investigation into Ms. Baylor came to light, which was a "very disruptive, stressful and tumultuous time" for Ms. Jackson. Despite the absence of any memory of signing these lines, Ms. Jackson acknowledged that it was "possible" that the lines were signed by her, during this tumultuous period when she was "moving too fast and not paying enough attention at a time when she was asked to sign a large number of papers in a large number of cases." [4]

4 In his letter to Bar Counsel, Mr. Brennan also addressed Bar Counsel's inquiry concerning another client-related matter involving Michelle Lyons. Although Bar Counsel's charges included this second client matter, the hearing judge determined that Bar Counsel failed to prove that Ms. Jackson "took any action" in connection with the Lyons matter. Bar Counsel did not file exceptions to the hearing judge's findings of fact pertaining to these charges. Accordingly, we shall not discuss them further. *See* Md. Rule 19-740(b)(2)(B) (we "may confine [our] review to the findings of fact challenged by the exceptions[ ]").

Mr. Brennan concluded by stating that, other than Ms. Jackson's "possible mistake" in signing two lines requesting that a summons be reissued in one of Ms. Baylor's cases in the aftermath of the SEC investigation, he was "confident that it ***190** was an isolated occurrence that ha[d] not reoccurred in the past six years." On behalf of his client, Mr. Brennan concluded by stating that he had "attempted to provide a thorough response to Bar Counsel's concerns, and that he and Ms. Jackson remained willing to cooperate in Bar Counsel's investigation."

[3] Despite Ms. Jackson's response to Bar Counsel's letter and willingness to cooperate, Bar Counsel initiated formal charges,[5] which resulted in the evidentiary ****262** hearing before ***191** Judge Hill. As previously noted, the hearing judge found only one violation of Rule 5.5(a)—related to two lines filed in the Yenchochic case discussed below.

5 The record before the hearing judge in this matter included portions of Bar Counsel's responses to Ms. Jackson's request for admissions ("admissions"). In the admissions, Bar Counsel admits that on February 11, 2020, Ms. Jackson requested additional information from the Office of Bar Counsel concerning what additional steps, if any, she could undertake to ensure compliance with her ethical obligations. According to Bar Counsel's admissions, Bar Counsel did not respond to Ms. Jackson's letter because its office "does not provide legal advice." Instead, the Commission proceeded to file this Petition in April 2020.

Although Bar Counsel's current policy is not to offer what it considers to be "legal advice" on compliance related matters, it has not always been that office's policy. At the evidentiary hearing, Ms. Jackson attempted to introduce the deposition transcript of Glenn M. Grossman, who was Bar Counsel from July 2010 – July 2017, to demonstrate what Bar Counsel's policy had been during the time period covering some of the charges. Counsel for Ms. Jackson deposed Mr. Grossman on November 12, 2020, which Bar Counsel's office attended. Because Mr. Grossman resided in Florida at the time of the evidentiary hearing, Ms. Jackson's counsel offered portions of his deposition transcript into evidence pursuant to Maryland Rule 2-419(a)(3)(B). This rule permits the deposition of a witness to "be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had due notice thereof, if the court finds: ... that the witness is out of the State, unless it appears that the absence of the witness was procured by the party offering the deposition." The hearing judge sustained Bar Counsel's objection to the introduction of Mr. Grossman's deposition transcript, reasoning that the witness could have "Zoomed in from Naples." Ms. Jackson excepts to the hearing judge's failure to admit the deposition testimony into evidence. We sustain this exception. Ms. Jackson was entitled to admit Mr. Grossman's deposition transcript pursuant to Maryland Rule 2-419(a)(3)(B) because the deposition was properly noted, Bar Counsel attended the deposition, Mr. Grossman was out of the State, and Ms. Jackson did not procure his absence. There is no "Zoom exception" to the witness unavailability rules, and Ms. Jackson was entitled to rely upon the Maryland Rules as written. Mr. Grossman's deposition testimony highlights the policy changes in the Office of Bar Counsel during the period between Ms. Ridgell's 2015 visit to Ms. Jackson's office and the filing of charges in this matter in 2020. Mr. Grossman acknowledged that "there were a number of ways that I pursued [the job of protecting the public.]" Although "one way was to prosecute those who violated the Rules of Professional Conduct[,] ... another way was to educate lawyers on their ethical obligations so that they wouldn't have to get into trouble and the public would be protected in that way." When asked whether staff counsel such as Ms. Ridgell would "have occasion to engage in a dialogue with attorneys to help them meet their ethical obligations," Mr. Grossman confirmed that such a practice "would happen" during his tenure as Bar Counsel.

Representation of Michelle Yenchochic

Michelle Yenchochic retained the Baylor & Jackson law firm for her representation in an uncontested divorce with her then-husband Roger Diaz. In May 2011, Ms. Baylor filed the complaint on Ms. Yenchochic's behalf in the Circuit Court for Montgomery County. The hearing judge found that Ms. Baylor was Ms. Yenchochic's counsel of record for the duration of her case. Ms. Baylor's assistant served as the liaison with the client. To Ms. Yenchochic's recollection, she only worked with two attorneys—Ms. Baylor and later, Tiffany Sims—both of whom were licensed to practice in Maryland. Ms. Sims appeared on behalf of Ms. Yenchochic at her divorce proceedings in December 2012 and January 2013. The hearing judge found that Ms. Sims properly appeared in Ms. Yenchochic's divorce proceeding, obtained a judgment of absolute divorce on her client's behalf, and closed the case.

The hearing judge found that Ms. Jackson had no contact with Ms. Yenchochic regarding her divorce case. Ms. Yenchochic testified that she "never dealt with Dawn Jackson," "never met her," "never spoke to her," never exchanged emails with her, and had no knowledge of her participation in any aspect of the divorce proceedings.

***192** The only involvement that Ms. Jackson had with Ms. Yenchochic's case involved the filing of two lines bearing Ms. Jackson's signature—one in March 2012 and a second in September 2012—requesting the reissuance of summons, after Ms. Baylor encountered difficulty serving Mr. Diaz. The hearing judge found that Ms. Jackson had no recollection of the Yenchochic case "at all[,]" nor did she recall signing the forms "close to a decade ago." The hearing judge credited Ms. Jackson's testimony that, amid the SEC scandal, her life in 2012 "was a blur. I was literally a zombie trying to keep everything together." The hearing judge found that Ms. Jackson had no idea as to how her signature was included on the two lines that were filed "close to a decade ago" and that her lack of memory was "very reasonable." Despite her lack of recollection, the hearing judge determined that Ms. Jackson "admitted to the authenticity of her signature."

[4] **[5]** Ms. Jackson's sole exception to the hearing judge's factual findings in this matter relates to his finding that Ms. Jackson signed the lines requesting the reissuance of a summons in the Yenchochic case. She argues that Bar Counsel failed to meet its burden of proving by clear and ****263** convincing evidence that she, in fact, signed the forms. She contends that the hearing judge's findings on this point are somewhat inconsistent, noting that the hearing judge found that, given the passage of time, it places Ms. Jackson in "the awkward position of trying to defend her actions when, in fact, she cannot recall them either." She points out that the hearing judge found her "recollection or lack thereof to be very reasonable" and recognized the difficulty that this posed in his fact finding. Although this is a close case given Bar Counsel's burden, we overrule Ms. Jackson's exception. We cannot say, on this record, that the hearing judge's factual finding was clearly erroneous. Based upon our review of the record, the hearing judge found Ms. Jackson's testimony to be very reasonable and credible on every point, including her admission that the signature on these forms that were executed eight years prior to the hearing appeared to be hers, which ***193** were signed at a chaotic period in her life, the circumstances of which were not of her own making.[6]

6 Ms. Jackson urges us to exercise our discretion to dismiss these charges based upon the equitable doctrine of laches. Although we have never applied laches in the context of an attorney grievance proceeding, we have recognized that the defense may apply where prejudice to the attorney or other circumstances make it "inequitable to grant the relief sought." *Attorney Grievance Comm'n v. Penn*, 431 Md. 320, 335, 65 A.3d 125 (2013) (citations omitted). Although this is a closer case than those in which we have previously considered the equitable defense, *see e.g.*, *id.*; *Attorney Grievance Commission v. Cassilly*, 476 Md. 309, 262 A.3d 272 (2021); *Attorney Grievance Commission v. Kahn*, 290 Md. 654, 431 A.2d 1336 (1981); *Anne Arundel Bar Association v. Collins*, 272 Md. 578, 325 A.2d 724 (1974), we decline to apply the doctrine here, given that we have considered Bar Counsel's extraordinary delay in pursuing charges against Ms. Jackson as part of the mitigating factors in this case, and are exercising our discretion to impose no sanction in this case.

II

Hearing Judge's Conclusions of Law

At the start of the evidentiary hearing, Bar Counsel voluntarily dismissed charges against Ms. Jackson for violations of Rules 1.1 and 1.3. As previously noted, the hearing judge determined that Bar Counsel failed to meet its burden of establishing by clear and convincing evidence that Ms. Jackson violated Rules 1.4, 1.16, 3.3, 3.4, 5.1, 5.3, 8.1(a), 8.4(a), (b), (c), and (d), and BOP § 10-206 and BOP § 10-601 pertaining to the unauthorized practice of law. The hearing judge concluded that the only violation that Bar Counsel established was a violation of Rule 5.5(a)—arising from Ms. Jackson filing two lines in the Yenchochic case requesting the reissuance of a summons. Based upon this act, the hearing judge determined that Ms. Jackson "did to the lowest degree engage in the unauthorized practice of law by signing a [l]ine." Reiterating that the act of filing of a "[l]ine is a highly technical act," the hearing judge concluded that it was nonetheless a violation of Rule 5.5(a).

We conduct a de novo review of the hearing judge's conclusions of law. Md. Rule 19-740(b)(1). Neither party filed exceptions ***194** to the majority of the hearing judge's conclusions that there was insufficient evidence to find a violation of the professional rules as charged. With respect to the legal conclusions for which no exceptions were filed by either party, based upon our independent review of the record, we agree with the hearing judge's conclusions that Bar Counsel failed to establish a violation of these rules by clear and convincing evidence, and we see no reason to elaborate further. We shall focus on the conclusion of law for which exceptions have been lodged.

****264** Both parties have filed exceptions to the hearing judge's conclusions concerning Rule 5.5. Notwithstanding the hearing judge's characterization of the violation as being a "highly technical" one, Ms. Jackson excepts to the hearing judge's conclusion that she violated the rule at all. Bar Counsel excepts to the hearing judge's failure to find more violations of Rule 5.5 based upon the undisputed facts. Bar Counsel also excepts to the hearing judge's failure to find a violation of Rule 8.4(a), (b), and (d), as well as BOP §§ 10-601 and 10-206. We start our discussion with Rule 5.5—the flagship violation from which all other charges and exceptions flow.

Rule 5.5 – The Unauthorized Practice of Law

The crux of this attorney grievance case involves Rule 5.5 and the applicable provisions of the Business Occupations and Professions Article of the Maryland Code,[7] which prohibit attorneys who are not licensed in this State from engaging in the practice of law unless permitted by an exception set forth in the rule or statute.

7 BOP § 10-206(a) states that "[e]xcept as otherwise provided by law, before an individual may practice law in the State, the individual shall: (1) be admitted to the Bar; and (2) meet any requirements that the Court of Appeals may set by rule." BOP § 10-601(a) states that "[e]xcept as otherwise provided by law, a person may not practice, attempt to practice, or offer to practice law in the State unless admitted to the Bar."

Rule 5.5 provides in pertinent part:

(a) An attorney shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

***195** (b) An attorney who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the attorney is admitted to practice law in this jurisdiction.

Rule 5.5 has four basic components.[8] First, paragraphs (a) and (b) set out the ****265** general prohibitions against non-Maryland ***196** barred attorneys engaging in or assisting in the unauthorized practice of law, representing to the public that they are licensed in the jurisdiction, or establishing an office in the State. Second, paragraph (c) relaxes these prohibitions somewhat by allowing attorneys admitted in any United States jurisdiction (and not disbarred or suspended in any jurisdiction) to provide legal services on a temporary basis under certain enumerated conditions ("temporary services exception"). Third, paragraph (d) provides that an attorney admitted in another United States jurisdiction may provide legal services in Maryland that are provided to the attorney's employer or affiliate organization ("in-house counsel exception") or services that the attorney is authorized to provide under federal law ("federal practice exception") or law of this State ("state law exception").[9] Finally, paragraph (e) provides certain exceptions for "foreign attorneys" who are not admitted to practice law in any United States jurisdiction but who ***197** are members in good standing of a recognized legal profession in a country other than the United States.

8 As noted, Rule 5.5(c), (d), and (e) permits an attorney who is not admitted in Maryland to provide legal services in the State only under the following circumstances:

(c) An attorney admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with an attorney who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the attorney, or a person the attorney is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within subsections (c)(2) or (c)(3) of this Rule and arise out of or are reasonably related to the attorney's practice in a jurisdiction in which the attorney is admitted to practice.

(d) An attorney admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the attorney's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the attorney is authorized to provide by federal law or other law of this jurisdiction.

(e)(1) In this section, "foreign attorney" means an attorney who (A) is not admitted to practice law in any United States jurisdiction, (B) is a member in good standing or a recognized legal profession in a country other than the United States and, as such, is authorized to practice law in that country, (C) is subject to effective regulation and discipline by a duly constituted professional body or a public authority of that country, and (D) has not been disbarred or suspended from the practice of law in any jurisdiction of the United States.

(2) A foreign attorney may not establish an office or other systematic and continuous presence in this State for the practice of law, or hold out to the public or otherwise represent that the attorney is admitted to

practice law in this State. Any violation of this provision or any material misrepresentation regarding the requirements in subsection (e) (1) of this Rule by the foreign attorney will subject the foreign attorney to liability for the unauthorized practice of law.

(3) A foreign attorney, with respect to any matter, may (A) act as a consultant to a Maryland attorney on the law and practice in a country in which the foreign attorney is admitted to practice, including principles of international law recognized and enforced in that country and (B) in association with a Maryland attorney who actively participates in the matter, participate in discussions with a client of the Maryland attorney or with other persons involved with the matter, provided that the Maryland attorney shall remain fully responsible to the client for all advice and other conduct by the foreign attorney with respect to the matter.

9 BOP § 10-206(b) provides some state law exceptions to the unauthorized practice of law that are not pertinent here.

In this case, Ms. Jackson argues that her office does not run afoul of Rule 5.5(a) and (b) because as a member of the Bar of the District of Columbia, her practice falls within the federal practice exception set forth in Rule 5.5(d). We will consider the application of the federal practice exception as part of our discussion of the Rule. But first, we start with the hearing judge's conclusions pertaining to Rule 5.5, starting with his conclusions related to the client-specific matter, followed by his conclusions related to Ms. Jackson's conduct generally by maintaining a practice in Maryland.

A. Rule 5.5(a) – Charges Arising from the Reissuance of a Summons

[6] The only violation of Rule 5.5 that the hearing judge found related to Ms. Jackson's conduct in filing the two lines requesting the reissuance of a summons in the uncontested Yenchochic divorce case in ****266** 2012 after Ms. Baylor's departure from the firm. The hearing judge determined that Bar Counsel met its burden of proving that Ms. Jackson signed the summons reissuance lines, concluding that Ms. Jackson sufficiently authenticated her signature by acknowledging that, although she did not recall signing them, the signatures "appeared" to be hers. Based upon this authentication, the hearing judge concluded that Ms. Jackson, "by her own admission did compose a 'form that was filed in a court.' " The hearing judge concluded that such an act fell within the statutory definition of the "practice of law." However, in reaching his conclusion, the hearing judge noted that "pro se parties file these same types of forms daily" and pointed out that "no degree of legal experience or knowledge is required to file a [l]ine to reissue [a summons]."

Ms. Jackson excepts to the hearing judge's conclusion that signing a line requesting that a summons be reissued constitutes the practice of law. Ms. Jackson points out that the hearing judge found the violation to be a technical one and observed that "no degree of legal experience or knowledge is ***198** required to file a line to reissue" a summons. Ms. Jackson also notes that the hearing judge found no evidence showing that she fundamentally participated in material elements" of this or any other case.

We agree with the hearing judge's characterization of the act of filing a pro forma line requesting the issuance of a summons as being a violation of Rule 5.5(a) in the most technical sense. The preparation of such a document does not require any degree of legal experience, knowledge, or training. Nor is such a document considered to be a "pleading" as defined by the Maryland Rules. *See* Md. Rule 1-202(v). However, a line is a paper filed with the court. *See* Md. Rule 1-202(t). The Maryland Rules require that "[e]very pleading and paper of a party represented by an attorney shall be signed by at least one attorney who has been admitted to practice law in this State ...." Md. Rule 1-311(a). Ms. Jackson caused a line to be filed bearing her signature. We determine that this act of signing and filing the line constituted a violation of the Maryland Rules in violation of Rule 5.5(a) and overrule her exception.

B. Rule 5.5(a) and (b) – Charges Related to Ms. Jackson's Practice Generally

Turning to Bar Counsel's charges that relate to Ms. Jackson's practice generally, the hearing judge concluded that Bar Counsel had not proven that Ms. Jackson violated Rule 5.5 by generally engaging in the unauthorized practice of law. Concerning testimony from Ms. Jackson and the Maryland attorneys in the law firm that they would engage in general interoffice discussions, the hearing judge concluded as follows:

> Regarding [Ms. Jackson's] advice or discussing matters with a Maryland attorney, the [c]ourt finds no violation. There is nothing in the Rules that prohibit[s] a Maryland attorney from seeking the opinion of a non-Maryland barred attorney. Therefore, the [c]ourt finds there is no violation to providing advice to a barred Maryland attorney.

As for Bar Counsel's Rule 5.5 charges related to Ms. Jackson's physical presence in Maryland, the hearing judge ***199** concluded that Bar Counsel had not met its burden in proving that Ms. Jackson "maintained a systematic and continuous presence in Maryland for the practice of law[.]" The hearing judge noted that, although Ms. Jackson "maintained an office for the practice of law" in Maryland, which was also the firm's address, "there was no evidence that [Ms. Jackson] held herself out as a Maryland ****267** attorney." The hearing judge also pointed out that "[a]t all times, she had a Maryland attorney on staff" and observed that "[a]nyone in the public who saw the firm listed in the lobby of the building, website, advertising, and/or business cards could meet and consult with a Maryland attorney." (Cleaned up). The hearing judge commented on the fact that, "although going back years, [Bar Counsel] did not produce one witness who testified they were told [that Ms. Jackson] was a Maryland attorney or sat and consulted with [Ms. Jackson] in the Maryland office." In reaching his conclusion, the hearing judge also found it noteworthy that Ms. Ridgell met with Ms. Jackson in 2015 and that the Office of Bar Counsel was aware that Ms. Jackson had established her office in Maryland by that time. The hearing judge pointed out that Bar Counsel had not called their former colleague to testify in this matter. The hearing judge commented that, despite Ms. Ridgell's knowledge of Ms. Jackson's office and physical presence in the State, she did not take any action to stop it or to follow up to ensure that "no systematic presence occurred."

Bar Counsel excepts to the hearing judge's failure to find additional Rule 5.5 violations over and above the technical violation involving the lines for reissuance of the summons. For ease of discussion, we categorize Bar Counsel's exceptions into three buckets of alleged misconduct based upon undisputed facts. In the first exceptions bucket, Bar Counsel contends that the hearing judge erred by failing to conclude that Ms. Jackson *actually* engaged in the unauthorized practice of law. In the second bucket, Bar Counsel asserts that the hearing judge erred in failing to conclude that Ms. Jackson *held herself out to the public* as being admitted to practice law in Maryland. In the third and final bucket, Bar Counsel asserts ***200** that the hearing judge erred in failing to conclude that Ms. Jackson violated Rule 5.5(b)(1) by *maintaining an office* in Maryland. [10]

[10] We determine that it is particularly appropriate to compartmentalize Bar Counsel's exceptions in this manner given the unique and significant mitigating factors in this case (including the fact that, for *years*, the Office of Bar Counsel was not only aware of Ms. Jackson's Maryland office, but had made *specific recommendations for how to maintain it*), as well as the fact that under our current rules and case law, there *are* exceptions where an attorney who is not admitted in Maryland, may nonetheless maintain an office for the practice of law and not run afoul of the prohibition in Rule 5.5(b)(2) against holding oneself out as a Maryland lawyer.

1. Bar Counsel's Exceptions Related to Rule 5.5(a) Charges that Ms. Jackson Engaged in the "Unauthorized Practice of Law"

Bar Counsel contends that Ms. Jackson engaged in the unauthorized practice of law in violation of Rule 5.5(a) by: (1) determining fees to be charged by the Maryland attorneys in the law firm for Maryland cases; (2) preparing settlement sheets in Maryland cases that itemized expenses and documented the clients' recovery; and (3) attending settlement conferences or mediations in Maryland cases. Bar Counsel contends that these "undisputed facts provide additional grounds for violations of Rule 5.5(a)." For these undisputed facts to form the basis of a Rule 5.5 violation, we must first determine whether such acts constitute the "practice of law."

[7] Although Rule 5.5 prohibits the unauthorized practice of law, it doesn't define it, and with good reason. We have "found it difficult to craft an all-encompassing definition." *Attorney Grievance Comm'n v. Hallmon*, 343 Md. 390, 397, 681 A.2d 510 (1996) (cleaned up). This Court determines ****268** what constitutes the "practice of law." [11] To determine what is the ***201** practice of law, we look at the facts of each case and

determine whether they "fall within the fair intendment of the term." *Id.* (cleaned up). As we recently stated in *Attorney Grievance Commission v. Maldonado*,

> [t]o determine whether an individual has engaged in the practice of law, the focus of the inquiry should be on whether the activity in question required legal knowledge and skill in order to apply legal principles and precedent. The unauthorized practice of law includes utilizing legal education, training, and experience to apply the special analysis of the profession to a client's problem. Where trial work is not involved but the preparation of legal documents, their interpretation, the giving of legal advice, or the application of legal principles to problems of any complexity, is involved, these activities are still the practice of law.

463 Md. 11, 43, 203 A.3d 841 (2019) (internal quotations and citations omitted).

11 BOP § 10-101(h)(1) also identifies certain conduct as constituting the "practice [of] law." Specifically, the statute defines the phrase "Practice law" as "engag[ing] in any of the following activities: (i) giving legal advice; (ii) representing another person before a unit of the State government or of a political subdivision; or (iii) *performing any other service that the Court of Appeals defines as practicing law*." (Emphasis added). In other words, although the statute provides some basic definitions as far as what constitutes the practice of law, it recognizes that for any other conduct, it is this Court's role to define it. We have described the role of the Legislature and the Court of Appeals in connection with defining the practice of law as follows:

> Under our constitutional system of separation of powers, the determination of what constitutes the practice of law and the regulation of the practice and of its practitioners is, and essentially and appropriately should be a function of the judicial branch of the government. In many States it has been held that the legislative branch cannot constitutionally exercise that judicial function although it may make implementing regulations. In Maryland there has always been a comfortable accommodation in this area .... The legislature has forbidden the practice of law by one not a lawyer ... but it consistently has recognized that the courts can and should decide in any instance presented what does and does not constitute the practice of law.

Public Service Comm'n v. Hahn Transp., Inc., 253 Md. 571, 583, 253 A.2d 845 (1969) (internal citations omitted).

Based upon our review of this record, we determine that Bar Counsel has failed to prove by clear and convincing evidence that Ms. Jackson engaged in the unauthorized practice of law through her performance of administrative functions related to the operation of the law firm. Ms. Jackson was ***202** in charge of hiring attorneys, determining their salary, and approving leave. As part of her administrative functions, she established the hourly rates for associate-attorneys employed by the firm. She tracked expenses incurred by the firm and provided the information to the Maryland attorneys so that they could assist their clients in understanding their potential recovery. Ms. Jackson testified that she "did not have any involvement in handling Maryland cases," but that through the performance of the firm's administrative duties, she managed the disbursement process and assisted her colleagues with calculating the clients' net recovery after deducting contingency fees, liens, and case expenses.

[8] **[9]** Bar Counsel argues that Ms. Jackson's preparation of settlement sheets for clients of the firm constituted the practice of law. Stripped of its label, a "settlement sheet" typically consists of a document prepared using basic bookkeeping functions—deducting expenses and fees from a gross recovery number.[12] None of ****269** these administrative or bookkeeping functions require applying legal knowledge or skill, providing legal advice, or applying legal principles to problems of any complexity. Indeed, these functions are routinely performed by non-lawyers in office management positions. We determine that the cases relied upon by Bar Counsel to argue that a Rule 5.5(a) violation arising from Ms. Jackson's performance ***203** of these administrative functions are inapposite and factually distinguishable. *See* *Attorney Grievance Comm'n v. Barton*, 442 Md. 91, 116–17, 110 A.3d 668 (2015) (concluding that the attorney violated Rule 5.3(a), (b), and (c) by failing to supervise a non-lawyer who met with clients, quoted fees, provided legal advice, and held himself out as an attorney); *Attorney Grievance Comm'n v. Zhang*, 440 Md. 128, 167, 100 A.3d 1112 (2014) (concluding that a Maryland attorney violated Rule 5.5(a) by representing a client in a divorce proceeding in Virginia by drafting and preparing pleadings to be filed, participating in settlement negotiations, and preparing for hearings).

12 In support of its argument that Ms. Jackson's preparation of settlement sheets constitutes the practice of law, Bar Counsel attempts to equate the act of preparing a *settlement sheet* with the act of *settling cases* or preparing *settlement agreements.* We have previously determined that the act of "[s]ettling cases is the practice of law." *See*, *e.g.*, *Attorney Grievance Comm'n v. Sperling*, 459 Md. 194, 251, 185 A.3d 76 (2018). When an attorney engages in settlement discussions with another party or his or her client, such conduct necessarily involves analyzing legal issues, including assessing the strengths and weaknesses of a client's particular position, and providing advice to the client concerning settlement options. Here, there is no evidence that Ms. Jackson settled cases, or provided any legal advice to any clients of the law firm on any case or matter arising in Maryland. We determine that, based upon the facts proven by Bar Counsel here (or a lack thereof), Ms. Jackson's administrative or bookkeeping function in preparing settlement sheets for clients of the firm, without more, did not constitute the practice of law.

[10] **[11]** With respect to Bar Counsel's exception to the hearing judge's failure to find a violation of Rule 5.5(a) arising from Ms. Jackson's attendance at Maryland settlement conferences and mediations that were also attended by Maryland attorneys who were representing their clients, we similarly overrule this exception. In response to Ms. Jackson's request for admissions, Bar Counsel admitted that it "had no evidence that [Ms. Jackson] attended proceedings as counsel before any Maryland Court." Although Ms. Jackson attended some private mediations in Maryland cases, she attended them in the presence of Maryland lawyers, Victoria Adegoke and Tiffany Sims, both of whom testified that Ms. Jackson never held herself out as counsel to any party, and she was always accompanied by a licensed Maryland attorney who was handling the case. In other instances, the undisputed evidence reflected that Ms. Jackson attended settlement conferences with her mentor, Stan Brown, a Maryland attorney who represented crime victims, to shadow or learn from Mr. Brown within the legal practice area of negligent security claims. We overrule Bar Counsel's exception that the hearing judge should have found additional Rule 5.5(a) violations based upon this record. [13]

13 In addition to the performance of administrative functions, Bar Counsel relies on *Attorney Grievance Commission v. Harper and Kemp*, 356 Md. 53, 737 A.2d 557 (1999) ("*Harper*"), for the proposition that "[t]his Court's jurisprudence supports the conclusion that Ms. Jackson's operation of the law firm from the Maryland office constitutes the unauthorized practice of law under Rule 5.5(a)." In *Harper*, we found that a Maryland attorney assisted a non-Maryland attorney in the unauthorized practice of law in violation of Rule 5.5(a). In that case, Bar Counsel asserted a "legal theory" of the unauthorized practice of law—"that the lawyer who is admitted in another jurisdiction, but who is not admitted in Maryland, may not practice law in Maryland in partnership with a Maryland attorney, out of an office maintained by the partnership in Maryland, unless the Maryland attorney supervises the work of the unadmitted lawyer." *Id.* at 61–62, 737 A.2d 557. We pointed out, *however that both respondent attorneys accepted Bar Counsel's legal analysis, and as such, we had "no occasion in this matter to explore the theory further*." *Id.* at 62, 737 A.2d 557 (emphasis added). In addition to failing to challenge Bar Counsel's legal premise, the non-admitted attorney, Mr. Harper, did not file any exceptions on the "principal issue" involving the unauthorized practice of law, and he limited his exceptions to challenging the sufficiency of the evidence to support two of the client-specific charges. *Id.* At oral argument, Mr. Harper only addressed the more global charge involving the unauthorized practice of law by making a factual argument that he was, in fact, supervised by the Maryland barred attorney, Mr. Kemp. *Id.* On the facts of that case, we rejected Mr. Harper's factual argument. Given the respondents' acceptance of Bar Counsel's theory in that case, and their failure to file exceptions to the legal conclusions of a Rule 5.5(a) violation on that point, we are not persuaded

that *Harper* dictates a finding of a Rule 5.5(a) violation under the unique facts of this case.

****270 *204** 2. Bar Counsel's Exceptions Relating to Rule 5.5(b)(2) Charges that Ms. Jackson "Held Herself Out to the Public" as a Maryland Lawyer

[12] Bar Counsel excepts to the hearing judge's failure to conclude that Ms. Jackson violated Rule 5.5(a) and (b) by "holding herself out as a Maryland attorney." Bar Counsel asserts that "the undisputed facts establish[ ] that, between 2014 and 2020, [Ms. Jackson] violated Rule 5.5(a) and (b) when she ... held herself out to the public as being admitted to practice law in Maryland." Bar Counsel bases its assertion on the following facts: (1) from 2014 to 2015, Ms. Jackson's letterhead, business cards, email signature, and website did not disclose or identify her jurisdictional limitation; (2) from 2014 until the present, the law firm office signage (specifically, the sign in the lobby of the office building, the office suite door, and a sign inside the office) has not identified Ms. ***205** Jackson's jurisdictional limitation; and (3) in 2020, the law firm's website included a link to an Avvo.com profile that failed to state her jurisdictional limitations yet offered personal injury services. [14]

14 In addition to these facts, Bar Counsel identifies additional undisputed facts related to Ms. Jackson's *physical presence* in Maryland which Bar Counsel contends support a violation of Rule 5.5(b)(2). These facts are that: (1) between 2014 and 2019, Ms. Jackson was the sole owner of Jackson & Associates; (2) between 2014 until 2020, Jackson & Associates' only office location was in Maryland; and (3) Ms. Jackson physically practiced law from her office and routinely met with clients. As we discuss in this opinion, although Ms. Jackson's conduct in establishing an office in Maryland and practicing law from that location violated Rule 5.5(b)(1), we do not conclude, based upon this record, that Ms. Jackson, through her physical presence alone, "held herself out to the public or otherwise represent[ed]" that she is a Maryland lawyer. We overrule Bar Counsel's exception to a finding of a Rule 5.5(b)(2) violation based upon her presence alone.

[13] **[14]** We shall sustain Bar Counsel's exception to the hearing judge's failure to find that Ms. Jackson violated Rule 5.5(b)(2) in the 2014–2015 time period (prior to her meeting with Senior Assistant Bar Counsel) during which time she had not placed jurisdictional limitations on her letterhead, business card, email signature, and website. Based on this record, we overrule Bar Counsel's exception to the hearing judge's failure to find Rule 5.5(a) and (b) violations because the law firm's office signage did not contain Ms. Jackson's jurisdictional limitation, and the firm's website only contained Ms. Jackson's jurisdictional limitation under the attorney's profiles and not elsewhere on the website prior to the website being updated in 2019. As the hearing judge observed, ****271** the law firm employs three lawyers barred in Maryland. A client or prospective client who visits the office may meet with a Maryland lawyer to discuss Maryland legal matters. Given the facts and circumstances of this case—including that Ms. Jackson implemented the jurisdictional limitations suggested by Senior Assistant Bar Counsel in 2015, that the firm employs Maryland attorneys, and that the hearing judge found that Bar Counsel failed to establish any evidence that Ms. Jackson has engaged in the unauthorized practice of law, or has otherwise held herself out ***206** to the public as a Maryland lawyer despite her physical presence here for the past six years—we agree with the hearing judge's conclusion that Bar Counsel failed to prove that the law firm signage or website established a violation of Rule 5.5(a) or (b).

[15] Nor will we find a violation of Rule 5.5(a) or (b) based upon the fact that a third-party website, Avvo.com, did not specify Ms. Jackson's jurisdictional limitation. Again, Ms. Jackson made the changes suggested by Senior Assistant Bar Counsel to reflect her jurisdictional limitations. The hearing judge found that Ms. Jackson did not create the Avvo.com profile and did not review the profile to make sure it noted that she was only barred in the District of Columbia. After this matter was brought to Ms. Jackson's attention in the context of this disciplinary proceeding, the Avvo.com profile was changed and currently lists Ms. Jackson's jurisdictional limitation.

3. Bar Counsel's Exceptions Relating to Rule 5.5(b)(1) Charges Related to Ms. Jackson's Physical Presence in Maryland

This takes us to Bar Counsel's final exceptions bucket related to Rule 5.5—its assertion that the hearing judge erred in failing to find that Ms. Jackson's conduct in establishing an office in Maryland violated Rule 5.5(b)(1). As we previously noted, this subparagraph states the general rule that, unless "authorized by these Rules or other law," an attorney who is not admitted in Maryland shall not "establish an office or other systematic and continuous presence" in Maryland for the practice of law. The rule, as currently written, prohibits an attorney who is not admitted in Maryland from maintaining an office in the State or maintaining some other "continuous and systematic presence," unless one of the enumerated exceptions applies.

[16] Ms. Jackson argues that her practice falls within the federal practice exception set forth in Rule 5.5(d)(2). Ms. Jackson points out that attorneys who limit their practice to ***207** matters arising under federal laws in federal courts or federal agencies routinely practice from offices in Maryland without admission into the Maryland Bar. *Cf. Attorney Grievance Comm'n v. Tatung*, 476 Md. 45, 258 A.3d 234 (2021). Ms. Jackson contends that, by limiting her practice to cases and matters arising in the District of Columbia or other federal courts, she falls within the federal practice exception. Like bankruptcy and federal tax courts, she points out that District of Columbia courts were authorized by Congress under Article I of the United States Constitution, are funded entirely by the federal government, and are staffed with judges appointed by the President of the United States.

We disagree with Ms. Jackson's interpretation of the federal practice exception and decline to hold that it applies to all non-Maryland barred attorneys who are licensed in the District of Columbia, as we determine that such an interpretation would expand the exception beyond its plain language, as well as its purpose and intent.

****272** The federal practice exception, Rule 5.5(d)(2), provides that "[a]n attorney admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, *may provide legal services in this jurisdiction* that ... are services that the attorney is *authorized to provide by federal law* or other law of this jurisdiction." (Emphasis added). Paragraph (d)(2) permits an attorney to provide legal services in a jurisdiction in which the attorney is admitted, if authorized by federal or other law, court rules, executive regulations, or jurisdictional precedents. *See* Md. Rule 5.5, cmts. [15] and [18]. Under the plain language of the statute, if a federal court or federal agency authorizes an individual to appear in its court or in an administrative proceeding *in Maryland* without being licensed in Maryland, our professional rules permit such conduct.

The language in our Rule 5.5, as well as the comments thereto, are substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules. The federal practice exception was adopted in response to a 1963 Supreme ***208** Court decision, *Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963). In that case, Mr. Sperry, a non-attorney, practiced patent law in Tampa, Florida without admission to the Florida Bar or any other state bar. Mr. Sperry, however, was licensed to practice before the U.S. Patent and Trademark Office ("USPTO"). *Id.* at 381, 83 S.Ct. 1322. The Florida Bar brought suit to enjoin Mr. Sperry's conduct on the ground that it constituted the unauthorized practice of law. *Id.* at 383, 83 S.Ct. 1322. Although the Court did not question the determination that, under Florida law, preparing and prosecuting patent applications for others constituted practicing law, and that Florida had a substantial interest in regulating the practice of law within the State, it could not validly prohibit this "practice" because Congress had given the Commission of Patents the authority to promulgate "regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office." *Id.* at 384, 83 S.Ct. 1322. Accordingly, the Court concluded that state law must "yield" when it is incompatible with federal law. *Id.* at 383–84, 83 S.Ct. 1322.

Based upon the *Sperry* decision, the federal practice exception (sometimes referred to as the "federal overlay" exception) was developed in recognition that, for those who limit their practice to federal law, federal law may preempt a state's power to regulate the practice within its geographic borders. *See also Surrick v. Killion*, 449 F.3d 520 (3d Cir. 2006) (holding that the suspension of an attorney by a state supreme court cannot override the federal district court's power to authorize an attorney to maintain a law office in the state dedicated exclusively to his practice in federal court); *Augustine v. Dep't of Veterans Affairs*, 429 F.3d 1334 (Fed. Cir. 2005) (holding that federal law, not state law, controls whether an attorney who is not licensed in a state may represent the claimant and recover statutory fees in a federal administrative proceeding); *In re Desilets*, 291 F.3d 925 (6th Cir. 2002) (Texas attorney who was not admitted in Michigan, and who had an office in Michigan was permitted to practice in the ***209** federal bankruptcy court in Michigan because he was admitted to practice before the federal bankruptcy court in that state).

The District of Columbia courts are courts of general jurisdiction that are physically located within the geographic boundaries of the District. The preemption concerns that precipitated the enactment of the federal practice or federal overlay exception in Rule 5.5(d)(2) (as articulated by the Supreme Court in *Sperry*) are not ****273** present when an individual is licensed to practice law in the District of Columbia and practices in the courts located there. Unlike the United States District Court for the District of Maryland, the United States Bankruptcy Court for the District of Maryland, or a federal administrative agency located in Maryland, the courts established in the District of Columbia are not located within our geographic borders, and therefore do not trigger any federal overlay concerns. We decline to interpret the federal practice exception in a manner that is inconsistent with its plain language,[15] or its purpose or intent.

15 Under a plain language analysis of the exception, of course, there is no "federal law" that authorizes an individual who is licensed by the District of Columbia Bar to practice in its courts of general jurisdiction to also practice law in Maryland. *See* Md. Rule 5.5(d)(2).

[17] Because we have determined that Ms. Jackson's physical presence in Maryland did not fall within the federal practice exception (or any other exception), we are constrained to give effect to the plain language of Rule 5.5(b)(1) as presently adopted, and to sustain Bar Counsel's exception that Ms. Jackson's conduct in maintaining an office in our State was in violation of that rule.

Although we are constrained to apply the plain language of the Rule, the facts of this case (and changes to the modern practice of law) have caused us to reflect on its continued wisdom. Specifically, we question whether a rigid prohibition based *solely* upon geographic considerations of physical presence remains an appropriate litmus test for determining whether an individual is engaged in the unauthorized practice ***210** of law in our State. As discussed below, we observe that some states have departed from this formalistic approach.

Rule 5.5 – The Modern Treatment of "Physical Presence" Adopted by Some of Our Sister Supreme Courts

As previously noted, Maryland Rule 5.5 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct. The annotations to ABA Model Rule 5.5 point out that, "[a]lthough not reflected in the Model Rules, a potentially growing state trend is to permit out-of-state lawyers to maintain an office in-state so long as they do not practice the host state's law." Ann. Mod. Rules Prof. Cond. § 5.5 (9th Ed. 2019).

We observe that Arizona Rule of Professional Conduct 5.5(d) provides that:

> A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction, *may provide legal services in Arizona that exclusively involve* by federal law, *the law of another jurisdiction,* or tribunal law.

(Emphasis added). The phrase "law of another jurisdiction" contained in the Arizona Rule expressly permits a lawyer who is not licensed in Arizona, but is licensed in another state, to practice the law of the state where he or she is licensed, within the geographic boundaries of the State of Arizona.

In New Hampshire, in addition to the in-house counsel exception and the federal practice exception included in the ABA Model Rule, the New Hampshire Rule of Professional Conduct 5.5(d)(3) contains an additional exception, which permits an attorney who is barred in a jurisdiction other than New Hampshire to maintain an office or other continuous and systematic presence in the state to provide legal services that "relate solely to the law of a jurisdiction in which the lawyer is admitted." Notably, ****274** Comment [3] to the New Hampshire Rule 5.5 notes in part that:

> Prior versions of Rule 5.5 and our prior interpretations of the Rule assumed that attorneys practiced in fixed physical ***211** offices and only deal with legal issues related to the States in which their offices are located. The increased mobility of attorneys, and, in particular, the ability of attorneys to continue to communicate with and represent their clients from anywhere in the world, are circumstances that were never contemplated by the Rule.
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> * * * *
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> The assumption that a lawyer must be licensed in New Hampshire simply because he or she happens to be present in New Hampshire no longer makes sense in all instances. *Rather than focusing on where a lawyer is physically*

> *located, New Hampshire's modifications* to Rule 5.5(b)(1) and (2) and adoption of new Rule 5.5(d)(3) *clarify that a lawyer who is licensed in another jurisdiction but does not practice New Hampshire law need not obtain a New Hampshire license to practice law solely because the lawyer is present in New Hampshire.*

(Emphasis added).

In Virginia, Comment 4 to Virginia Rule 5.5 states that "[d]espite the foregoing general prohibition [on the unauthorized practice of law], a Foreign Lawyer[16] may establish an office or other systematic and continuous presence in Virginia if the Foreign Lawyer's practice is limited to areas which by state or federal law do not require admission to the Virginia State Bar." The Virginia Supreme Court has approved a Virginia Ethics Opinion concluding that,

> foreign lawyers who are licensed to practice in other U.S. jurisdictions and based in [a] multi-jurisdictional law firm in Virginia would not be engaging in the unauthorized practice of law in violation of Rule 5.5 so long as they limit[ ] their practice to the law of the jurisdiction/s where they are ***212** licensed, to federal law not involving Virginia law, or to temporary or occasional practice as authorized by [certain subsections of Virginia Rule 5.5(d)].

Va. Ethics Op. 1856 (2011; Supreme Court approval 2016).

16 The Virginia Rule of Professional Conduct Rule 5.5(d)(1) defines "Foreign Lawyer" as "a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation, but is neither licensed by the Supreme Court of Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia, nor disbarred or suspended from practice in any jurisdiction."

[18] Like our colleagues on the New Hampshire Supreme Court, we question whether the "physical presence" limitations set forth in Rule 5.5(b)(1) continue to strike the appropriate balance between protecting the public and our profession on the one hand and recognizing the realities of the modern practice of law on the other.[17] As we recently observed in *Tatung*, ****275** with the modern digital and electronic advances that have enhanced professional portability, "it is increasingly possible for an attorney to practice law from a location other than the jurisdiction in which he or she is licensed." 476 Md. at 50, 258 A.3d 234. Indeed, the events associated with the COVID-19 pandemic have highlighted the benefits of professional portability.[18] Our current Rule 5.5 does not reflect the reality ***213** of a modern, portable profession. Additionally, in the context of a multi-jurisdictional practice, this case highlights the challenges posed by a professional rule that equates the "unauthorized practice of law" solely with physical presence. As written, the rule may create complications for multi-jurisdictional law firms maintaining an office in Maryland where some lawyers employed by the law firm are not licensed in Maryland but are licensed to practice in another jurisdiction.[19] For the reasons expressed by the Supreme Court of New Hampshire, discussed *supra*, we shall refer this Rule to the Standing Committee on Rules of Practice and Procedure for consideration and recommendation, as a matter of general policy, regarding whether an amendment to Rule 5.5(b)(1) may be warranted.

17 The purpose of the attorney professional conduct rules prohibiting the unauthorized practice of law is "to protect the public from being preyed upon by those not competent to practice law—from incompetent, unethical, or irresponsible representation." *Attorney Grievance Comm'n v. Brisbon*, 422 Md. 625, 641, 31 A.3d 110 (2011) (internal citations omitted). Even if this Court were to expand the exceptions by which an attorney who is not licensed in Maryland may maintain an office or physical presence in this State, of course, the attorney would not be permitted to practice Maryland law. For example, we have disciplined attorneys who exceed the boundaries of the federal practice exception by also engaging in the practice of Maryland law. *See*, *e.g.*, *Attorney Grievance Comm'n v. Ambe*, 425 Md. 98, 38 A.3d 390 (2012) (reprimanding an attorney after upholding a violation of Rule 5.5(a) where an immigration attorney who maintained an office in Maryland engaged not only in federal immigration

law, but also practiced Maryland tort law, and upholding a violation of Rule 5.5(b) by failing to clearly indicate on his business cards that he was not licensed to practice law in Maryland). The requirements of Rule 5.5(a) and (b)(2) require that an attorney who is not licensed in Maryland exercise caution regarding public information concerning his or her practice. For example, the attorney must indicate the limitations of his or her practice on letterhead, business cards, website, etc. *See* Md. Rules 7.1 and 7.5.

18 For example, an attorney who is licensed only in the District of Columbia but resides in Maryland may have practiced law from his or her home during the pandemic. We question whether the "unauthorized practice of law" should be triggered based solely upon a "continuous and systematic presence" if the attorney's practice is limited to the laws of the jurisdiction in which he or she is licensed, and there is no evidence that the attorney is holding himself or herself out as a Maryland attorney.

19 Counsel for Ms. Jackson asserts that a formalistic rule based solely on geography or physical presence might be selectively and unfairly enforced against a smaller multi-jurisdictional law firm such as Jackson & Associates (with four attorneys, one of whom is barred in the District of Columbia and three others licensed in Maryland) and not enforced against a midsize or large multi-jurisdictional firm located in Maryland that may employ attorneys who work in that office but are licensed in another state in a similar manner.

Bar Counsel's Exceptions to Hearing Judge's Failure to Find a Violation of Rule 8.4 and Section 10-601 of the Business and Occupations Professions Article

[19] Finally, Bar Counsel has filed exceptions to the hearing judge's failure to conclude that Ms. Jackson's physical presence in Maryland resulted in a violation of Rule 8.4(a), (b), (d),[20] and section 10-601 of the Business and Occupations ***214** Professions Article. Bar Counsel asserts that these rules were violated when Ms. Jackson "established an office in Maryland for the practice of law and held out to the public ****276** that she was authorized to practice law in Maryland[.]" According to Bar Counsel, Ms. Jackson violated "8.4(b) by committing a criminal act that reflects adversely on her honesty, trustworthiness, or fitness as a lawyer[ ]" and points out that BOP § 10-601 "criminalizes the unauthorized practice of law."

20 Rule 8.4 provides, in part:

> It is professional misconduct for an attorney to:
> (a) violate or attempt to violate the Maryland Attorneys' Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) commit a criminal act that reflects adversely on the attorney's honesty, trustworthiness or fitness as an attorney in other respects;
> * * *
> (d) engage in conduct that is prejudicial to the administration of justice[.]

Based upon the unique facts of this case, we overrule Bar Counsel's exceptions. We cannot ignore the fact that any violation of Rule 5.5(a) or (b) arising from Ms. Jackson's continuous and systematic presence in this State since 2015 was undertaken with knowledge by the Office of Bar Counsel, and its express recommendations concerning how to maintain her office in a manner that purported to comply with the professional rules. To be sure, Ms. Jackson initially relocated to Maryland and failed to state her jurisdictional limitations on her business cards, email signature, and website. However, the hearing judge determined that she implemented the recommendations made by Senior Assistant Bar Counsel. Additionally, by visiting with Ms. Jackson at her office, suggesting safeguards to comply with the professional rules, and then failing to follow up with Ms. Jackson in any manner for three and one-half years, a reasonable person in Ms. Jackson's position would have taken those suggestions as either explicit or tacit approval that her conduct in maintaining an office in Maryland complied with the professional rules. Ms. Jackson has, in good faith, attempted to comply with the jurisdictional parameters recommended by the Office of Bar Counsel. We overrule Bar Counsel's exceptions to the hearing judge's failure to find a violation of Rule 8.4(a), (b), and (d) or violations of BOP § 10-601.

*215 III

Sanction

[20] Turning to any potential sanction that we may impose in this case, Bar Counsel initially recommended that we disbar Ms. Jackson in the event we "wholly or substantially

sustain[ed] Petitioner's exceptions." At the oral argument in this matter, Bar Counsel changed the recommended sanction from disbarment to indefinite suspension, again assuming that we sustained Petitioner's exceptions. In the event we overruled Bar Counsel's exceptions (which we have, for the most part), Bar Counsel recommended that we impose a 60-day suspension on Ms. Jackson. Ms. Jackson recommended that we dismiss the charges or impose no sanction. Under the unique facts presented in this case, we agree with Ms. Jackson that no sanction is appropriate in this case.

[21] **[22]** **[23]** **[24]** The purpose of a sanction in an attorney discipline case is "not so much to punish the attorney as to protect the public and the public's confidence in the legal profession." *Attorney Grievance Comm'n v. Singh*, 464 Md. 645, 677, 212 A.3d 888 (2019) (internal quotations omitted). The sanction should be "commensurate with the nature and gravity of the violations and the intent with which they were committed." *Attorney Grievance Comm'n v. Stein*, 373 Md. 531, 537, 819 A.2d 372 (2003). "We evaluate each attorney grievance matter on its own merits, taking into consideration the particular facts and circumstances when fashioning the appropriate sanction." *Attorney Grievance Comm'n v. Ibebuchi*, 471 Md. 286, 308–09, 241 A.3d 870 (2020). When considering the sanction to be imposed in a particular case, we typically consult the list of aggravating and mitigating factors developed by the American Bar Association. *Attorney Grievance Comm'n v. Blatt*, 463 Md. 679, 707 n.19, 208 A.3d 820 (2019) (listing aggravating and mitigating factors). We consider any aggravating or mitigating factors that are peculiar to the ****277** respondent attorney or the facts of the particular case. In the end, we do not apply these factors mechanically or as a rote formula. Rather, we tailor ***216** the sanction to the facts and circumstances of the particular case.

Aggravating Factors

With respect to aggravating factors, the hearing judge found none. Bar Counsel contends that it proved by clear and convincing evidence the presence of three aggravating factors, specifically that Ms. Jackson: (1) has substantial experience in the practice of law; (2) committed multiple offenses; and (3) engaged in a pattern of misconduct. We sustain Bar Counsel's exception concerning the presence of one aggravating factor—that Ms. Jackson has substantial experience in the practice of the law. We overrule Bar Counsel's exceptions as far as the hearing judge's failure to find the presence of the latter two aggravating factors. We agree with the hearing judge that Bar Counsel failed to prove that Ms. Jackson committed multiple offenses or engaged in a pattern of misconduct.

Mitigating Factors

The hearing judge found the presence of nine mitigating factors: (1) absence of prior disciplinary record, (2) absence of a dishonest or selfish motive; (3) presence of personal or emotional problems; (4) good faith efforts to rectify concerns; (5) delay in disciplinary proceedings; (6) full and free disclosure to the disciplinary board; (7) a cooperative attitude toward proceedings; (8) a fine character and reputation; and (9) unlikelihood of misconduct in the future. Neither party filed exceptions to the hearing judge's findings concerning the presence of the substantial mitigating factors in this case. Given that the mitigating factors present here tip the scales in favor imposing no sanction under the unique facts of this case, it is useful to discuss them, as well as the hearing judge's findings of fact that support each factor.

1. Absence of a Prior Disciplinary Record

The hearing judge noted that Ms. Jackson has no history of discipline, pointing out that the "only time she has been involved in prior disciplinary proceedings" involved her "cooperation as a witness" in the matters involving her ex-partner.

***217** 2. Absence of a Dishonest or Selfish Motive

The hearing judge determined that Ms. Jackson had no dishonest or selfish motive in connection with any violation of professional rules.

3. Personal or Emotional Problems

The hearing judge found that the scandal involving her ex-partner, Ms. Baylor, created a "professional and emotional upheaval" that "flowed into her personal life [and] had dire consequences to her income." The hearing judge also found that, from the moment that the SEC called Ms. Jackson "to break the news [that her partner was being investigated for civil fraud involving her law firm] and for more than a year thereafter, her life 'was a blur.' " The hearing judge credited Ms. Jackson's testimony that she was "emotionally ... distraught, because everything that I worked for, I just got a call that it was over." Ms. Jackson testified that, with her accounts frozen, "there was no way to take care of my family or the staff." Ms. Jackson described herself as "a zombie trying to keep everything together." The hearing judge summarized Ms. Jackson's personal and emotional state during the time period beginning with the SEC's telephone call as being "overwhelmed with obligations to her family, her staff, the SEC, the disciplinary authorities investigating [Ms.] Baylor ****278** in [the District of Columbia] and in Maryland and [ ] embroiled in civil litigation herself as a 'relief defendant.' " In finding that Ms. Jackson suffered from personal or emotional problems during "a large chaotic period[,]" the hearing judge relied upon Ms. Jackson's medical records that were admitted into evidence, and credited her testimony summarizing her emotional state at that time:

> [T]here were certain days where I couldn't get out of bed ... where I was so sick and I started to suffer from panic attacks to the point that I couldn't drive .... There were days where I couldn't even pick up my kids because I felt so overwhelmed ... with trying to sustain a firm, trying to stay barred, trying to work with the Department of Justice, ***218** trying to work with Bar Counsel, trying to find a way to pay the staff.
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> I had gone to the hospital for panic attacks, I was on medicine. I was winding down with the SEC all of the financials for Baylor [&] Jackson. I was doing depositions with the Department of Justice for [the investigation involving] my partner. I was dealing with D.C. Bar Counsel and getting out letters and trying to figure out what clients would stay and what I needed to do as far as reassign refunds and things of that nature.

Based upon this evidence, the hearing judge found that Ms. Jackson continued "to maintain her old firm while forming another and meeting everyone else's demands," " 'was not available for [her own] cases,' missed significant office time, and grew increasingly reliant on her staff." Based upon these facts, the hearing judge concluded that Ms. Jackson's personal and emotional state should be considered as a mitigating factor, particularly given that he only found one violation of a professional rule—signing two lines to reissue a summons.

4. <u>Timely Good Faith Efforts to Rectify Misconduct</u>

The hearing judge found that "[l]ong before these proceedings began, [Ms. Jackson] exercised good faith in resolving any issues [that were] brought to her attention." The hearing judge determined that, "[a]t a bare minimum," Ms. Jackson attempted to address any "possible concerns" that the Office of Bar Counsel had with her Maryland office, by making the suggested changes to her letterhead, website, business cards, etc. "even if it was later than [Bar Counsel] believes it should have occurred."

5. <u>Delay in Disciplinary Proceedings</u>

The hearing judge made considerable findings with respect to this mitigating factor under the unique facts of this case. Specifically, the hearing judge noted that Bar Counsel learned of Ms. Jackson's "continuous and systematic presence in Maryland at least six years ago when [Ms. Ridgell] met with her ***219** in early 2015 and personally visited [her Maryland office] shortly thereafter." The hearing judge found that, "[r]ather than instruct[ing] her to close the office, or launch a formal investigation into its propriety, Dolores Ridgell *made recommendations for maintaining it*." (Emphasis added). The hearing judge commented on the prejudicial effect that Bar Counsel's "extraordinary delay" had on Ms. Jackson's ability to defend the charges that were ultimately filed against her:

> Regardless of Bar Counsel's reasons for this delay, its consequences are particularly evident from the record in this case. Given the passage of time, most witnesses do not remember details of the allegations contained in the Petition. Lack of specificity from witnesses due to ****279** length of time would relieve [Bar Counsel] of its burden. This also places [Ms. Jackson] in the awkward position of trying to defend her actions when, in fact, she cannot recall them either. *Even if the prejudice resulting from this extraordinary delay is not a dispositive factor in this case, it should certainly be considered as a mitigating factor in the ultimate outcome.*

(Emphasis added). We agree with the hearing judge's characterization of the delay presented in this case. Not only was Ms. Jackson prejudiced in having to explain her signature on two lines many years after they were filed, but she was also prejudiced by Bar Counsel's actions in giving her recommendations on how to maintain an office in Maryland and then waiting three and one-half years to raise its concerns.

6. Full and Free Disclosure to Disciplinary Board

In response to Bar Counsel's attempt to "use [Ms. Jackson's] unrecorded interview responses against her," the hearing judge found "no merit in [Bar Counsel's] claims that she gave any false statement [to Bar Counsel] whatsoever."[21] The ***220** hearing judge determined that Ms. Jackson "has, at all relevant times, been open and honest throughout Bar Counsel's investigation and all related proceedings." The hearing judge noted that, [i]f anything, [Ms. Jackson] has shown a long history of close cooperation with the Office of Bar Counsel."

21 The hearing judge's reference to Ms. Jackson's unrecorded statement relates to Bar Counsel's attempt to prove that Ms. Jackson "made a false statement of material fact" to Bar Counsel in connection with its investigation in violation of Rule 8.1(a). Bar Counsel alleged that Ms. Jackson misrepresented her involvement in the Yenchochic case, as well as the Lyons case. The hearing judge disagreed, finding that Ms. Jackson was not involved in either case, and also finding no Rule 8.1(a) violation in connection with Ms. Jackson's responses to Bar Counsel on these matters. The hearing judge observed that "there is a large difference between disagreeing with a response and finding said response is knowingly false."

7. Cooperative Attitude Toward Proceedings

Along the same vein as mitigating factor 6 above, the hearing judge found that Ms. Jackson "fully cooperated with the Office of Bar Counsel in the course of its investigation and in these proceedings."

8. Character and Reputation

In the mitigation phase of the hearing, Ms. Jackson called two witnesses to testify as to her character, Judge Dolores Dorsanvil, and Bridgett Stumpf, who is the Executive Director of the Network for Victim Recovery of DC ("NVRDC").[22] The hearing judge found that both witnesses hold Ms. Jackson in very high esteem and that she has earned their respect as a strong advocate for crime victims who may not otherwise have access to justice in the District of Columbia. Ms. Stumpf testified that Ms. Jackson has been honored by the NVRDC for her dedication to survivors of sexual assault and other crimes, providing pro bono legal services to crime victims through her participation in that organization. Ms. Stumpf testified that, on an annual basis for over eight years, she has referred Ms. Jackson more than a dozen cases, with the knowledge that Ms. Jackson will handle these clients with care. Ms. Stumpf testified that "it takes a special committed ***221** dedicated selfless person to do this type of civil work particularly for ****280** these clients that are so vulnerable." In Ms. Stumpf's opinion, "she is an incredible human." Ms. Stumpf testified that "Dawn is few and far between" among "those of us in this work that are dedicating our careers to making other people's lives better."

22 Although Ms. Jackson offered to call two additional character witnesses, the hearing judge was satisfied with the testimony provided by Judge Dorsanvil and Ms. Stumpf.

Judge Dorsanvil also testified that Ms. Jackson is "a very good person. She is very honest. She is very trustworthy." As a former Assistant Bar Counsel in the State of Maryland and Assistant Disciplinary Counsel for the District of Columbia, Judge Dorsanvil "wouldn't feel comfortable calling her a friend if [she] didn't think that she had certainly good moral character." A "voice for people who ordinarily ... would probably never get their day in court," Ms. Jackson "prides herself on handling cases that ... many firms would more than likely turn away" and is "very passionate" about her role in the lives of D.C. crime victims. The hearing judge characterized Judge Dorsanvil's testimony as follows:

> [When a]sked whether the allegations of the Petition have diminished her respect for [Ms. Jackson], this former ethics lawyer testified otherwise. Indeed, when [Ms. Jackson] told her 'some years ago' that she was 'being investigated for engaging in unauthorized practice of law,' Judge Dorsanvil

knew better. 'I have never known her to hold herself out as a Maryland lawyer. She has always been a D.C. lawyer.'

The hearing judge commented that both witnesses testified to Ms. Jackson's character as being "beyond reproach," and found "more than a preponderance of evidence on this mitigating factor."

9. Unlikelihood of Repetition of Any Misconduct

Noting that Ms. Jackson has also opened an office in the District of Columbia, the hearing judge stated that "it would certainly appear that any lingering concerns with [Ms. Jackson's] practice have been fully addressed." The hearing judge further stated that, although "[t]his court is not convinced that [Ms. Jackson] engaged in the unauthorized practice of law, [Bar Counsel] has not voiced any concern with maintaining a ***222** law firm with more than one location. So long as she does so, this [c]ourt would not expect any further complaint from Petitioner or from Bar Counsel."

As previously noted, Bar Counsel did not file any exceptions to the presence of these mitigating factors. We agree with the hearing judge's determination that Ms. Jackson has proven the existence of significant mitigating factors in this case.

[25] With these mitigating factors in mind, we turn to the appropriate sanction. In cases involving the unauthorized practice of law, we "primarily consider factors of deterrence, whether respondent's conduct was willful and deliberate, and whether respondent cooperated with Bar Counsel's investigation." *Attorney Grievance Comm'n v. Lang*, 461 Md. 1, 77, 191 A.3d 474 (2018) (cleaned up).

In the event that we overruled Bar Counsel's exceptions (which we have, for the most part), Bar Counsel urges us to impose a 60-day suspension. Although acknowledging that the case is "not on all fours," Bar Counsel suggests that *Attorney Grievance Commission v. Thompson*, 462 Md. 112, 198 A.3d 234 (2018), is instructive. In that case, we imposed a 60-day suspension in a disciplinary proceeding involving an attorney who was only licensed in the District of Columbia and maintained a "systematic and continuous presence" for the practice of law in Maryland by using her home address and a mail drop box address for business purposes. In addition to the Rule 5.5(b) violation, we ****281** upheld additional violations of Rules 1.1, 1.3, 1.4, 1.5(a), 1.15 (a), (b), (c) and (d), 1.16(d) in connection with client-related matters, as well as violations of Rules 8.1(a) and (b) and 8.4(a), (b), and (d) associated with the disciplinary proceedings. Given the additional rule violations present in *Thompson*, and the significant mitigating factors present here, we are not persuaded that this case is instructive.

Bar Counsel also directs us to *Attorney Grievance Commission v. Harris-Smith*, 356 Md. 72, 737 A.2d 567 (1999), where we imposed a 30-day suspension where the attorney violated Rule 5.5(a). In that case, Ms. Harris-Smith was licensed to practice law in Pennsylvania, Virginia, and the District of ***223** Columbia, and was admitted to practice before the United States District Court for the District of Maryland. She maintained a principal office for the practice of law for approximately three years in Maryland, where she shared a practice with three attorneys, two of whom were admitted to the Maryland Bar. The law firm promoted itself through radio and newspaper advertising. The radio advertisements "targeted those listeners for whom filing for bankruptcy was likely to be appropriate, yet [the advertisements] did not state that [Harris-Smith's] practice was limited to bankruptcy law [and matters arising within the Maryland federal court]." *Id.* at 76, 737 A.2d 567. Ms. Harris-Smith's role was to "prescreen" (a term she used) prospective clients. When she determined that a client's matter involved bankruptcy law, she proceeded to represent the client without the supervision of a Maryland attorney. When representation in a state court was required, however, she would refer the client to one of the firm's other attorneys admitted in Maryland.

Based upon this conduct, we concluded that Ms. Harris-Smith violated Rule 5.5(a). We imposed a 30-day suspension based in part on the following factual considerations: (1) that Ms. Harris-Smith did not represent clients in Maryland state court proceedings; (2) that she was admitted to the Maryland federal court and made some effort to conduct her practice in Maryland within the practice limits associated with her admission to the federal court; and (3) that once Bar Counsel commenced its investigation, Ms. Harris-Smith moved her office from Maryland to the District of Columbia. We determined that a 30-day suspension was sufficient to "deter other unadmitted attorneys from undertaking a federal practice from an office in Maryland from which the non-admitted attorney would hold himself or herself out to the public as generally practicing law in order to identify cases that the attorney was authorized to handle." *Id.* at 91, 737 A.2d 567.

In this case, the only rule violations that Bar Counsel has proven are the violation of Rule 5.5(a) arising from the filing of the Yenchochic lines, and the violations of Rule 5.5(b) related to Ms. Jackson's physical presence in Maryland. The ***224** Rule 5.5(a) violation relating to the lines seeking reissuance of a summons occurred in 2012—some six years prior to Bar Counsel's investigation and before Ms. Jackson moved her office to Maryland. The hearing judge found that the lines were filed during a tumultuous time in Ms. Jackson's life where an accidental filing of this nature was certainly understandable. Bar Counsel did not establish any other conduct by Ms. Jackson that constituted the unauthorized practice of law in Maryland. To the contrary, as the hearing judge observed, all the witnesses who testified in this case—including those witnesses called by Bar Counsel—confirmed that Ms. Jackson has never held herself out to be a Maryland lawyer, nor has she ever represented a client in a Maryland court. She limited her ****282** practice to matters arising in the District of Columbia.

As for the violations of Rule 5.5(b), Ms. Jackson promptly placed the appropriate jurisdictional limitations on the firm website, letterhead, her business card, and email signature after Senior Assistant Bar Counsel recommended that she do so. And we cannot ignore the fact that the Office of Bar Counsel knew that Ms. Jackson was practicing from an office in Maryland and *gave her specific recommendations for how to maintain her practice*. Ms. Jackson complied with Bar Counsel's suggestions. Having done so, it was reasonable for Ms. Jackson to assume that her physical presence in Maryland was not an issue. Had Ms. Ridgell raised any concern with Ms. Jackson at their meeting in June 2015 about her office location, given Ms. Jackson's record of compliance with Bar Counsel, there is no reason, based on the record in this case, to believe that she would not have addressed any concerns related to her physical presence at that time. After Bar Counsel commenced its investigation, Ms. Jackson opened an office in the District of Columbia. The hearing judge found that Ms. Jackson has been cooperative and forthcoming with the Office of Bar Counsel and has attempted to comply with its directives. Given the significant delay in the investigation of this matter and the specific recommendations made by Bar Counsel, as well as the presence of the other considerable ***225** mitigating factors, we exercise our discretion and determine that no sanction is appropriate in this case.

Having determined that no sanction is appropriate in this case, we dismiss this case pursuant to Maryland Rules 19-740(c)(1)(F) and 19-706(a)(6). Given that we have dismissed this case, this matter shall not be construed as an adverse disciplinary action by this Court. Ms. Jackson shall continue to have no history of prior discipline in Maryland.

IT IS SO ORDERED; PETITIONER SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT UNDER THE DISMISSAL ORDERED BY THE COURT.

All Citations

477 Md. 174, 269 A.3d 252

End of Document

« Rule 5.5. »

Del. Rules of Prof'l Conduct Rule 5.5

Rule 5.5. Unauthorized practice of law; multijurisdictional practice of law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction. (Amended, effective Oct. 16, 2007; effective Jan. 7, 2008.)

COMMENT

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person. For example, a lawyer may not assist a person in practicing law in violation of the rules governing professional conduct in that person's jurisdiction.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this

paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or

potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law. Lawyers desiring to provide *pro bono* legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should

consult Supreme Court Rule 58 on Provision of Legal Services Following Determination of Major Disaster.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or(d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5.

Cross references. — As to admission pro hac vice, see Supreme Court Rule 71.

NOTES TO DECISIONS

Analysis

Advertising.

Broadcast of legal service ads which did not include or reference an unlicensed foreign attorney, or any lawyer in the firm, did not establish a violation of the rule prohibiting the unauthorized practice of law. In re Edelstein, 99 A.3d 227 (Del. 2014).

Assisting unauthorized practice.

Lawyer engaged in knowing misconduct, for which suspension was the appropriate discipline, by: (1) assisting a suspended lawyer in the unauthorized practice of law when the lawyer engaged the suspended lawyer to work on cases without determining the applicable restrictions;

(2) failing to supervise the suspended lawyer adequately; and (3) giving the suspended lawyer a percentage of a contingency fee that included work performed both before and after the suspension. In re Martin, 105 A.3d 967 (Del. 2014).

Multi-jurisdictional practice.

No violation of subsection (a) established where attorney represented client who had moved to Florida. In re McCann, 669 A.2d 49 (Del. 1995).

Attorney, who was not authorized to practice law in Delaware, was disbarred for violating R. Prof. Conduct 5.5(b)(1) as the attorney lived in Delaware, was active in church groups, and worked in the medical office of the attorney's husband before and after the attorney was reinstated as an attorney in Pennsylvania; many of the attorney's Delaware clients were the patients of the attorney's husband, or people the attorney met through church activities, and while the attorney might not have engaged in formal advertising to attract clients, the attorney cultivated a network of Delaware contacts who accomplished the same result. In re Tonwe, 929 A.2d 774 (Del. 2007).

Attorney's actions in continuing to prepare documents for an accountant despite not being licensed in Delaware and the attorney's knowing violation of a cease and desist order violated the attorney's ethical duties and seriously undermined the legal system; the attorney's actions were in violation of Law. R. Prof. Conduct 5.5 and warranted disbarment. In re Kingsley, 950 A.2d 659 (Del. 2008).

While a liberal reading of a client's complaint signaled a violation of Law R. Prof. Conduct 5.5, such a violation in and of itself provided insufficient grounds for a suit based on legal malpractice. Brooks v. Quinn & Quinn, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 14206 (D. Del. Feb. 19, 2010).

Attorney's conduct in meeting with a former client to provide legal advice, discussing legal services and fees with a potential client which led the client to believe that the attorney's residential services company could provide legal services and using the attorney's former law firm email address in communications with the public at least 6 weeks after a suspension order violated Law. Prof. Conduct R. 5.5(a). In re Davis, 43 A.3d 856 (Del. 2012).

In determining reasonableness of an attorneys' fee award, an attorney did not act unethically in billing hours associated with an appeal in anticipation of being admitted pro hac vice; further, fees charged by Delaware counsel for attending the trial were proper, where counsel filed the motion for the admission of the out-of-state attorney and was required to attend unless excused by the court. Staffieri v. Black, 2013 Del. Ch. LEXIS 322 (Del. Ch. Aug. 8, 2013).

Attorney violated this rule by providing legal services to at least 75 Delaware residents involved in automobile accidents, covered by Delaware insurance policies; although the attorney did not go to court in Delaware, the attorney's meeting with clients in Delaware could have given the impression that the attorney was a Delaware lawyer. In re Nadel, 82 A.3d 716 (Del. 2013).

Sanctions.

An attorney's actions in engaging in the unauthorized practice of law in Delaware, which included establishing an office for the practice of law, were deemed knowingly conducted; the attorney's violation of the Rules of Professional Conduct warranted the sanction of a 1-year suspension from the practice of law. In re Pelletier, 84 A.3d 960 (Del. 2014).

Board on Professional Responsibility properly found that an attorney engaged in the unauthorized practice of law because by representing Delaware residents in over 100 matters involving Delaware motor vehicle accidents despite not being admitted to the Delaware Bar; the attorney was sanctioned with a 1-year suspension upon weighing of the mitigating and aggravating factors. In re Edelstein, 99 A.3d 227 (Del. 2014).

To award attorneys' fees or impose sanctions on a nonparty, for failure to comply with a subpoena to produce documents at a deposition, under Super. Ct. Civ. R. 45 was inappropriate; plaintiff's counsel was at least partially responsible for certain of the costs incurred and had not yet been admitted pro hac vice in Delaware when counsel took a deposition of the nonparty in violation of Super. Ct. Civ. R. 90.1 and Law. Prof. Conduct R.

5.5. Beresford v. Does, — A.3d —, 2019 Del. Super. LEXIS 435 (Del. Super. Ct. Sept. 12, 2019).

West's Delaware Code Annotated
Delaware Rules of Court
Rules of the Supreme Court
Part II. Appeals--General

Sup.Ct.Rules, Rule 12

RULE 12. ATTORNEYS OF RECORD; WITHDRAWAL

Currentness

(a) Appearance and Signing of Papers.

(i) *Original Signature by Delaware Attorney.* Except in the case of a party appearing pro se, all papers filed with the Court shall be signed by an attorney who is an active member of the Bar of this Court and who maintains an office in Delaware for the practice of law. The attorney shall list the attorney's address, telephone number, and Supreme Court identification number on all papers filed with the Court. Such attorney or the attorney's partner or an associate of the attorney's firm must attend all proceedings. The attorney, if any, designated on the notice of appeal as the attorney below for the appellee shall be deemed to be the attorney for the appellee unless another attorney shall file a notice of appearance substantially in the form provided in Official Form E.

(ii) *Original Signature Is Certification.* The original signature of an attorney or party constitutes a certification by the attorney that the attorney has read the paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.

(b) Withdrawal. Except as permitted by order of the Court, no attorney may withdraw and all appearing attorneys are required to continue as such and to perform the duties of counsel imposed by law, by The Delaware Lawyers' Rules of Professional Conduct, and these Rules. Withdrawal of an attorney ordinarily will not be considered as permissible ground for delay and relief under these Rules.

(c) Appearance Pro Se. As a condition for a party appearing pro se, the party must designate a mailing address other than a post office box for the receipt of all notices, papers and orders filed in the case. If a pro se party's address is a post office box, the pro se party must provide the pro se party's street address to the Court.

(d) Office for the Practice of Law. As used in these rules, an "office for the practice of law" means a bona fide office maintained in this State for the practice of law in which the attorney practices by being there a substantial and scheduled portion of time during ordinary business hours in the traditional work week. An attorney is deemed to be in an office even if temporarily absent from it if the duties of the law practice are actively conducted by the attorney from that office. An office must be a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person or by telephone during normal business hours and which has the customary facilities for engaging in the practice of law. A bona fide office is more than a mail drop, a summer home which is unattended during a substantial portion of the year or an answering, telephone forwarding, secretarial or similar service.

Credits

[Amended effective April 1, 1999; April 7, 2000.]

Editors' Notes

COMMITTEE COMMENTARY

This is a new rule. It is designed to make clear that a member of the Delaware Bar must be an attorney of record. It is also designed to make clear that withdrawal is permitted only by order of the Court.

The amendment to Rule 12(a), which takes the form of an added subsection, conforms the Supreme Court Rule to the concept in Chancery and Superior Court Rules 11 that signature of a paper certifies that it has been read by the signer, that he believes there is good ground to support it in law or fact, and that it is not interposed for delay. While Chancery and Superior Court Rules 11 refer to "pleadings," the word "paper" in amended Rule 12(a) includes more broadly any document filed with the Court requiring a signature. The Rule as amended is also somewhat broader than the Superior and Chancery Court Rules 11 in that it applies to pro se parties as well as attorneys. Violation of Rule 12(a)(ii) may be a basis for sanctions and, in the case of attorneys, discipline, under Rule 33.

Sup.Ct.Rules, Rule 12, DE R S CT Rule 12

All state and local court rules are current with amendments received through June 1, 2022. Some rules may be more current, see credits for details.

End of Document

Original Image of 99 A.3d 639 (PDF)

99 A.3d 639
Supreme Court of Delaware.

In the Matter of a Member of the Bar
of the Supreme Court of Delaware:
Fred BARAKAT, Respondent.

No. 397, 2013.
|
Submitted: Sept. 18, 2013.
|
Decided: Dec. 11, 2013.

Synopsis

Background: In attorney disciplinary proceedings, the Board on Professional Responsibility found misconduct and recommended a suspension.

[Holding:] The Supreme Court held that two year suspension was warranted for attorney who violated rules of professional conduct by failing to maintain Delaware office and failing to maintain adequate books and records.

Suspension ordered.

West Headnotes (7)

[1] **Attorneys and Legal Services** Court of last resort; Supreme Court

Supreme Court has the inherent and exclusive authority to discipline members of the Delaware Bar.

[2] **Attorneys and Legal Services** Recommendations below in general

Attorneys and Legal Services Evidence, verdict, and findings

Although recommendations in attorney discipline proceeding by Board on Professional Responsibility are instructive, Supreme Court is not bound by them; Court reviews the record independently to determine whether there is substantial evidence to support the Board's factual findings.

[3] **Attorneys and Legal Services** Obedience to court rules, orders, and rulings

Attorney violated rule of professional conduct by knowingly disobeying an obligation under the rules of a tribunal to maintain a bona fide office in Delaware; attorney's arrangement with landlord in which attorney could rent a conference room and utilize secretarial reproduction, facsimile, word processing, and shipping services did not constitute a "bona fide office," even if attorney was reachable by telephone. Sup.Ct.Rules, Rule 12; Rules of Prof.Conduct, Rule 3.4(c).

1 Cases that cite this headnote

[4] **Attorneys and Legal Services** Conduct as to Disciplinary Process

Attorney violated rule of professional conduct by knowingly making a false statement in connection with a disciplinary matter and by engaging in conduct involving dishonesty when he informed the Office of Disciplinary Counsel he was meeting the requirement to maintain a bona fide office for the practice of law in Delaware, where attorney claimed to have four employees at his Delaware office when in fact he had no employees and only occasionally rented office space in the building. Sup.Ct.Rules, Rule 12; Rules of Prof.Conduct, Rules 8.1(a), 8.4(c).

1 Cases that cite this headnote

[5] **Attorneys and Legal Services** Money; Funds

Attorney violated rule of professional conduct regarding safekeeping of client property when he deposited any fee under $2500 automatically into his operating account; attorney was required to put any portion of an unearned advance fee into a fiduciary account. Rules of Prof.Conduct, Rule 1.15.

1 Cases that cite this headnote

[6] **Attorneys and Legal Services** Agreements and retainers in general

Attorney violated rule of professional conduct by providing written retainer agreements that failed to state the advance fee was refundable if it was not earned; although retainer agreements stated that a portion of the retainer was non-refundable at a certain point, the agreements did not state that unearned fees were refundable. Rules of Prof.Conduct, Rule 1.15(f).

[7] **Attorneys and Legal Services** Definite Suspension

Attorneys and Legal Services Mishandling of trust account or client funds

Two year suspension from the practice of law was warranted for attorney who violated rules of professional conduct by failing to maintain Delaware office, making false statements in a disciplinary investigation, and failing to maintain adequate books and records. Sup.Ct.Rules, Rule 12; Rules of Prof.Conduct, Rules 1.15, 8.1(a), 8.4(c).

3 Cases that cite this headnote

***640** Disciplinary Proceeding Upon Final Report of the Board on Professional Responsibility of the Supreme Court. **SUSPENSION IMPOSED.**

Attorneys and Law Firms

Patricia Bartley Schwartz, Esquire, Office of Disciplinary Counsel, Wilmington, Delaware.

Fred Barakat, Esquire, Wilmington, Delaware.

Before HOLLAND, BERGER and JACOBS, Justices.

Opinion

PER CURIAM:

Pending before us is an attorney disciplinary proceeding. Fred Barakat, Esquire, was found to have failed to maintain a bona fide office for the practice of law in Delaware, and to maintain adequate books and records as required by the Delaware Lawyers' Rules of Professional Conduct (the "Rules"). In a Report dated July 25, 2013, the Board on Professional Responsibility of the Supreme Court of Delaware (the "Board") found that Barakat's course of conduct violated Rules 1.5(f), 1.15(a), 1.15(d), 3.4(c), 8.1(a), 8.4(c), and 8.4(d). Barakat maintains that his conduct has not violated the Rules, and objects to the Board's findings on both factual and legal grounds. The Office of Disciplinary Counsel ("ODC") does not object to the Board's Report, which recommends that Barakat be suspended for two years.

We find that, with respect to Counts I through V, and VII through XII of the ODC Petition, Barakat's objections lack merit. Regarding Count VI, we find the record not sufficiently developed to support the Board's finding of a violation, [1] and thus dismiss that Count. We, therefore, adopt the Board's findings on Counts I through V and VII through XII. Lastly, we independently determine that Barakat should be suspended from the practice of law for two years, as the Board recommended.

1 The Board addressed Count VI in only a conclusory manner that, because of the lack of analysis, gives us nothing of substance to review.

Facts [2]

2 Barakat's objections to the facts, if any, are addressed in the Analysis, *infra.*

Barakat has been a member of the Delaware Bar since 1992. [3] Since January 2005, Barakat's address of record with this Court has been 901 North Market Street, Suite 460, in Wilmington, Delaware. Barakat also works from his home in Chadds Ford, Pennsylvania. [4]

3 Report of the Board on Professional Responsibility, Board Case No. 2012–0019–B (July 25, 2013), at

3 (Bd. Rep.); Amended Resp. to Petition, para. 1 (Am. Resp.).

4 Bd. Rep. at 4; Am. Resp., paras. 1, 6.

Barakat's 901 North Market Street office is not an "office" in the traditional sense. Barakat's lease does not include any designated office space that is exclusively his. Rather, the employees of the landlord collect Barakat's mail and greet any visitors Barakat may have.[5] The building security guards direct visitors to the fourth floor, where a receptionist is stationed during normal business hours.[6] Under this arrangement, Barakat is entitled, ***641** for additional fees, to rent a conference room or office space, and utilize secretarial, reproduction, facsimile, word processing, and shipping services.[7]

5 Bd. Rep. at 4; Tr. at 32, 43–44, 60.

6 Bd. Rep. at 4; Tr. at 43–44.

7 Bd. Rep. at 5; ODC Ex. 8.

The landlord's billing records (the "Occupant Ledger"), and the testimony of two employees who work on the fourth floor, evidence that Barakat's presence at 901 North Market Street is "sporadic and unscheduled."[8] The Occupant Ledger reflects that in 2010, Barakat rented conference space approximately three times in April, four times in May, twice in June, once in both September and October, and twice in November.[9] This pattern of use continued through August 2012.[10] In October 2011, Barakat informed the United States Internal Revenue Service ("IRS") that "all of [his] work aside from meeting clients, court room appearances and depositions are conducted at [his] home [in Pennsylvania]," and that he has no employees at his Wilmington office.[11]

8 Bd. Rep. at 9; ODC Ex. 10; Tr. at 49–50, 56–57.

9 Barakat also incurred charges for other, undated use of a conference room. Bd. Rep. at 9; ODC Ex. 10.

10 Bd. Rep. at 9–10; ODC Ex. 10.

11 Bd. Rep. at 7–8; ODC Ex. 17.

In 2005, the ODC inquired about Barakat's compliance with Supreme Court Rule 12, which requires Delaware attorneys to maintain a "bona fide" office for the practice of law in Delaware.[12] By letter dated May 5, 2005, the ODC informed Barakat of the requirements of Rule 12.[13] Barakat responded to that letter on May 6, 2005. There is no evidence, however, that he responded to the ODC's later (May 17, 2005) request for additional information.[14]

12 SUPR. CT. R. 12(d) defines a "bona fide" office as an office where the "attorney practices by being there a substantial and scheduled portion of time during ordinary business hours in the traditional work week. An attorney is deemed to be in an office even if temporarily absent from it if the duties of the law practice are actively conducted by the attorney from that office. An office must be a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person or by telephone during normal business hours and which has the customary facilities for engaging in the practice of law. A bona fide office is more than a mail drop, a summer home which is unattended during a substantial portion of the year or an answering, telephone forwarding, secretarial or similar service."

13 Bd. Rep. at 5; ODC Ex. 1.

14 Bd. Rep. at 6.

In 2010, the ODC renewed its inquiry into Barakat's Rule 12 compliance. Barakat responded by letter dated December 19, 2010, asserting that advances in technology enabled him to handle client matters effectively, despite his lack of presence in the Wilmington office.[15] The ODC again reminded Barakat that Rule 12 requires, at a minimum, a " 'responsible person acting on [your] behalf'—i.e., accountable and answerable to you, by employment or by contract."[16] On July 2, 2011, Barakat sent the ODC a letter, asserting, *inter alia,* that he had four employees in his Wilmington office and that he would be present in the Wilmington office "some portion of ... 3 days per week, most weeks."[17] Based on that representation, the ODC dismissed the investigation with a formal warning, stating that its purpose was "to directly inform and educate [Barakat] as to conduct which ... has raised ***642** professional concerns."[18]

15 *Id.;* ODC Ex. 4.

16 Bd. Rep. at 6; ODC Ex. 5.

17 Bd. Rep. at 7; ODC Ex. 6.

18 ODC Ex. 7.

Barakat's books and records were first reviewed in 2008 by the firm of Master, Sidlow, the auditors for the Lawyers' Fund for Client Protection (the "LFCP"). That compliance audit, which covered the six month period ending December 31, 2007, revealed that Barakat's "books and records were deficient based upon his failure to prepare bank reconciliations or client subsidiary ledgers and the inability to prove cash receipt entries to deposit totals." [19] In a letter dated July 7, 2008, Barakat assured the LFCP that the "deficiencies noted in the report have been corrected and the books are now and will continue to be properly maintained." [20]

19 Bd. Rep. at 10–11; ODC Ex. 26.

20 Bd. Rep. at 11; ODC Ex. 27.

In February 2012, after a judicial referral alerting the ODC to possible professional misconduct, Bryan Morgan, a senior Master, Sidlow accountant, performed a second compliance audit covering the six month period ending December 31, 2011. Mr. Morgan's 2011 Audit Report concluded that Barakat's books and records practices were irregular. [21]

21 Bd. Rep. at 11–13; ODC Ex. 28. The 2011 Audit Report noted that Barakat did not maintain monthly bank reconciliations; cash receipt entries could not be proved to deposit totals; Barakat's retainer agreements did not state that the "fee is refundable if not earned;" and that Barakat deposited retainers directly into the operating account, or personally retained cash retainers. In addition, Barakat incorrectly answered four questions in his 2011 Certificate of Compliance (to this Court) regarding his books and records practices.

After the February 2012 audit, the ODC requested an in-depth, forensic audit of Barakat's books and records for the period January 1, 2008 through December 31, 2011. Mr. Joseph McCullough, who conducted that audit, found similar deficiencies in Barakat's bookkeeping practices, including not reporting or improperly recording fees received in cash, depositing most retainer fees directly into his operating account, commingling personal funds into the operating account, and failing to prepare monthly bank reconciliations or client subsidiary ledgers. [22] Indeed, Barakat's accounts and records were in such disarray that McCullough was unable to complete the audit. [23] During the Board proceedings, Barakat admitted that he "pockets" cash retainers, rarely deposits retainers he receives into his escrow account, commingles personal funds in his operating account, and does not maintain bank reconciliations. [24]

22 Bd. Rep. at 14; ODC Ex. 29.

23 *Id.*

24 Bd. Rep. at 15; Tr. at 319, 338, 347, 365.

Procedural Background

The ODC filed a Petition for Discipline with the Board on October 10, 2012. The Petition alleged twelve Counts of Rules violations "arising out of (1) a failure by Respondent to meet the requirements of a bona fide office for the practice of law in Delaware, (2) misrepresentations by Respondent regarding whether he maintains a bona fide office, (3) books and records deficiencies, (4) mishandling of client funds, and (5) misrepresentations by Respondent on his Supreme Court Certificates of Compliance from 2008 to 2012." [25] The Petition alleged that this conduct violated Rules 1.5(f), 1.15(a), 1.15(d), 3.4(c), 8.1(a), 8.4(c), and 8.4(d). [26]

25 Bd. Rep. at 3; Petition for Discipline.

26 *Id.*

***643** Barakat filed a Response to Petition for Discipline on October 25, 2012, and an Amended Response on October 31, 2012. [27] The Board held a hearing on February 12, 2013, at which Ms. Patricia Fry Cox and Ms. April Yanacek, [28] as well as Messrs. Bryan Morgan and Joseph McCullough, the auditors, testified. Barakat also testified. [29]

27 A supplement to the original response was received by the Board on November 5, 2012, and a supplement to the amended response was received on February 11, 2013.

28 Ms. Fry Cox is a property manager for 901 N. Market Street, and Ms. Yanacek is an assistant to Ms. Fry Cox. Both work on the fourth floor of the

building and Ms. Yanacek sits in the center of the fourth floor lobby. Tr. at 24–25, 54.

29 Bd. Rep. at 1–3.

After the hearing, the Board granted two motions by Barakat to supplement the record. The ODC and Barakat both submitted written closing submissions on March 22, 2013, and on April 4, 2013 both parties submitted written replies. The Board issued its findings and recommendations in a report dated July 25, 2013 (the "Board Report"). The Board concluded that the ODC had established by clear and convincing evidence all twelve Counts of the Petition, and recommended that a two-year suspension be imposed. [30]

30 *Id.* at 20–29, 37.

ANALYSIS

[1] **[2]** This Court has the "inherent and exclusive authority to discipline members of the Delaware Bar." [31] Although Board recommendations are instructive, we are not bound by them. [32] We review the record independently to determine whether there is substantial evidence to support the Board's factual findings. [33] We review the Board's conclusions of law *de novo.* [34]

31 *In re Martin,* 2011 WL 2473325, at *3 (Del. June 22, 2011) (citing *In re Abbott,* 925 A.2d 482, 484 (Del.2007)).

32 *Id.*

33 *Id.*

34 *Id.*

I. Bona Fide Office

[3] Under Count I, the Board concluded that Barakat violated Rule 3.4(c) by "knowingly disobeying an obligation under the rules of a tribunal to maintain a bona fide office in Delaware." [35] Barakat advances several weak objections to that finding.

35 Bd. Rep. at 21; SUPR. CT. R. 12(d); PROF. COND. R. 3.4(c).

First, he argues that that finding is barred by *res judicata* and collateral estoppel because of the May 5, 2005 and May 17, 2005 letters he received from the ODC that (he alleges) acquiesced in his office arrangements. [36] Addressing Barakat's Motion *in Limine,* the Board correctly concluded that the bona fide office issue had not yet been adjudicated, and that the "Supreme Court's final order will be the first adjudication of the bona fide office issue to which the principles of *res judicata* and/or collateral estoppel may apply." [37]

36 Respondent's Obj. at 9–10. Barakat filed a Motion *in Limine* prior to the hearing to bar the testimony of April Yanacek and Patty Fry Cox based on the same theory. Bd. Rep. at 2.

37 Bd. Rep. at 20. Barakat's reliance on *Betts v. Townsends, Inc.,* 765 A.2d 531 (Del.2000), and *City of Newark v. Unemployment Ins. Appeal Bd.,* 802 A.2d 318 (Del.Super.Ct.2002) is misplaced. Both cases dealt with administrative bodies that had adjudicated claims. Moreover, in both cases the court held that the principles of collateral estoppel and *res judicata* did not apply.

***644** Second, Barakat argues that he meets the requirements of Supreme Court Rule 12, because he is reachable by phone, and, therefore, has complied with the Rule. [38] The Rule requires that the *office* "be a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person or by telephone," and have "the customary facilities for engaging in the practice of law." [39] Barakat's July 2, 2011 letter to the ODC undermines his claim that being reachable by phone is sufficient under Rule 12. Were (remote) phone access sufficient, Barakat would have had no reason to represent that he was present three days per week and that a paralegal was present two days per week. [40]

38 Respondent's Obj. at 33.

39 SUPR. CT. R. 12(d).

40 Bd. Rep. at 7; ODC Ex. 6.

Finally, Barakat appears to suggest that Supreme Court Rule 12, as interpreted by the ODC, imposes an unconstitutional residency requirement, and violates the commerce clause of the United States Constitution. [41] That claim is unsupported. Barakat cites *Tolchin v. Supreme Court of the State of N.J.,* a case that involved a challenge of New Jersey's bona fide office requirement. In *Tolchin,* the Third Circuit held that the requirement violated neither the commerce clause, nor the privileges and immunities clause, nor the equal protection clause. [42]

41 Respondent's Obj. at 30–31, 34–35. Barakat also argues that the days that he is in court in Delaware should be counted toward his presence in the office. However, it is unclear how presence in court constitutes presence in the office. Barakat has admitted that "aside from stopping at the office prior to court, or to pick up mail," he goes to the office only "to meet clients by appointment." ODC Ex. 16.

42 *Tolchin v. Supreme Court of the State of N.J.,* 111 F.3d 1099 (3d Cir.1997).

[4] With respect to Counts II and III, the Board found that Barakat violated Rule 8.1(a) "by knowingly making a false statement in connection with a disciplinary matter," and also Rule 8.4(c), [43] "by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation when he informed the ODC he was meeting the requirement to maintain a bona fide office for the practice of law in Delaware." [44] Barakat claims that his July 2, 2011 letter was neither knowingly false nor dishonest or fraudulent, because when he wrote the letter, his court schedule and record of bank deposits showed that he was in Delaware approximately 12–15 days per month. [45] Even if Barakat was in his "office" three days per week, that does not cure his misrepresentations about his staff in the Wilmington office and their activities managing his practice. [46]

43 The Board Report refers to Rule 8.3(c). However, the language following the rule is that of 8.4(c).

44 Bd. Rep. at 21.

45 Respondent's Obj. at 38–39. He claims that a change in fortune—a failure to sign new Delaware clients—caused him to be absent from the office for the remainder of 2011.

46 Bd. Rep. at 7, 23; ODC Ex. 6.

Regarding Count IV, the Board found that Barakat violated Rule 8.4(d) by "engaging in conduct that is prejudicial to the administration of justice by failing to maintain a bona fide office for the practice of law in Delaware." [47] Although Barakat objects generally to all of the Counts, he ***645** advances no specific argument regarding this particular one. Therefore, the finding is conceded.

47 Bd. Rep. at 21–22.

It is clear from the record that the Board's findings on Counts I–IV are supported by substantial evidence.

II. Accounting Misconduct

Counts V through X are based on Barakat's books and records practices, including the safeguarding of client funds. V and VI are based on Barakat's dealings with a particular client (Giles). VII through X charge general violations. [48]

48 Bd. Rep. at 26–28.

As for Counts VII through X, the Board concluded, based on the findings of the audits conducted by Messrs. Morgan and McCullough, that Barakat had violated Rules 1.5(f) (Count VII), [49] 1.15(a) (Count VIII), [50] 1.15(d)(3) (Count IX), [51] and 1.15(d) (Count X). [52] Barakat objects to the admission of the 2011 Audit Report, Mr. McCullough's Audit Report, and the testimony of both Mr. Morgan and Mr. McCullough. [53] Barakat claims that the testimony and reports lack scientific validity under both Delaware Rule of Evidence 705 and the standard established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). [54] Messrs. Morgan and McCullough are both experienced auditors who are very familiar with the auditing procedures of the LFCP. [55] Morgan has performed "approximately one hundred Rule 1.15 and 1.5(f) compliance audits for the LFCP using the standard procedure and following the outline developed by LFCP...." [56] Morgan testified that when conducting his compliance audit of Barakat, he followed LFCP's standard procedure. [57] McCullough is an experienced accounting professional who spent thirty years as a special agent in the criminal division of the IRS specializing in white collar crime and financial recordkeeping. [58] He has also performed approximately two hundred forensic audits, and between fifty and sixty audits for the LFCP. [59]

49 As for Count VII, the Board found that by "depositing unearned advance fees into his

operating account, and by providing written retainer agreements that fail to state the advance 'fee is refundable if [it] is not earned,' [Barakat] violated Rule 1.5(f)." *Id.* at 27.

50 As for Count VIII, the Board found that by "depositing unearned advance fees into his operating account, [Barakat] failed to safeguard client funds in violation of Rule 1.15(a)." *Id.*

51 As for Count IX, the Board found that by "commingling personal funds into his attorney operating account, [Barakat] violated Rule 1.15(d)(3)." *Id.*

52 As for Count X, the Board found that by "(1) retaining advance fees for personal use and not depositing them into any account, (2) not proving cash receipt entries to deposit totals, (3) depositing unearned advance fees directly into his operating account, (4) not preparing monthly bank reconciliations, and (5) not preparing reconciled client subsidiary ledgers, [Barakat] failed to abide by the requirements for maintaining his books and records in violation of Rule 1.15(d)." *Id.* at 28.

53 Respondent's Obj. at 5–7.

54 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593–94, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

55 Bd. Rep. at 26.

56 *Id.;* Tr. at 110.

57 Tr. at 110.

58 Tr. at 180–81.

59 Bd. Rep. at 26; Tr. at 182.

[5] Barakat also contends that he has maintained his records and accounts in ***646** compliance with the Rules. [60] Barakat's primary argument is that he complied with the Comments to Rule 1.5 and that the auditors erroneously failed to account for those Comments in their audits. Barakat specifically relies on Comments 10 and 12. [61] Comment 10 provides in relevant part that:

60 A difficulty in evaluating Barakat's objections arises from the general disarray of Barakat's accounts and records. Both auditors testified that the lack of standard records made it difficult to get a clear sense of exactly what was happening with Barakat's accounts. In fact, McCullough could not finish the audit. Tr. at 115–123, 191.

61 Respondent's Obj. at 7, 20.

> Some smaller fees—such as those less than $2500.00—may be considered earned in whole upon some identified event, such as upon commencement of the attorney's work on that matter.... Nevertheless, all fees *must be reasonable such that even a smaller fee might be refundable, in whole or in part, if it is not reasonable under the circumstances.* [62]

62 PROF. COND. R. 1.5, Comment 10, (emphasis added).

Comment 12 is substantially similar. It provides that in certain contexts, such as bankruptcy representation, fees greater than $2500 may be deemed earned upon the occurrence of a particular event. [63]

63 *Id.,* Comment 12.

First, these Comments do not mean what Barakat claims they do. By their plain language, the Comments do not authorize an attorney to deposit any fee under $2500 automatically into his operating account (which Barakat admitted is his practice). [64] By the Comments' own terms, if an attorney receives an advance fee of less than $2500, of which he earns a portion upon commencing work, *the unearned portion of the advance fee must still be placed in a fiduciary account.* [65] Even if (counterfactually) the Comments could be read to condone Barakat's accounting practices, the Preamble to the Rules clearly states that the Comments are not authoritative and are meant only for interpretive guidance. [66]

64 Bd. Rep. at 27; Respondent's Obj. at 20.

65 Although Barakat asserted at certain points that his retainer fee in bankruptcy cases is earned at his initial consultation with a client, he also stated that a portion of his bankruptcy retainer is not refundable once the bankruptcy petition is substantially prepared, and that the remainder of the retainer is not refundable upon the petition's filing. That explanation of his bankruptcy fees, and his bankruptcy retainer agreement, undermine

Barakat's claim that the bankruptcy retainer fee is fully earned at the initial consultation. Respondent's Obj. at 16–17.

66 PROF. COND., preamble, para. 21.

[6] Regarding his retainer agreements (at issue in Count VII), Barakat argues that he satisfied Rule 1.5(f) because his agreements state that a portion of the retainer is "non-refundable" at a certain point.[67] Although one might infer from this that the balance of the retainer is refundable, Rule 1.5(f) requires an explanation that *unearned* fees are refundable. Barakat's retainer agreement does not explain that unearned fees are refundable.

67 Respondent's Obj. at 17.

The audit reports and the testimony of Morgan and McCullough establish that the Board's findings on Counts VII–X are supported by substantial evidence.

Count VI charges Barakat with failing to deposit an advance fee from his client, Giles, into his trust account.[68] Barakat objects to this Count. The record on ***647** Count VI is unclear and undeveloped. Barakat claims that Giles paid him $800 upon the signing of a bankruptcy fee agreement (dated April 16, 2008),[69] which "basically covered the work [he] had done that day."[70] The Board Report does not adequately address Barakat's claim that he earned the fee *that same day.*[71] We therefore conclude that the Board's findings on this Count are not supported by substantial evidence.

68 Bd. Rep. at 25.

69 Respondent's Obj. at 23.

70 Tr. at 314.

71 Bd. Rep. at 17. The Board relies on the language in the fee agreement that states that "the full fee must be paid prior to filing." *Id.*

III. Certification Statements

Counts XI and XII charge false statements made by Barakat on his 2008–2012 Certificates of Compliance. Barakat certified that (i) "[a]ny and all fiduciary funds held are maintained in an attorney trust/escrow account;" (ii) "[c]heck register balances are reconciled monthly to bank statement balances;"[72] (iii) "[w]ith respect to attorney trust/escrow account(s), there is a client subsidiary ledger maintained with monthly listings;" and (iv) "[w]ith respect to attorney trust/escrow account(s), the reconciled end-of-month cash balance agrees with the total of the client balance listing of the client subsidiary ledger."[73] The Board concluded that Barakat did not follow any of these procedures, should have so reported, and therefore violated Rules 8.4(c) and 8.4(d).[74] We agree.

72 In his 2008 and 2012 Certificates of Compliance, Barakat responded "N/A" to this question.

73 Bd. Rep. at 18–19; ODC Exs. 39–43.

74 *Id.* at 18–19, 28–29.

In his objection to the Board Report, Barakat points to (allegedly) exonerating statements made by the auditors during cross-examination.[75] This objection lacks merit. The testimony to which Barakat points is either in response to hypothetical questions that assume the Comments to Rule 1.5 (as interpreted by Barakat) govern, or is cited out of context.[76] Moreover, Messrs. Morgan and McCullough were called to testify about their respective audits, not to offer legal opinions.

75 Respondent's Obj. at 21–22, 26–27.

76 *See, e.g.,* Tr. at 230–31, 239, 245, 252–54.

IV. Sanctions

[7] This Court follows the ABA standards for imposing lawyer sanctions. "The ABA framework consists of four key factors to be considered by the Court: (a) the ethical duty violated; (b) the lawyer's mental state; (c) the extent of the actual or potential injury caused by the lawyer's misconduct; and (d) aggravating and mitigating factors."[77]

77 *In re Bailey,* 821 A.2d 851, 866 (Del.2003) *reinstatement granted,* 842 A.2d 1244 (Del.2004) (citing *In re Lassen,* 672 A.2d 988, 998 (Del.1996)).

Regarding the first three factors, the Board found that Barakat had violated duties owed to clients, the legal system and the legal profession. The Board also concluded, that based on the history of interactions with the ODC, Barakat was aware of his obligations to maintain a bona fide office in Delaware and to maintain his books and records in accordance with the Rules. Although no actual harm to clients was demonstrated, the Board concluded that Barakat's failure to maintain adequate books and record presented a serious risk of harm to clients.[78]

78 *See* *In re Benson,* 774 A.2d 258, 262 (Del.2001) ("[E]ven though Benson's violations did not result in any injury to her clients, her careless record keeping certainly had the potential to cause injury because of the difficulty in ascertaining that all client funds in fact were being properly maintained.").

***648** In determining the appropriate sanctions for Barakat, the Board identified six aggravating factors—dishonest or selfish motive, a pattern of misconduct, multiple offenses, the submission of false and/or misleading statements, an unwillingness to admit the wrongful nature of his conduct, and substantial experience in the practice of law—and only two mitigating factors—absence of a prior disciplinary record, and Barakat's cooperative attitude.[79]

79 Bd. Rep. at 33–35. The Board noted that the two mitigating factors were partially negated by the years-long span of Barakat's wrongful conduct, and by Barakat's false and misleading statements to the ODC.

Barakat argues that the two year suspension recommended by the Board is disproportionate to the adjudicated violations. He points to *In re Doughty,* as support for a more lenient punishment.[80] Although that case involved similar violations, this Court found that Mr. Doughty had "negligently" engaged in the misconduct, had no dishonest motive, and had engaged in "timely, good faith remedial efforts."[81] The factors supporting relative leniency in Doughty's case are simply not present in Barakat's case.

80 *In re Doughty,* 832 A.2d 724 (Del.2003). Doughty was publicly sanctioned and placed on probation for two years.

81 *Id.* at 736.

CONCLUSION

For the reasons stated above, we adopt the terms of the Board's recommendation with respect to Counts I–V, and Counts VII–XII, and dismiss Count VI. It is hereby ordered that Barakat be disciplined as follows:

1. Barakat hereby is immediately suspended from the practice of law in this State for a period of two years;

2. During the period of suspension, Barakat must fully cooperate with the ODC in its efforts to monitor his compliance with the suspension order and shall not: (a) have any contact directly or indirectly constituting the practice of law, including the sharing or receipt of legal fees, except that Barakat is entitled to any legal fees earned prior to the date of this order; (b) share in any legal fees earned for services by others during such period of suspension. Barakat also shall be prohibited from having any contact with clients or prospective clients or witnesses or prospective witnesses when acting as a paralegal, legal assistant, or law clerk under the supervision of a member of the Delaware Bar;

3. The Office of Disciplinary Counsel (ODC) shall file a petition in the Court of Chancery for the appointment of a Receiver for Barakat's law practice pursuant to Rule 24 of the Delaware Lawyers' Rules of Disciplinary Procedure; the Receiver shall provide notice to clients, adverse parties, and others as required by Rule 23 of the Delaware Lawyers' Rules of Disciplinary Procedure; and the Receiver shall make such arrangements as may be necessary to protect the interests of any of Barakat's clients and the public;

4. Barakat shall cooperate in all respects with the Receiver, including providing him/her with all law office books and records;

5. Barakat shall promptly pay the costs of the disciplinary proceedings in accordance with the Delaware Lawyers' Rules of Disciplinary Procedure when presented with a statement of costs by the ODC;

***649** 6. As reinstatement is not automatic, should Barakat apply for reinstatement, any such application must be made pursuant to Rule 22 of the Delaware Lawyers' Rules of Disciplinary Procedure following the suspension period; and

7. This Order shall be disseminated by the ODC as provided in Rule 14 of the Delaware Lawyers' Rules of Disciplinary Procedure.

All Citations

99 A.3d 639

End of Document

Rule 3.3: Candor Toward the Tribunal

Share:

Advocate

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

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April 17, 2019

Rule 3.4: Fairness to Opposing Party & Counsel

Share:

Advocate

A lawyer shall not:

(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

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Rule 7030-1 Depositions.

(a) Attendance at Deposition. A deposition may be attended only by (i) the deponent, (ii) counsel for any party and members and employees of their firms, (iii) a party who is a natural person, (iv) an officer or employee of a party who is not a natural person designated as its representative by its counsel, (v) counsel for the deponent, (vi) any consultant or expert designated by counsel for any party, (vii) the United States Trustee, (viii) counsel for any trustee, (ix) counsel for the debtor, (x) counsel for any official committee and (xi) counsel for any party providing postpetition financing to the debtor under 11 U.S.C. § 363 or 364. If a confidentiality order has been entered, any person who is not authorized under the order to have access to documents or information designated confidential shall be excluded from a deposition upon request by the party who is seeking to maintain confidentiality while a deponent is being examined about any confidential document or information.

(b) Reasonable Notice of Deposition. Unless otherwise ordered by the Court, "reasonable notice" for the taking of depositions under Fed. R. Civ. P. 30(b)shall not be less than seven (7) days.

(c) Motions to Quash. Any party seeking to quash a deposition must file a motion with the Court under Fed. R. Civ. P. 26(c) or 30(d). If such motion is filed at least one (1) business day before the scheduled deposition, neither the objecting party, witness, nor any attorney is required to appear at a deposition to which a motion is directed until the motion is resolved.

(d) Depositions Upon Oral Examination. From the commencement until the conclusion of deposition questioning by an opposing party, including any recesses or continuances thereof of less than five (5) calendar days, counsel for the deponent shall not consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order.

158 F.R.D. 573
United States District Court, D. Delaware.

TUERKES–BECKERS, INC., Plaintiff,
v.
NEW CASTLE ASSOCIATES and Richard I. Rubin & Company, Inc., Defendants.

Civ. A. No. 93–509–RRM.
|
November 5, 1993.

Synopsis

Suit was brought to enforce provision in settlement agreement. The District Court, McKelvie, J., set forth suggested procedure for deposition of attorney for a party.

Order accordingly.

Attorneys and Law Firms

***574** Arthur L. Dent, Potter, Anderson & Corroon, Wilmington, DE, and Judith Sturtz Karp and Virginia A. Whitehill, Zuckerman, Spaeder, Goldstein, Taylor & Kolker, Washington, DC, for plaintiff.

Edward M. McNally, Barbara J. MacDonald, John D. Demmy, Morris, James, Hitchens & Williams, Wilmington, DE, and Michael S. Silberman, Silberman, Markovitz & Raslavich, Philadelphia, PA, for defendants.

OPINION

McKELVIE, District Judge.

This is an action to enforce a provision in a settlement agreement. The plaintiff is Tuerkes–Beckers, Inc., a tenant at the Christiana Mall in Newark, Delaware. The defendants are the owner and the manager of the Mall. The plaintiff contends the defendants have wrongfully refused to renew its lease, in violation of an anti-retaliation provision in a Stipulation of Settlement of a class action brought by the Mall's tenants against the defendants. *Gordon D. McMahon v. New Castle Associates, et. al.,* C.A. No. 87–526—RRM.

On November 3, 1993, the Court entered a Scheduling Order setting a hearing on the plaintiff's application for injunctive relief for November 10, 1993. In the Scheduling Order, the Court provided that should counsel find they are unable to resolve a discovery dispute, before filing a motion, they should jointly call the Court to schedule a time for an office conference or telephone conference call to review the matter.

During a telephone conference call on November 5th, plaintiff's counsel reported he had been unable to reach an agreement with defendants' counsel on scheduling the deposition of Christopher Kuhn, Esquire. Kuhn is an attorney with the firm that represents the defendants in this matter, and he had certain communications with the plaintiff relating to the landlord's decision not to renew the lease. During the conference call, defendants' counsel reported that he had agreed to make arrangements for Mr. Kuhn to be available to be deposed, but that because Mr. Kuhn is an attorney for the defendants and because the plaintiff may be inquiring into matters that are protected from disclosure by the attorney-client privilege, the defendants want the plaintiff to describe the nature and scope of the questions to be asked during the course of the deposition.

While the Court encourages counsel to communicate on discovery requests and to work to reach agreements relating to the nature, scope and timing of discovery, they should look to the Rules of Civil Procedure for guidance on when and how one party may restrict another party's opportunity to gather information in discovery. In this context, the deposition of an attorney for a party may raise difficult questions relating to the scope of allowable discovery. To assist the parties in identifying the information sought and the privileges claimed, the Court takes this opportunity to set out for counsel the following as a summary of the Court's expectations as to conduct during depositions.

Unless the parties stipulate otherwise, counsel shall conduct depositions according to the following procedure:

a. *examination.* Each party wishing to examine a deponent should ordinarily designate one attorney to conduct the principal examination. Examination by other attorneys shall be limited to matters not previously covered unless there is a good faith basis to believe that different answers will be obtained.

b. *objections generally.* The only objections that should be raised at a deposition are those involving a privilege against the disclosure of information or some matter that ***575** may be corrected immediately following the objection, such as an objection to the form of the question. Any statement of an objection should be concise, should not be argumentative, and should not suggest an answer or otherwise coach the deponent.

c. *statement of objections.* Objections as to the form of the question should be limited to the words "Objection, form." All other objections should be limited to the word "Objection" and a brief identification of the ground, preferably in no more than three words.

d. *instructions not to answer.* Counsel may not instruct a witness not to answer a question, unless (1) answering the question would require the disclosure of information that is protected from disclosure as privileged or work product, or (2) counsel intends to move promptly to terminate or limit examination pursuant to Federal Rule of Civil Procedure 30(d), in which case counsel shall immediately call the Court to request a time to present the motion. When a privilege is claimed, the witness should answer questions relevant to the existence, extent, or waiver of the privilege, and disclose information such as the date of the communication, who made the statement to whom and in whose presence, the names of other persons to whom the contents of the statement have been disclosed, and the general subject matter of the statement.

e. *procedure.* Pursuant to Federal Rule of Civil Procedure 30(c), the examination should proceed as permitted at trial, except that the scope of cross examination shall not be limited to those matters covered on direct. Counsel for a witness may not consult with that witness about the subject matter of his or her testimony while that witness is under examination by an opposing party.

As the Court has noted to counsel, in the context of counsel's obligations under Federal Rules of Civil Procedure 11 and 26(g), these procedures should ensure that plaintiff's counsel can take Mr. Kuhn's deposition, gather information that is discoverable, and provide a factual context for the Court to review any objection to discovery based on a claim of work product or attorney client privilege. In addition, absent an application for a protective order under Federal Rule of 26(c), defendant's counsel cannot unilaterally block a deposition until plaintiff's counsel provides a satisfactory description of the information sought.

All Citations

158 F.R.D. 573

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848 F.Supp. 527
United States District Court, D. Delaware.

In re ML–LEE ACQUISITION FUND II, L.P. AND ML–LEE ACQUISITION FUND (RETIREMENT ACCOUNTS) II, L.P. SECURITIES LITIGATION.

Civ. A. No. 92–60–JJF.
|
March 31, 1994.

Synopsis
Mutual fund investors brought securities fraud action against mutual funds and other defendants. On various motions by both parties, the District Court, Farnan, J., held that: (1) investor stated cognizable cause of action in complaint under section of Investment Company Act prohibiting persons affiliated with registered investment company from engaging in fraudulent, deceptive, or manipulative acts; (2) investors failed to state cause of action in complaint under Investment Company Act against various defendants under aiding and abetting theory; (3) appropriate limitations period in private right of action brought pursuant to Investment Company Act was one-third year limitations period applied to claims under Securities Act of 1933 and Securities Exchange Act of 1934, and (4) investors would be certified as class representatives.

So ordered.

Attorneys and Law Firms

***534** Pamela S. Tikellis, Carolyn D. Mack, and James C. Strum, of Chimicles Jacobsen & Tikellis, Wilmington, DE, Michael J. Freed, and Carol V. Gilden, of Much Shelist Freed Denenberg & Ament, Chicago, IL, William J. French, Robert L. Gegios, and Glen E. Lavy, of Gibbs Roper Loots & Williams, Milwaukee, WI, James S. Youngblood, of Atlanta, GA, for plaintiffs.

Kenneth J. Nachbar, of Morris Nichols Arsht & Tunnell, Wilmington, DE, James N. Benedict, Mark Holland, David J. Lewittes, Martin L. Seidel, Laura L. Icken, James F. Moyle, and Jeffrey N. Naness, of Rogers & Wells, New York City, for defendants Mezzanine Investments II, L.P., ML Fund Administrators, Inc., Merrill Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc. d/b/a Merrill Lynch Capital Markets, ML Mezzanine II, Inc., Matthew D. Castagna, Warren C. Smith, Jr., Rosalie Y. Goldberg, Robert Miller, Frederick J.C. Butler, Kevin K. Albert, Jerome P. Greene, and J. Huston McCullough II.

Stephen E. Herrmann, of Richards Layton & Finger, Wilmington, DE, Sanford F. Remz and Richard S. Nicholson, of Hutchins Wheeler & Dittmar, Boston, MA, for defendants Thomas H. Lee Co., T.H. Lee Mezzanine II, Thomas H. Lee Advisors II, L.P., and Thomas H. Lee.

Michael D. Goldman, and Stephen C. Norman, of Potter Anderson & Corroon, Wilmington, DE, John D. Donovan, Jr., and Michael K. Fee, of Ropes & Gray, Boston, MA, for defendants ML Lee Acquisition Fund II, L.P., ML Lee Acquisition Fund (Retirement Accounts) II, L.P., Vernon R. Alden, Joseph L. Bower, and Stanley H. Feldberg.

David C. McBride, of Young Conaway Stargatt & Taylor, Wilmington, DE, Brackett B. Denniston, III, J. Anthony Downs, and Todd Hahn, of Goodwin Procter & Hoar, Boston, MA, for defendant Hutchins Wheeler & Dittmar.

OPINION

FARNAN, District Judge.

I. INTRODUCTION

Presently before the Court in this putative securities class action are a number of motions filed by both parties: (1) Defendants' motions to dismiss the second consolidated amended complaint ("complaint"), [1] (2) Plaintiffs' motion to disqualify Hutchins, Wheeler & Dittmar as counsel for the Lee Defendants, (3) Plaintiffs' motion for class certification, (4) Plaintiffs' motion to file third consolidated amended complaint, and (5) two motions to compel filed by Plaintiffs. For the reasons stated, the Court will (1) grant in part and dismiss in part both Defendants' motions to dismiss, (2) deny Plaintiffs' motion to disqualify HW & D, (3) grant Plaintiffs' motion for class certification, (4) grant in part and deny in part Plaintiffs' two motions to compel, and (5) deny Plaintiffs' motion to file third consolidated amended complaint.

1 There are two motions to dismiss. The first was filed by the following defendants: ML–Lee Acquisition Fund II, Thomas H. Lee, Thomas H. Lee Advisors II, L.P., Thomas H. Lee Company, T.H. Lee Mezzanine II, Merrill Lynch & Co., Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc.,

Mezzanine Investment II, L.P., ML Mezzanine II, Inc., ML Fund Administrators, Inc., Matthew D. Castagna, Warren C. Smith, Jr., Rosalie Y. Goldberg, Robert Miller, Frederick J.C. Butler, Kevin K. Albert, Jerome P. Greene, J. Huston McCullough II, Vernon R. Alden, Joseph L. Bower, and Stanley H. Feldberg. The second motion to dismiss was filed by defendant Hutchins, Wheeler & Dittmar.

A. The Parties

1. The Plaintiffs

Plaintiff Ronald Goldstein purchased twenty units of Fund II on November 10, 1989. Plaintiff William Seidel purchased ten units of Retirement Fund II on November 10, 1989.

2. The Funds

ML–Lee Acquisition Fund II, L.P. ("Fund II") and ML–Lee Acquisition Fund (Retirement Accounts) II, L.P. ("Retirement Fund II") (together with Fund II designated "the Funds") are Delaware limited partnerships. In addition, both are closed-end mutual funds. The Funds are business development ***535** companies under the Investment Company Act and reporting companies under the 1934 Act. Fund II is authorized to borrow money, and thus Fund II is distinguishable from Retirement Fund II in that certain tax-exempt investors cannot invest in Retirement Fund II.

3. The Lee Defendants

Defendant Thomas H. Lee Advisors II, L.P. ("Advisors II"), also a Delaware limited partnership, serves as the investment adviser to the Funds. Individual defendant Thomas H. Lee ("Lee") is an individual general partner of the Funds and of Advisors II. Defendant Thomas H. Lee, Co. ("the Lee Co.") is a sole proprietorship owned by Mr. Lee. The Lee Co. formed Advisors II and several of its managers have interests in and are advisors to Advisors II.

The other individual general partners of the Funds are Vernon R. Alden, Joseph L. Bower, and Stanley H. Feldberg ("IGPs"). Defendant T.H. Lee Mezzanine II ("Lee II"), a Massachusetts business trust, is an administrative general partner of Advisors II.

4. The Merrill Lynch Defendants

Merrill Lynch & Co., Inc. ("Merrill") is a Delaware corporation. Merrill Lynch, Pierce, Fenner & Smith, Inc. ("MLPF & S"), a wholly owned subsidiary of defendant Merrill, is the underwriter for the Funds' offering. ML Mezzanine II, Inc. ("ML Mezzanine"), also a wholly-owned subsidiary of Merrill, is the sole general partner of defendant Mezzanine Investments II, L.P. ("Mezzanine Investments"). Mezzanine Investments is a limited partnership, with Advisors II serving as its sole limited partner. Mezzanine Investments serves as the managing general partner of the Funds.

ML Fund Administrators, Inc. ("Administrators"), a Delaware corporation and another wholly-owned subsidiary of Merrill, is the administrator of the Funds.

5. The Individual Defendants

Individual Defendants Matthew D. Castagna, Rosalie Y. Goldberg, Robert Miller, Frederick J.C. Butler, Kevin K. Albert, Jerome P. Greene, Warren C. Smith, Jr., and J. Huston McCullough ("Individual Defendants") are the officers and directors of the managing partners of the Funds.

6. Hutchins, Wheeler & Dittmar

Defendant HW & D is a law firm which serves as general counsel to the Funds. HW & D advised the Securities and Exchange Commission ("SEC") that the Funds would not make any investments in companies that were controlled by Lee Co. in absence of an exemptive order under section 57(a) of the Investment Company Act.

B. Relevant Non-parties

1. Fund I

Like the Funds, Fund I is a Delaware limited partnership. Lee and the individual general partners of the Funds serve as the individual general partners of Fund I. Thomas H. Lee Advisors I ("Advisors I") serves as the investment advisor to Fund I. The officers and directors of Advisors I serve as officers and directors of Advisors II.

2. Hills Department Stores, Inc.

Hills Department Stores, Inc. ("Hills") is a Delaware corporation that has been controlled by Lee since 1985. Both Fund I and Funds invested in Hills. Most, if not all, of Lee II's officers and directors and Advisor II's limited partners and officers owned stock in Hills. Throughout the late 1980's, Hills was in a precarious financial condition. Funds II eventually invested in Hills. Subsequently, Hills filed for bankruptcy.[2]

2 A more detailed discussion of the facts with respect to the Funds' investments appears below.

3. Petco Animal Supplies Inc.

Petco Animal Supplies, Inc. ("Petco") is a Delaware corporation. On July 20, 1988, Lee Co., Fund I, and Drexel Burnham Lambert, Inc. ("Drexel"), among others acquired the predecessor to Petco through a leveraged buyout. Fund I and Lee Co. acquired 18.5% and 4.5% respectively of Petco Holding Company ("PHC"). Petco was a wholly owned subsidiary of PHC. By November 30, 1988, ***536** Fund I owned 24.7% of PHC common stock. Fund I also owned several million dollars worth of Petco's debt securities. Drexel also acquired a significant amount of Petco's debt securities as well as approximately 7.6% of PHC common stock. Funds II eventually made various unsuccessful investments in Petco, including a purchase of Petco debt securities from Drexel.

4. Stanley Interiors

Stanley Interiors is a Delaware corporation. Fund I and Lee Co. owned approximately 60% and 40% respectively of the common stock of Stanley Holding Company ("SHC"). As of October 16, 1992, all outstanding stock of Stanley was held by Stanley Acquisition Corporation, a wholly-owned subsidiary of SHC. Fund I also purchased significant amounts of Stanley's debt securities. The Funds eventually made an unsuccessful investment in Stanley debt securities.

II. DISCUSSION

Plaintiff Seidel commenced suit on February 3, 1992 and plaintiff Goldstein filed a substantially identical complaint on February 5, 1992.[3] Plaintiffs' claims are based upon sections 11, 12(2) and 15 of the Securities Act of 1933 ("1933 Act")[4], sections 10(b) and 20 of the Securities Exchange Act of 1934 ("1934 Act")[5], Rule 10b–5 promulgated pursuant to section 10(b) of the 1934 Act[6], sections 17(j), 36, 48 and 57 of the Investment Company Act of 1940[7] and Rule 17j promulgated pursuant to section 17(j) of the Investment Company Act.[8] The following factual allegations form the basis of the substantive causes of action spelled out in the Complaint.

3 On May 14, 1992, following an order of the Court to consolidate, the Plaintiffs filed a Consolidated Amended Complaint.

4 15 U.S.C. §§ 77k, 77*l*(2), and 77*o*.

5 15 U.S.C. §§ 78j(b) and 78t.

6 17 C.F.R. 10b–5.

7 15 U.S.C. §§ 80a–17(j), 80a–35, 80a–47, 80a–56.

8 17 C.F.R. § 270.17j–1.

Plaintiffs purchased the limited partnerships of the defendant Funds between November 10, 1989 and January 5, 1990. Plaintiffs allege they were induced to make their investments on the basis of a materially false Prospectus. Plaintiffs contend the Prospectus was false because it stated specific investment guidelines would be followed and that the investment adviser or its affiliates would make contemporaneous coinvestments in the mezzanine investments in managed companies made by the Funds.[9] Plaintiffs further contend the Prospectus was false in stating that until at least 75% of each of the Funds' net offering proceeds had been invested or committed to investment Advisors II and its affiliates would act exclusively on behalf of the Funds. Finally, Plaintiffs assert the Prospectus also falsely stated that no specific investments had been contemplated for the Funds prior to the offering.

9 Mezzanine securities "consist primarily of subordinated debt and/or preferred stock combined with an equity participation known as an equity kicker." ¶ 7. Managed companies were to be "companies to which the Funds would provide significant managerial assistance after the investment." ¶ 8.

Through a public offering between November 10, 1989 and January 5, 1990, 33,584 investors purchased Units in the Funds worth approximately $400,360,000. On April 3, 1990, after extensive consideration by the partners of the Funds and Advisors II, Funds invested $48,500,000 in Hills by purchasing 15% Junior Notes due 1998. At the time Hills was a financially ailing company[10] in which several of the

Defendants had existing interests. ¶ 162 Prior to the Funds' investment in Hills, Lee Co. owned 19.1% of Hills common stock ¶ 105, and Lee owned 45.9% of one series and 60% of another series of the preferred stock of Hills Stores, a wholly owned subsidiary of Hills ¶ 110. Lee served as director of both Hills and Hills ***537** Stores between 1985 and December 31, 1991. ¶ 111 [11]

10 Due to increasing debt, and other reasons, Hills suffered financially. The value of Hills' common stock decreased in value from April 1988 to February 1990 from approximately $10.75 per share to $4.00 per share.

11 At a meeting regarding the proposed investment of Funds in Hills, attorneys from H & W stated with respect to the potential conflict of interest in investing in a company affiliated with Lee, that "because the amounts were nominal, it did not present a significant conflict." ¶ 152

At the time of the Funds' investment in Hills, Advisors II did not make a contemporaneous investment in Hills. ¶ 153 Defendants failed to obtain exemptive orders from the S.E.C. as Plaintiffs assert they were required under section 57 of the Investment Company Act. ¶ 163

Hills filed for protection under Chapter 11 of the Bankruptcy Code within one year of the investment of the Funds investment in Hills. ¶ 168 The Funds' 1990 Annual Report (issued April 1, 1991) disclosed the investment and its lack of success. ¶ 169

On April 6, 1990, the Funds purchased an interest in Petco Corporation, another financially ailing corporation in which certain Defendants had preexisting interests. ¶ 185 Following a leveraged buyout transaction in July 1988, Defendant Lee Co. controlled Petco Holding Corporation ("PHC"), which in turn controlled Petco. ¶ 171 Lee Co. also controlled Funds I. By March 5, 1990, Lee Co. and Funds I controlled 35.9% of PHC's common stock. ¶ 179 On April 5, 1990, Drexel, or persons affiliated with Drexel owned approximately 7.6% of Petco's common stock or warrants to purchase Petco's common stock. ¶ 188

On April 6, 1990, Defendants caused the Funds to purchase (at 70% of face value) $500,000 worth of Petco 15.5% Extendable Notes from Drexel. ¶ 185 [12] Defendants failed to obtain necessary exemptive orders from the S.E.C. as required under section 57 of the Investment Company Act. ¶ 186 Neither Advisors II nor its affiliates made contemporaneous investments as required under the Prospectus. ¶ 186

12 HW & D was present at a March 19, 1990 meeting of the Funds' general partners and Advisors II in which the investments were approved.

On November 16, 1990, the Defendants approved a further investment of approximately $459,000 in Petco 14% Subordinated Bridge Notes due March 1, 1991. ¶ 193 Again, Defendants failed to obtain exemptive orders from the S.E.C. ¶ 194

On April 19, 1991, the Defendants caused an additional investment of approximately $379,000 to be made in Petco Bridge Notes. ¶ 196 Defendants again failed to obtain necessary exemptive orders from the S.E.C. as allegedly required under section 57 of the Investment Company Act. ¶ 197

As of January 17, 1989, Lee Co. and Funds I controlled a corporation called Stanley Holding Corporation ("SHC"), a subsidiary of which was Stanley Corporation ("Stanley"). ¶ 199–200 At some time prior to July 5, 1991, the Defendants caused the Funds to invest $523,673 in 10% Stanley Preferred Stock. ¶ 203 On July 5, 1991, the Funds and SHC purchased Stanley 10% Preferred Stock at the same price and in approximately the same amounts from Nortek, Inc. ¶ 204 At the same time the Funds sold a nine month option to SHC on the block of Stanley 10% Preferred Stock for 5% of the purchase price of the stock. ¶ 204

SHC and the Funds were under the common control of Lee, and thus SHC was related to the Funds under the Investment Company Act. ¶ 205. Defendants obtained an exemptive order from the SEC as required under section 57 of the Investment Company Act. ¶ 205 However, according to the Plaintiffs, the transaction engaged in went beyond the terms of the application for the exemptive order, which related only to an equity coinvestment. ¶ 205

Plaintiffs allege that the purchase of the option also required an exemptive order by virtue of the relationship between SHC, Lee and the Funds, and that no such order was obtained. ¶ 206 The Funds' 1991 Form 10–K statement filed on March 30, 1992 stated that the Funds had ceased accruing income from the investment in Stanley due to "unrealized depreciation." ¶ 207

Plaintiffs finally allege that each of the described investments in Hills, Petco and Stanley violated the terms of the Prospectus ***538** as well as the guidelines set out for the investments of the Funds. ¶ 209

A. The Original Defendants' ("Defendants") Motion to Dismiss

Defendants offer three arguments in support of their motion to dismiss Plaintiffs' federal securities law claims. First, Defendants contend that the complaint should be dismissed for failure to plead compliance with the applicable limitations period. Second, Defendants aver there is no implied private action based upon "controlling person" or "aider and abettor" liability under the Investment Company Act. Third, the Defendants assert that the allegations of the Complaint fail to allege primary violations of either Section 17(j) of the Investment Company Act or Rule 17j–1 promulgated thereunder. In addition, because the federal causes of action are subject to dismissal before trial, Defendants urge the Court to also dismiss the supplemental state law claims.

In considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court must consider as true all facts alleged by plaintiff. *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 101–02, 2 L.Ed.2d 80 (1957).

1. Private Rights of Action under Investment Company Act

Plaintiffs assert claims under sections 17(j), 36, 48 and 57 of the Investment Company Act and Rule 17j–1 [13] promulgated pursuant to section 17(j). Defendants contend, and Plaintiffs concede, that no explicit private right of action exists under any of these provisions. Defendants argue that the Court should not find that any implied private rights of action exist.

13 7 C.F.R. § 270.17j–1.

a. Implied Rights of Action

In absence of explicit congressional authorization for permitting a private right of action where it appears that Congress intended for a private right of action to exist. *See* *Karahalios v. National Federation of Federal Employees, Local 1263,* 489 U.S. 527, 532–33, 109 S.Ct. 1282, 1286–87, 103 L.Ed.2d 539 (1989).

> Unless such "congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." It is also an "elemental canon" of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide "additional remedies."

Id. (quoting *Thompson v. Thompson,* 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988)) (citation omitted).

In this regard, there is one express private right of action under the Investment Company Act. In the Investment Company Amendments Act of 1970, Pub.L. No. 91–547, 84 Stat. 1413, Congress added section 36(b). Section 36(b) provides for a private right of action by a security holder against the investment adviser "with respect to the receipt of compensation for services, or payments of a material nature" for a breach of the adviser's fiduciary duty. 15 U.S.C. § 80a–35(b); *see also* *Tannenbaum v. Zeller,* 552 F.2d 402, 416–17 (2d Cir.), *cert. denied,* 434 U.S. 934, 98 S.Ct. 421, 54 L.Ed.2d 293 (1977); *Bancroft Convertible Fund, Inc. v. Zico Invest. Holdings, Inc.,* 825 F.2d 731, 735 (3d Cir.1987).

Congress again amended the Investment Company Act in 1980 in the Small Business Investment Incentive Act of 1980, Pub.L. No. 96–477, 94 Stat. 2275 (1980). The House Report on Pub.L. No. 96–477 states, in pertinent part:

> The rationale for implying private rights of action under the securities laws beyond those actions expressly provided for had been well articulated by the Supreme Court when it observed that implied private rights of action allowing shareholders to sue to remedy their losses would significantly assist the congressional goal of promoting fair corporate suffrage. But in recent years, the Supreme court turned its focus toward a strict construction of statutory language and expressed intent.
>
> The Committee wishes to make plain that it expects the courts to imply private rights of action under this legislation, ***539** where the plaintiff falls within the class of persons protected by the statutory provision in question. Such a right would be consistent with and further Congress' intent in enacting that provision, and where such actions would not improperly occupy an area traditionally the concern of state law. In appropriate instances, for example, breaches of fiduciary duty involving personal

> misconduct should be remedied under Section 36(a) of the Investment Company Act. With respect to business development companies, the Committee contemplates suits by shareholders as well as by the Commission, since these are the persons the provision is designed to protect, and such private rights of action will assist in carrying out the remedial purposes of Section 36.

H.R.Rep. No. 1341, 96th Cong., 2d Sess. 28–29 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4800, 4810–11 (footnotes omitted) (quoted in *Bancroft Convertible Fund,* 825 F.2d at 735–36).

The United States Court of Appeals for the Third Circuit observed that "[c]learly, the Committee Report expressly approves the position of those courts which, following the 1970 amendments, held that private causes of action should be implied from the Investment Company Act." *Bancroft Convertible Fund,* 825 F.2d at 736. Given the stated intent of Congress, the Third Circuit held that a private right of action existed under section 12(d)(1)(A) of the Investment Company Act. *Id.* "Section 12(d)(1)(A) of the Investment Company Act prohibits an investment company from acquiring more than three percent of the outstanding voting stock of another investment company." *Id.* at 733. The Third Circuit was unpersuaded by the argument that a private cause of action should not be implied because prior to the congressional amendments there had been no case law suggesting the existence of a private cause of action under that section of the Investment Company Act. *Id.*

Furthermore, the Third Circuit stated that the defendant had failed to make a persuasive argument suggesting congressional intent to treat the conduct proscribed under section 12(d)(1)(A) any differently for the purpose of private enforcement than any of the prohibitions in the Investment Company Act that were designed to protect investors. *Id. see also* *Lessler v. Little,* 857 F.2d 866 (1st Cir.1988) (recognizing private cause of action under section 17(a)(2) of the Investment Company Act which prohibits investment advisers of registered investment companies and affiliates of the investment advisers from purchasing assets of that registered investment company), *cert. denied,* 489 U.S. 1016, 109 S.Ct. 1130, 103 L.Ed.2d 192 (1989); *Fogel v. Chestnutt,* 668 F.2d 100 (2d Cir.1981) (recognizing implied rights of action for damages under section 36(a) of Investment Company Act where advisers or directors breach fiduciary duty), *cert. denied,* 459 U.S. 828, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982); *Meyer v. Oppenheimer Management Corp.,* 764 F.2d 76, 86–88 (2d Cir.1985) (implying private right of action under section 15(f) of Investment Company Act); *Krome v. Merrill Lynch & Co.,* 637 F.Supp. 910 (implying private rights of action under sections 10(b), 15(a–b), 17(a), 22, 34(a), and 36 of the Investment Company Act), *vacated in part,* 110 F.R.D. 693 (S.D.N.Y.1986); *Jerozal v. Cash Reserve Management, Inc.,* 1982 WL 1363 (S.D.N.Y.1982) (implying private rights of action under sections 15, 35(b), 47(a) of the Investment Company Act); *Cambridge Fund, Inc. v. Abella,* 501 F.Supp. 598, 622–23 (S.D.N.Y.1980) (implying private right of action under 36(a) and 37 of the Investment Company Act).

It is clear from the foregoing discussion that Congress intended, in appropriate circumstances, for courts to imply private rights of action under the Investment Company Act, and that courts have consistently recognized such private rights of action. What remains to be determined is whether the circumstances in this case are such that the Court should imply private rights under the particular sections upon which Plaintiffs rely in the Complaint. To make this determination, the Court must ascertain whether "the plaintiff falls within the class of persons protected by the statutory right in question." *Bancroft Convertible Fund,* 825 F.2d at 736 (quoting H.R.Rep. No. 1341, 96th Cong., 2d Sess. 28–29 (1980), *reprinted in* 1980 ***540** U.S.C.C.A.N. 4811). Once the Court decides whether private rights of action should be implied under the sections that Plaintiffs have alleged Defendants violated, the Court will consider the question of whether Plaintiffs can proceed against Defendants under Plaintiffs' theories of primary and secondary liability.

b. Section 17(j) of the Investment Company Act

In Count VIII of the Complaint, Plaintiffs assert a claim against Defendants for violations of section 17(j) of the Investment Company Act and Rule 17j–1 promulgated thereunder. This Count relates to the Hills and Stanley transactions. The Complaint alleges that defendant Lee is primarily liable based upon his control over Funds, Hills and SHC for Hill's and SHC's allegedly fraudulent, deceitful or manipulative acts or practices with respect to their transactions with the Funds. The Complaint also alleges that all other Defendants are secondarily liable as aiders and abettors with respect to the Hills transaction, and all

Defendants except Lee and HW & D are secondarily liable as aiders and abettors with respect to the Stanley transaction.

Section 17(j) [14] essentially prohibits persons affiliated with a registered investment ***541** company from engaging in fraudulent, deceptive, or manipulative acts or practices in connection with the purchases or sales of securities held or to be acquired by an investment company. On the record before it, the Court finds that Plaintiffs, as limited partners in the Funds, are within the class of persons to be protected by section 17(j). No reported decision relating specifically to section 17(j) has been found. However, other courts have implied private rights of action under other subsections of 15 U.S.C. § 80a–17. *See* *Lessler v. Little,* 857 F.2d at 873 (implied private right of action under 15 U.S.C. 80a–17(a)(2)); *Krome,* 637 F.Supp. at 919 (implied private right of action under 15 U.S.C. § 80a–17(a)). Thus, the Court concludes that an implied private right of action exists under section 17(j). Accordingly, the Court finds that Count VIII states a cognizable cause of action against defendant Lee. The Court will address the potential liability of the remaining Defendants in its discussion of aider and abettor liability.

14 15 U.S.C. § 80a–17j provides, in pertinent part:

It shall be unlawful for any affiliated person of or principal underwriter for a registered investment company or any affiliated person of an investment advisor of or principal underwriter for a registered investment company, to engage in any act, practice, or sale, directly or indirectly, by such person of any security held or to be acquired by such registered investment company in contravention of such rules and regulations as the Commission may adopt to define, and prescribe means reasonably necessary to prevent, such acts, practices, or courses of business as are fraudulent, deceptive or manipulative. Such rules and regulations may include requirements for the adoption of codes of ethics by registered investment companies and investment advisers of, and principal underwriters for, such investment companies establishing such standards as are reasonably necessary to prevent such acts, practices, or courses of business.

Rule 17j provides, in pertinent part:

270.17j–1 Certain unlawful acts, practices, or courses of business and requirements relating to codes of ethics with respect to registered investment companies.

(a) It shall be unlawful for any affiliated person of or principal underwriter for a registered investment company, or any affiliated person of an investment adviser of or principal underwriter for a registered investment company in connection with the purchase or sale, directly or indirectly, by such person of a security held or to be acquired, as defined in this section, by such registered investment company:

(1) To employ any device, scheme or artifice to defraud such registered investment company;

(2) To make to such registered investment company any untrue statement of a material fact or omit to state to such registered investment company a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading;

(3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any such registered investment company; or

(4) To engage in any manipulative practice with respect to such registered investment company.

(b)(1) Every registered investment company, and each investment adviser of or principal underwriter for such investment company, shall adopt a written code of ethics containing provisions reasonably necessary to prevent its access persons from engaging in any act, practice, or course of business prohibited by paragraph (a) of this section and shall use reasonable diligence, and institute procedures reasonably necessary, to prevent violations of such code.

(2) The requirements of paragraph (b)(1) shall not apply to any underwriter (i) which is not an affiliated person of the registered investment company or its investment adviser, and (ii) none of whose officers, directors or general partners serves as an officer, director or general partner of such registered investment company or investment adviser.

. . . . .

(e) As used in this rule

(1) “Access person” means:

(i) With respect to a registered investment company or an investment adviser thereof, any director, officer, general partner, or advisory person, as defined in this section, of such investment company or investment adviser;

(ii) With respect to a principal underwriter, any director, officer, or general partner of such principal underwriter who in the ordinary course of his business makes, participates in or obtains information regarding the purchase or sale of securities for the registered investment company for which the principal underwriter so acts or whose functions or duties as part of the ordinary course of his business relate to the making of any recommendation to such investment company regarding the purchase or sale of securities.

. . . . .

(3) "Control" shall have the same meaning as that set forth in section 2(a)(9) of the Act [15 U.S.C. 80a–2(a)(9)].

(4) "Purchase or sale of a security" includes, inter alia, the writing of an option to purchase or sell a security.

. . . . .

(6) "Security held or to be acquired" by a registered investment company means any security as defined in this rule which, within the most recent 15 days, (i) is or has been held by such company, or (ii) is being or has been considered by such company or its investment adviser for purchase by such company.

c. Section 36(a) of the Investment Company Act

Plaintiffs, in Count VII, allege a claim against all Defendants for a violation of section 36(a) of the Investment Company Act.[15] ***542** This Count alleges that Lee, Mezzanine Investments, Alden, Bower, and Feldberg, as directors or officers of the Funds, and Advisors II, as the investment adviser to Funds, committed primary violations of section 36(a). These Defendants allegedly breached their fiduciary duties to the investors by: (1) approving the Funds' investments in Hills, Petco and Stanley without obtaining necessary exemptive orders; (2) approving a non-guideline investment in Hills without obtaining approval of a majority of disinterested directors; (3) engaging in self-dealing by investing in the financially ailing Hills, Petco and Stanley in which Defendants or their affiliates had existing investments; and (4) withholding information in the Prospectus concerning their intent to invest in financially ailing enterprises in which the Defendants held substantial interests.

15 15 U.S.C. § 80a–35 provides, in pertinent part:

Breach of fiduciary duty

(a) Civil actions by Commission; jurisdiction; allegations; injunctive or other relief. The Commission is authorized to bring an action in the proper district court of the United States, or in the United States court of any territory or other place subject to the jurisdiction of the United States, alleging that a person serving or acting in one or more of the following capacities has engaged within five years of the commencement of the action or is about to engage in any act or practice constituting a breach of fiduciary duty involving personal misconduct in respect of any registered investment company for which such person so serves or acts—

(1) as officer, director, member of any advisory board, investment adviser, or depositor; or

(2) as principal underwriter, if such registered company is an open-end company, unit investment trust, or face-amount certificate company.

If such allegations are established, the court may enjoin such persons from acting in any or all such capacities either permanently or temporarily and award such injunctive or other relief against such person as may be reasonable and appropriate in the circumstances, having due regard to the protection of investors and to the effectuation of the policies declared in section 1(b) of this title [15 U.S.C. § 80a–1(b)].

(b) Compensation or payments as basis of fiduciary duty; civil actions by Commission or security holder; burden of proof; judicial consideration of director or shareholder approval; persons liable; extent of liability; exempted transactions; jurisdiction; finding restriction. For the purposes of this subsection, the investment adviser of a registered investment company shall be deemed to have a fiduciary duty with respect to the receipt of compensation for services, or of payments of a material nature, paid by such registered investment company, or by the security holders thereof, to such investment adviser or any affiliated person of such investment adviser. An action may be brought

> under this subsection by the Commission, or by a security holder of such registered investment company on behalf of such company, against such investment adviser, or any affiliated person of such investment adviser, or any other person enumerated in subsection (a) of this section who has a fiduciary duty concerning such compensation or payments, for breach of fiduciary duty in respect of such compensation or payments paid by such registered investment company or by the security holders thereof to such investment adviser or person. With respect to any such action the following provisions shall apply:
>
> (1) It shall not be necessary to allege or prove that any defendant engaged in personal misconduct, and the plaintiff shall have the burden of proving a breach of fiduciary duty.
>
> (2) In any such action approval by the board of directors of such investment company of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, and ratification or approval of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, by the shareholders of such investment company, shall be given such consideration by the court as is deemed appropriate under all the circumstances.
>
> (3) No such action shall be brought or maintained against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of damages shall be recoverable for any period prior to one year before the action was instituted. Any award of damages against such recipient shall be limited to the actual damages resulting from the breach of fiduciary duty and shall in no event exceed the amount of compensation or payments received from such investment company, or the security holders thereof, by such recipient.

As discussed above, Congress explicitly created a private right of action under section 36(b) for breaches of fiduciary duty with respect to a registered investment company. The private cause of action explicitly included in section 36(b), however, is limited only to claims relating to the compensation or payment paid to officers, directors, members of any advisory boards, and principal underwriters of the investment company who breach their fiduciary duties to the investment company.

Nonetheless, House Report No. 1341 accompanying the 1980 amendments to the Investment Company Act makes clear in its discussion of private rights of action that Congress intended that "in appropriate instances, for example, breaches of fiduciary duty involving personal misconduct should be remedied under Section 36(a) of the Investment Company Act." H.R.Rep. No. 1341, 96th Cong., 2d Sess. 28–29 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4810–11 (footnotes omitted) (quoted in *Bancroft Convertible Fund,* 825 F.2d at 735–36). Thus, the Court believes Congress intended courts to continue to imply private rights of action for conduct proscribed under section 36(a). Therefore, insofar as Count VII of the Complaint contains allegations of breaches of fiduciary duties by Lee, Mezzanine Investments, Alden, Bower, and Feldberg, as directors or officers of Funds, and Advisors II, as the investment adviser to Funds, Plaintiffs have stated a cognizable cause of action.

The remaining Defendants (Lee Co., Lee II, Merrill, MLPF & S, Mezzanine, Mezzanine Individual Defendants, Administrators, HW & D, and Funds) are alleged to be secondarily liable as aiders and abettors. Again, the Court will address their potential liability in the section discussing aider and abettor liability.

d. Section 57 of the Investment Company Act, 15 U.S.C. § 80a–56

In Counts IV–VI Plaintiffs assert claims against all Defendants for violations of sections 57(a)(1–2), 57(a)(4) and 57(d) of the Investment Company Act. These Counts relate to the failure of Defendants to obtain the requisite exemptive orders from the SEC prior to engaging in the challenged transactions.

(1) *Count IV—Sections 57(a)(1) & (2)*

Plaintiffs' theory in Count IV is that Funds were related to Hills, Petco and Stanley by virtue of the common control of Lee and other Defendants over the Funds and Hills, Petco and Stanley. Plaintiffs allege that exemptive orders were required under section 57(a)(1), (2) [16] because the Funds were related to Hills, Petco and Stanley.

16 15 U.S.C. § 80a–56(a)(1–2) provides as follows:

Transactions involving controlling or closely affiliated persons

(a) It shall be unlawful for any person who is related to a business development company in a manner described in subsection (b) of this section, acting as principal—

(1) knowingly to sell any security or other property to such business development company or to any company controlled by such business development company, unless such sale involves solely (A) securities of which the buyer is the issuer, or (B) securities of which the seller is the issuer and which are part of a general offering to the holders of a class of its securities;

(2) knowingly to purchase from such business development company or from any company controlled by such business development company, any security or other property (except securities of which the seller is the issuer);

15 U.S.C. § 80a–56(b) provides as follows:

Controlling or closely affiliated persons

(b) The provisions of subsection (a) of this section shall apply to the following persons:

(1) Any director, officer, employee, or member of an advisory board of a business development company or any person (other than the business development company itself) who is, within the meaning of section 80a–2(a)(3)(C) of this title, an affiliated person of any such person specified in this paragraph.

(2) Any investment adviser or promoter of, general partner in, principal underwriter for, or person directly or indirectly either controlling, controlled by, or under common control with, a business development company (except the business development company itself and any person who, if it were not directly or indirectly controlled by the business development company, would not be directly or indirectly under the control of a person who controls the business development company), or any person who is, within the meaning of section 80a–2(a)(3)(C) or (D) of this title, an affiliated person of any such person specified in this paragraph.

***543** In Count IV, Plaintiffs challenge the Hills transactions on the grounds that, because Hills and the Funds were related, either Hills or the Funds were required to obtain exemptive orders before Hills could sell its securities to the Funds. Plaintiffs allege that defendant Lee is primarily liable due to his control over both the Funds and Hills. All other Defendants are alleged to be secondarily liable due to their relationship to either Hills or the Funds. HW & D is allegedly liable due to its assistance in consummating the Hills transactions with the knowledge of Lee's control over both the Funds and Hills.

With respect to Petco, Count IV alleges that the Petco transactions were accomplished without obtaining the requisite exemptive orders. Plaintiffs attack all three investments in Petco securities, all of which were consummated without obtaining exemptive orders from the SEC. Plaintiffs allege that Petco and the Funds were related because Lee controlled both Petco and the Funds.

Plaintiffs attack the first Petco transaction (the April 6, 1990 transaction with Drexel), alleging that, because Drexel controlled Petco and Petco and the Funds were related, Drexel was related to the Funds. Plaintiffs therefore allege that either Drexel or the Funds were required to obtain exemptive orders before Drexel could sell the Petco securities to the Funds. Plaintiffs allege that all Defendants, because of their respective relationships with the Funds, each other, and Petco, and because of their assistance in consummating the sale, are secondarily liable with respect to the sale of the Petco securities by Drexel to the Funds without the requisite exemptive orders.

With regard to the second and third Petco transactions (the November 16, 1990 and April 19, 1991 sale of Bridge Notes), Plaintiffs allege that either Petco or the Funds were required to obtain exemptive orders from the SEC. Plaintiffs allege that Defendants Lee, Lee Co., IGPs, Merrill, MLPF & S, and the Individual Defendants, because of their control over the Funds, Fund I and Petco, are primarily liable for failing to obtain the requisite exemptive orders. Plaintiffs allege that Defendants Lee II, Advisors II, Mezzanine Investments, Mezzanine, Administrators, and HW & D are secondarily liable with respect to the failure to obtain the requisite exemptive orders by virtue of their relationships to Petco and the Funds and their assistance in consummating the sale.

Plaintiffs also attack the Stanley transaction for the failure to obtain an exemptive order. Plaintiffs allege that Defendants Lee, Lee Co., the IGPs, Merrill, MLPF & S and the Individual Defendants controlled Fund I, SHC, and the Funds. Plaintiffs allege, therefore, that the Funds and SHC were related. Because SHC and the Funds were related, Plaintiffs allege that SHC or the Funds were required to obtain an exemptive order from the S.E.C. prior to the Funds selling SHC the option to buy the Stanley 10% Preferred Stock. "In purchasing the option to buy the Stanley 10% Preferred Stock from the Funds without the requisite exemptive order, SHC violated § 57(a)(2)." ¶ 257. Plaintiffs allege that Defendants Lee, ***544** Lee Co., the IGPs, Merrill, MLPF & S and the Individual Defendants are primarily liable due to their control over SHC. Plaintiffs allege that Defendants Lee II, Advisors II, Mezzanine Investments, Mezzanine, and Administrators are secondarily liable with respect to the failure to obtain the requisite exemptive orders by virtue of their relationships to SHC and the Funds and their assistance in consummating the sale.

(2) *Count V—Section 57(a)(4)*

In Count V of the Complaint, Plaintiffs allege that an exemptive order was also required under section 57(c) and Rule 17d–1 promulgated under section 17 of the Investment Company Act to effect the Stanley transaction. Plaintiffs allege that the failure to obtain the requisite exemptive order violated section 57(a)(4).

Plaintiffs allege that Defendants Lee, Lee. Co., the IGPs, Merrill, MLPF & S and the Individual Defendants are primarily liable based upon their control of SHC. Plaintiffs allege that Defendants Lee II, Advisors II, Mezzanine Investments, Mezzanine, Administrators, by virtue of their control of the Funds are secondarily liable with respect to the failure to obtain the exemptive orders necessary to engage in the joint transaction with Stanley.

(3) *Count VI—Section 57(d)*

In Count VI, Plaintiffs allege that if the Hills transaction did not require an exemptive order under section 57(a)(1), then it required an exemptive order under section 57(d). Plaintiffs allege that the Hills transaction required an exemptive order under section 57(d) for the following reasons: the transaction was not approved by a majority of disinterested general partners (allegedly there were none); the terms of the transaction were not reasonable and fair to the partners of the Funds; the investment involved overreaching on the part of the Funds; the transaction was inconsistent with the policy of the Funds as expressed in its SEC filings; the general partners failed to record in the minutes of the Funds their findings concerning the transaction.

Plaintiffs allege that defendant Lee, due to his control over Hills, is primarily liable for the failure to obtain the section 57(d) exemptive order. Plaintiffs also allege that Defendants Alden, Bower, and Feldberg are primarily liable because they held an interest in Hills. Plaintiffs allege that all other Defendants are secondarily liable for aiding and abetting the consummation of the Hills transaction without obtaining the necessary exemptive orders.

Section 57 of the Investment Company Act was added by Congress in 1980 as part of the Small Business Investment Act. *See* Pub.L. No. 96–477 § 57, 94 Stat. 2280. Section 57 parallels section 17 of the Investment Company Act and it

> generally prohibits business development companies from effecting or participating in certain transactions in which conflicts of interest might be present, unless explicit procedures are satisfied. The protective system which is established by the bill is similar to that applicable to registered investment companies under section 17 of the Act, and rules thereunder, but is modified to address concerns relating to unique characteristics presented by business development companies.

H.Rep. No. 96–1341, 96th Cong., 2d Sess. 45 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4827. The House Committee on Interstate and Foreign Commerce noted in their report concerning section 57 that "[t]he prohibitions contained in sections 57(a) and (d) are similar to those found in sections 17(a) and 17(d) of the Act." *Id.* There can be no question that Congress intended for section 57 and section 17 to be construed similarly because Congress expressly included in section 57 a provision stating that the rules and regulations promulgated by the SEC pursuant to section 17 were to apply to sections 57(a) and (d) until the SEC adopts rules and regulations pursuant to section 57. *See* 15 U.S.C. § 80a–56(i).

Given that section 57 is analogous to section 17 and the Court has concluded that a private right of action exists under section 17, it is consistent for the Court to conclude that a private right of action exists under section 57. The Court also notes that the House Report quoted above, which accompanied the enactment of section 57 specifically ***545** stated that "[w]ith respect to business development companies, the Committee contemplates suits by shareholders as well as by the Commission." H.R.Rep. No. 1341, 96th Cong., 2d Sess. 29 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4811 (footnotes omitted) (quoted in *Bancroft Convertible Fund,* 825 F.2d at 735–36). Further, the nature and purpose of sections 57(a) and (d) support finding a private right of action. These sections protect investors in business development companies by ensuring that the SEC act as a watchdog over transactions between the business development companies and its affiliates. By failing to obtain the requisite exemptive orders, affiliated persons avoid making public their questionable transactions, and thus avoid alerting both the SEC and their investors about such transactions. For these reasons, the Court concludes that a private right of action exists under sections 57(a) and (d).

2. Primary Liability as "Controlling Persons"

Plaintiffs allege that various Defendants are liable as primary violators of sections 17 and 57 on the basis of their ability to control or influence Hills, Petco, and Stanley. Plaintiffs contend that such liability exists under the Investment Company Act on the basis of both section 2(a)(9) which defines "control" and section 48 which applies to "Procuring violation [s]" of the Investment Company Act.

Section 2(a)(9) provides in pertinent part:

> "Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.
>
> Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company. Any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company. A natural person shall be presumed not to be a controlled person within the meaning of this subchapter.

15 U.S.C. § 80a–2(a)(9). Defendants appropriately note that section 2(a)(9) is merely a definition, and not the basis for imposing liability. The Court agrees.

However, the Court concludes that section 48 can provide a basis for imposing liability. *See* *Jerozal v. Cash Reserve Management, Inc.,* 1982 WL 1363 at *6 (S.D.N.Y. August 10, 1982) (finding cause of action under section 48(a) against various controlling or dominating directors of investment fund). Section 48 of the Investment Company Act provides in pertinent part:

> **Procuring violation of subchapter; obstructing compliance**
>
> (a) It shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this subchapter or any rule, regulation, or order thereunder.

15 U.S.C. § 80a–47. While the Defendants contend that section 48 is materially distinguishable from section 20(a) of the 1934 Act, which was a basis for the *Jerozal* court's determination that section 48(a) was a basis for controlling person liability, the Court concludes that a proper reading of section 48(a) supports finding such liability. Section 48(a) proscribes any actions taken "to cause" another to take actions that are unlawful under the Investment Company Act. Thus, insofar as Plaintiffs allege that the transactions at issue in the Complaint were undertaken illegally between "affiliated" entities and that the alleged controlling Defendants caused those actions to be taken, the Court concludes those controlling Defendants can possibly be held accountable under section 48(a).

3. Aider and Abettor Liability Under the Investment Company Act

Plaintiffs seek to proceed against several of the Defendants under a theory of secondary liability for aiding and abetting violations of the Investment Company Act by other Defendants who are primarily liable. Defendants contend that, assuming this Court were to find a private right of action under the sections Plaintiffs allege the Defendants violated, the Court should limit such ***546** liability in the same manner that Congress limited the one expressly recognized private right of action in the Investment Company Act, found at 15 U.S.C. § 80a–35(b) ("Section 36(b)"). Section 36(b) states, in pertinent part, that "No such action ... shall be brought or maintained against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments." 15 U.S.C. § 80a–35(b)(3).

Plaintiffs respond by asserting that the 1970 Senate Report on the amendments adding the private right of action in section 36(b) "indicates that the specific provisions of subsection (b) 'should not be read by implication to affect subsection (a).' " (D.I. 276 at 36 (quoting S.Rep. No. 91–184, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4897, 4911). Plaintiffs' out of context quotation is unpersuasive. The complete sentence in the report is as follows: "Although section 36(b) provides for an equitable action for breach of fiduciary duty as does section 36(a), the fact that subsection (b) specifically provides for a private right of action should not be read by implication to affect subsection (a)." S.Rep. No. 91–184, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4897, 4911).

At best, the Court finds the above-quoted sentence to be ambiguous. It might be interpreted as expressing the intent of Congress to preclude private equitable actions for breaches of fiduciary duty under section 36(a). On the other hand, it might reasonably be interpreted as instructing courts to feel free to impose private rights of action, notwithstanding Congress' failure to explicitly provide for one. Thus, what might reasonably be read as a statement limiting private actions under section 36(a), has been quoted by Plaintiffs to support a theory that increases the scope of private actions under section 36(a).

Moreover, as Defendants note, Congress has created liability for civil penalties for aiding and abetting violations of the Investment Company Act under Section 9 of the Investment Company Act, which exclusively involves SEC administrative proceedings.[17] The aiding and abetting section was added as part of the 1970 amendments, but the remedy initially was limited to removing or prohibiting violators from serving as employees or persons of influence in investment companies or affiliates of the investment advisers, depositors or principal underwriters of investment companies. *See* Pub.L. No. 91–547 § 4(b), 84 Stat. 1416. It was not until 1990 that Congress added provisions permitting the SEC to impose civil monetary penalties against aiders and abettors. Pub.L. No. 101–429 § 301(1, 3), 104 Stat. 941–45. Congress expressly stated that such civil monetary penalties could not be imposed for violations pre-dating the effective date of the 1990 amendments—October 15, 1990. *See* Pub.L. No. 101–429, § 1(c), 104 Stat. 931.

17 Section 9(b) provides, in pertinent part:

Certain persons serving investment companies; administrative action of Commission

The Commission may, after notice and opportunity for hearing, by order prohibit, conditionally or unconditionally, either permanently or for such period of time as it in its discretion shall deem appropriate in the public interest, any person from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter, if such person—

. . . . .

(3) has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of the Securities Act of 1933, or of the Securities Exchange Act of 1934, or of subchapter II of this chapter, or of this subchapter, or of the Commodity Exchange Act, or of any rule or regulation under any of such statutes.

15 U.S.C. § 80a–9(b)(3).

Section 9(d) provides, in pertinent part:

Money penalties in administrative proceedings

(1) Authority of Commission

In any proceedings instituted pursuant to subsection (b) of this section against any person, the Commission may impose a civil penalty if it finds, on the record after notice and opportunity for hearing, that such person—

. . . . .

(B) has willfully aided, abetted, counseled, commanded, induced, or procured such a violation by any other person;

. . . . .

and that such penalty is in the public interest. 15 U.S.C. § 80a–9(d)(1).

***547** Plaintiffs rely upon *Wellman v. Dickinson,* 475 F.Supp. 783, 834 (S.D.N.Y.1979), *aff'd,* 682 F.2d 355

(2d Cir.1982), *cert. denied,* 460 U.S. 1069, 103 S.Ct. 1522, 75 L.Ed.2d 946 (1983), to support their theory that private actions for violations of the Investment Company Act can be brought on a theory of aider and abettor liability. In *Wellman,* a consolidated action involving the SEC and private plaintiffs, the United States District Court for the Southern District of New York found aiding and abetting liability under the section 17(d) and 17(e) of the Investment Company Act. As Defendants correctly note, however, the District Court was applying aiding and abetting liability in the SEC enforcement action only. *Id.* at 791–95. In fact, the Court is aware of no decision in which a court has found that a private right of action exists under the Investment Company Act on the basis of aiding and abetting liability.

Nor does the specific text of the provisions at issue support finding a private cause of acting against aiders and abettors of violations of the Investment Company Act. Section 17(j) is specifically directed at "any affiliated person or promoter or principal underwriter for a registered investment company, ... or any affiliate person" of those person listed "acting as principal." Section 36(a) specifically limits the persons liable under that section to persons who act as "officer, director, member of any advisory board, investment adviser, or deposited; or ... principal underwriter, if such registered company is an open-end company, unit investment trust, or face-amount certificate company." Section 56 is specifically directed to affiliated persons "acting as principals." Thus, the explicit language of these provisions appears to preclude liability for aiders and abettors.

Moreover, the legislative history of the Investment Company Act and its recent amendments do not support finding a private cause of action against aiders and abettors of violations of the Investment Company Act. Because Congress, prior to 1990, explicitly limited the scope of liability for aiders and abettors to removing or prohibiting them from exercising positions of influence with respect to investment companies, the Court is reluctant to conclude that Congress impliedly intended for courts to imply private rights of actions for money damages against aiders and abettors. Accompanying, the legislation enacting sections 9 and 56 was the above quoted House Report stating Congress' intent that courts should imply private rights of actions. This was at a time when Congress was aware that courts had been consistently finding implied rights of action for primary violations of various provisions of the Investment Company Act. The Court concludes that had Congress intended to expand the scope of liability under private rights of action to include aiders and abettors, Congress would have done so explicitly.

Even more persuasive is Congress' silence with respect to private rights of action when amending Section 9 of the Investment Company Act in 1990 to provide for monetary penalties against aiders and abettors. The Court is equally reluctant to find that because of the 1990 amendments, permitting the SEC for the first time to impose monetary penalties upon aiders and abettors, in which the legislative history contains no expressed opinion about private rights of action, Congress now intends that courts should permit private rights of action for monetary damages against aiders and abettors. Congress' silence with regard to private rights of action in expanding the penalties which the SEC could impose upon aiders and abettors for violations of the Investment Company Act counsels against finding a private right of action against aiders and abettors. Accordingly, Plaintiffs' claims premised on aider and abettor liability will be dismissed.

4. Have Plaintiffs Adequately Alleged a Violation of Rule 17j–1

Defendants argue that Plaintiffs have failed to establish a violation of section 17(j) and Rule 17j–1. Defendants contend that in order to violate section 17(j) and Rule 17j–1 an affiliated person must purchase or sell a security that is simultaneously held or to be acquired by the investment company, and that Plaintiffs have not alleged any purchase or sale of Hills' or Stanley's securities ***548** by anyone else at the time of the Funds' transactions.

The Complaint alleges that:

> Section 17(j) of the [Investment Company Act] and Rule 17j promulgated thereunder prohibit a person affiliated with a [business development company] from engaging in fraudulent, deceptive, or manipulative acts or practices in connection with the sale or purchase of securities to or from such [business development company].

Complaint, at ¶ 283. The Complaint further alleges that "Hills' sale of its securities to the Funds and SHC's purchase of the stock options from the Funds were acts or practices designed to defraud, deceive, or manipulate the Funds at the expense of limited partners," Complaint, at ¶ 285, and that Lee, by virtue of his control over Hills, SHC, and the Funds, is primarily liable for Hills' and SHC's fraudulent, deceitful, or manipulative acts in related to the Funds' transactions. Complaint, at ¶ 286.

Section 17(j) was added to the 1940 Act in 1970. The legislative history demonstrates that 17(j)'s broad remedial purpose is to develop "adequate restraint on the trading of investment company insiders in the companies' portfolio securities." Investment Company Amendments Act of 1970, S.Rep. No. 91–184, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.Code Cong. & Admin.News 4897, 4923. Paragraph (a) of Rule 17j–1 is a general anti-fraud provision designed to prohibit fraudulent trading by certain persons affiliated with registered investment companies with respect to securities held or to be acquired by the investment company.

Defendants assert that the Court should interpret section 17(j) and Rule 17j–1 as applying only to those situations where an "insider" purchases or sells securities that (a) are already owned by an investment company or (b) are being considered for acquisition by the investment company. Under Defendants' interpretation, a violation of 17(j) requires a distinct securities transaction by an "insider" at a time when such securities were separately held or to be acquired by the Funds. In support of their interpretation of Rule 17j–1, Defendants quote from the SEC's commentary accompanying the promulgation of Rule 17j–1, where the SEC stated "the Commission has become aware of an increasing number of situations involving parallel trading by individuals with knowledge regarding transactions anticipated or engaged in by registered investment companies." *Prevention of Certain Unlawful Activities with Respect to Registered Investment Companies,* Investment Company Act Release No. 11421, [1980 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 82,679 at 83,735.

Plaintiffs argue for a broader reading of Rule 17j–1. Under Plaintiffs' reading, it would be a violation of Rule 17j–1 for an access person, through his/her position of influence, to cause an investment company to purchase or sell securities already owned by that access person, particularly in situations where the access person expects to personally benefit by the investment company's purchase or sale. Plaintiffs quote from the same SEC commentary relied upon by the Defendants.

> Another situation which would appear to present a conflict of interest of the type to which Sectoin [sic] 17(j) is addressed might occur where access persons already own a particular security and through their position of influence over the investment company attempt to cause the investment company to purchase, sell or hold the same security. This situation could be especially abusive where the investment strategy recommended by the access person may be expected to create a personal benefit to the access person.

Investment Company Act Release No. 11421, [1980 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 82,679 at 83,735–36.[18] Because defendant Lee is an access person as defined in Rule 17j–1(e)(1), Plaintiffs contend that the transactions between Hills and Funds and between Stanley and Funds are the types of transactions described by the SEC as presenting ***549** a conflict of interest, and thus violative of section 17(j) and Rule 17j–1.

18 Defendants correctly note that the above-quoted paragraph was written in the context of a discussion of what investment companies should appropriately consider in fashioning required codes of ethics.

Although the above quoted portion of the SEC's commentary relates to a discussion of what investment companies should appropriately consider in fashioning required codes of ethics, the Court finds it probative on the issue of what type of conduct constitutes a violation of section 17(j) and Rule 17j–1(a). Given the SEC's reading of section 17(j), the Court finds Plaintiffs' interpretation of section 17(j) at least plausible. Thus, the Court is unable to conclude at this juncture that Plaintiffs would be unable to prove any set of facts which would entitle them to relief. Accordingly, the Court will deny Defendants' motion to dismiss Count VIII for failure to state a claim.

5. Failure to Plead Compliance with Applicable Statutes of Limitations

Defendants also seek to have Plaintiffs' federal securities law claims dismissed for failure to plead sufficient facts to demonstrate that these claims were filed within the applicable limitations period. At the outset, Defendants contend that the applicable limitations period for all of the federal securities claims—claims under the 1933 Act, the 1934 Act and the Investment Company Act—is one year from the discovery of the cause of action and three years from the accrual of the cause of action. Defendants further argue that compliance with the applicable limitations period is an essential element of Plaintiffs' securities law claims which must be affirmatively pled.

The Complaint was filed more than two years after Plaintiffs purchased their shares in the Funds, approximately one year and ten months after the initial investments in Hills and Petco, approximately one year and three months after the second investment in Petco, less than one year after the third investment in Petco, and approximately seven months after the only investment in Stanley for which a specific date has been alleged.

Plaintiffs counter by first arguing that the applicable limitations period for the Investment Company Act claims is five years. Moreover, Plaintiffs assert that they have pled facts sufficient to satisfy the pleading standard with respect to the one year statute of limitations for the 1933 Act and 1934 Act claims.

Prior to determining whether Plaintiffs have satisfied the pleading standards, the Court will first determine the relevant date for the statute of limitations under the Investment Company Act, the 1933 Act and the 1934 Act.

a. The 1933 and 1934 Acts

The parties agree that the statute of limitations applicable to Plaintiffs' claims under the 1933 Act and 1934 Act (Counts I, II, and III) is one year from discovery of the alleged violation and three years from the date of the alleged violation. Plaintiffs' 1933 Act and 1934 Act claims relate to the use of a false Registration Statement and Prospectus to solicit sales of Funds' units. The parties also appear to agree that these causes of action accrued in 1989 when the Registration Statement was filed, the Prospectus was published and Plaintiffs purchased their limited partnership units. *See* *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, ——, 111 S.Ct. 2773, 2782, 115 L.Ed.2d 321 (1991) (three year limitations period under section 10(b) commences after alleged misrepresentations). Even assuming that these causes of action accrued on the date of the last possible sale of the Funds' units, January 5, 1990, both Complaints were filed within the three year repose time, but more than one year after the alleged fraudulent conduct occurred.

In *Hill v. Der,* 521 F.Supp. 1370 (D.Del.1981), the Court outlined the pleading requirements for demonstrating compliance with the statute of limitations. The Complaint

> must set forth [i] the time and circumstances of the discovery of the fraudulent statements, [ii] the reasons why discovery was not made earlier if more than one year has elapsed since the fraudulent conduct occurred, and [iii] the diligent efforts which plaintiff undertook in making or seeking such discovery.

Id. at 1389.

***550** Reading the Complaint as a whole, the Court finds that Plaintiffs [19] have sufficiently satisfied their pleading burden under *Hill v. Der.* The Complaint alleges the first date on which investors were alerted of Defendants' alleged wrongful conduct and the circumstances of their discovery with respect to the Hills transaction—April 1, 1991, Complaint at ¶ 169, the Petco transaction—March 30, 1992, Complaint at ¶¶ 195–198, and the Stanley transaction—March 30, 1992, Complaint at ¶ 207.

19 Defendants may be correct in their assertion that if February 4, 1991 is the relevant date, then the Goldstein Complaint would have been filed outside the statute of limitations and because it relates specifically to Fund II, and the Seidel Complaint relates to Retirement Fund II, then the statute of limitations would not be tolled on the Goldstein

Complaint. *See* *Robbin v. Fluor Corp.,* 835 F.2d 213, 214 (9th Cir.1987); *Korwek v. Hunt,* 827 F.2d 874, 878 (2d Cir.1987). However, as Plaintiffs have also alleged that date of inquiry notice was April 1, 1991, the Court finds it inappropriate to decide this issue at this time.

The Complaint also sets forth the reasons for Plaintiffs' inability to discover the alleged fraud sooner, i.e. misleading Prospectus and Registration statement, in addition to other concealing conduct of the Defendants. For example, the Complaint alleges that the fact that the Funds stopped accruing interest on Petco's debt securities as of January 1991 was omitted from the 1990 Annual Report and not disclosed to the investors until March 30, 1992.

The Court finds these allegations sufficient to overcome a motion to dismiss. As Plaintiffs have sufficiently alleged the circumstances of their discovery in accordance with *Hill v. Der,* the Court will deny Defendants' motion to dismiss Counts I, II, and III.

b. Investment Company Act

The parties disagree as to the appropriate limitations period to be applied to the Investment Company Act claims. Plaintiffs contend that the appropriate limitations period is the five year period found in section 36(a) of the Investment Company Act. Defendants on the other hand, urge the Court to adopt the ⅓ year limitations period applied to the 1933 and 1934 Act claims. [20]

20 Few courts have been called upon to determine a limitations period for implied private rights of action under the Investment Company Act. *See In re Taxable Municipal Bond Securities Litigation,* 1992 WL 124783 at *3 (June 4, 1992 E.D.La.) (statute of limitations for private claims under sections 15 U.S.C. §§ 80a–7, 80a–8 is one year from discovery, three years from accrual); *Herm v. Stafford,* 663 F.2d 669, 680 & n. 16 (6th Cir.1981) (assuming without deciding cause of action under 15 U.S.C. § 80a–20, statute of limitations is that found under Kentucky Blue Sky law—3 years).

In determining the appropriate limitations period for claims brought pursuant to the Investment Company Act, the Court is guided by the principles set forth in *Lampf,* 501 U.S. 350, 111 S.Ct. 2773. In *Lampf,* the United States Supreme Court set out the analytical steps "for ascertaining the appropriate limitations period for a federal cause of action where Congress has not set the time within which such an action must be brought." *Id.* at –––– – ––––, 111 S.Ct. at 2778–79. First, where "the claim asserted is one implied under a statute that also contains an express cause of action with its own time limitation, a court should first look to the statute of origin to ascertain the proper limitations period." *Id.* at ––––, 111 S.Ct. at 2780. "Only where no analogous counterpart is available should a court then proceed to apply state-borrowing principles." *Id.; see also In re Taxable Municipal Bond,* 1992 WL 124783 at *3–5 (discussing *Lampf*).

If the statute of origin does not contain any "comparable express remedial provisions" the Court must then apply the three part test for choosing between borrowing a state or federal limitations period. The first inquiry under the three part test is whether a uniform statute of limitations is appropriate. *Id.,* 501 U.S. at ––––, 111 S.Ct. at 2779. Then, assuming a uniform statute of limitations is desirable, the Court must decide whether the limitations period is to be chosen from state or federal law, focusing particularly on the geographic character of the claim. *Id.*

Finally, even if geographic considerations indicate the desirability of a federal limitations, the Court must also determine that an analogous federal source "truly affords ***551** a 'closer fit' with the cause of action at issue than does any available state-law source." *Id.* Under this last prong, the Court should consider such factors as commonality of purpose and similarity of elements. *Id.*

Plaintiffs contend that *Lampf* compels application of the five-year statute of limitations found in section 36(a) of the Investment Company Act to Plaintiffs' implied private rights of action brought pursuant to the Investment Company Act. The Court is not persuaded that Plaintiffs' interpretation of *Lampf* is correct.

Lampf counseled courts that "[w]here, as here, the claim asserted is one implied under a statute that also contains an *express cause of action* with its own time limitation, a court should look first to the statute of origin to ascertain the proper limitations period." *Id.* at ––––, 111 S.Ct. at 2780 (emphasis added). Section 36(a) creates an express cause of action for breach of fiduciary duty by certain management personnel of an investment company. However, the five year limitations period in section 36(a) expressly applies to SEC regulatory proceedings, not private litigants. Because section 36(a) provides a remedy in favor of the SEC as opposed to private litigants, the Court finds that it is not "comparable" to the rights of action being implied under the sections Investment Company Act at issue here. Therefore, *Lampf* does not mandate the application of the five year limitations period.

For similar reasons, the Court rejects Defendants' arguments that the one year period found in section 36(b) ought to be applied to Plaintiffs' Investment Company Act claims. Section 36(b) creates a private right of action for breach of fiduciary duty related to the compensation paid by an investment company or security holders to an investment advisor. 15 U.S.C. § 80a–35(b).

As with the five year period expressly rejected by the Supreme Court in *Lampf,* subsection (b) focuses on a narrow, specific problem. It is therefore, not comparable to the broad implied rights of action at issue here. Accordingly, the Court concludes that *Lampf* does not mandate borrowing this one year period from § 36(b).

Having determined that there is no comparable express remedial remedy in the Investment Company Act itself, the Court must now determine the appropriate limitations period using the three part analysis set forth in *Lampf.* First, the Court finds that a uniform federal statute of limitations for Investment Company Act claims is appropriate. *Lampf,* at ——, 111 S.Ct. at 2778 (finding uniform federal period for section 10(b) claims). *See also In re Taxable Municipal Bond,* 1992 WL 124783 at *3–5 (reading *Lampf* to compel federal limitations period for Investment Company Act claims). As the Supreme Court in *Lampf* noted, a federal limitations period is appropriate

> when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking.

Lampf, 501 U.S. at ——, 111 S.Ct. at 2778 (quotations omitted). The Court finds that such is the case with claims under the Investment Company Act.

Therefore, the next question becomes whether a federal or state period should govern. The Supreme Court has instructed the Court to pay particular attention to the geographic character of the claim. Where the provisions at issue "encompass numerous and diverse topics and subtopics," and the claims under the statute are of a multistate nature, a uniform federal limitations period is generally desirable. *Id.* at ——, 111 S.Ct. at 2779. Without question claims arising under the Investment Company Act are of a multistate nature, and therefore should be governed by a limitations period derived from a federal source.

Finally, the Court must find determine that the borrowed federal limitations period affords a "closer fit" with the cause of action at issue than would any available state-law source. The relevant considerations in this inquiry include the "commonality of purpose and similarity of elements," *id.* "which period ***552** will further the policies behind [the particular sections of the federal securities] law, ... the interest in uniformity, and the interest in having clearly defined, easily applied rules." *Kahn v. Kohlberg, Kravis, Roberts & Co.,* 970 F.2d 1030, 1034 (2d Cir.), *cert. denied,* 506 U.S. 986, 113 S.Ct. 494, 121 L.Ed.2d 432 (1992).

The nature and remedial purposes of sections 57, 36 and 17 of the Investment Company Act are more similar to claims under the Securities Act than claims for common law fraud or breach of fiduciary duty. These provisions, and the complex rules and regulations promulgated thereunder, are detailed and complex, like those found in the 1933 and 1934 Acts.

Moreover, the ⅓ limitations period provided for under the 1933 and 1934 Acts represents a balancing of the same concerns as are involved under the Investment Company Act. Each of the three acts comprise a part of a single body of federal securities law designed to regulate those who deal in the national securities market for the common goal of protecting investors. For these reasons, the Court finds that the one year from discovery and three year period of repose limitations period generally applied to claims under the 1933 and 1934 Acts will likewise apply to Plaintiffs' claims under the Investment Company Act.

The section 57 and section 36 Investment Company Act claims accrued each time that a prohibited transaction occurred because each prohibited transaction constituted a violation of section 57 and a breach of the fiduciary duties of certain Defendants to the Funds. The Hills transaction occurred on April 3, 1990. The first Petco transaction occurred on April 6, 1990. The second Petco transaction occurred on November 16, 1990. The third Petco transaction occurred on April 19, 1991. The only date provided for the Stanley transactions was July 5, 1991. The section 17(j) Investment Company Act claims accrued at the time of the Hills transaction on April 3, 1990, and at the time of the Stanley transaction on July 5, 1991.

Based on these dates, it is clear that the Stanley transaction and the third Petco transaction, having accrued within one year of the filing of the Complaint, are within the one year—three year statute of limitations. Moreover, as the Court has determined with regard to Plaintiffs' 1933 Act and 1934 Act claims, Plaintiffs have sufficiently plead compliance with the ⅓ statute of limitations with regard to the Hills transaction and the first and second Petco transactions. Accordingly, the Court will deny Defendants' motion to dismiss Counts IV–VIII for failure to plead compliance with the applicable statute of limitations.

B. Hutchins Wheeler & Dittmar, P.C.'s Motion to Dismiss

HW & D raises four arguments that the Second Consolidated Amended Complaint should be dismissed as to it. First, HW & D contends that the claims against HW & D are barred by the statute of limitations. Second, HW & D contends that the counts against HW & D under the Investment Company Act based on secondary liability for aiding and abetting fail to state a claim. Third, HW & D contends that Plaintiffs' fraud allegations lack sufficient particularity as required by Fed.R.Civ.P. 9(b). Fourth, HW & D asserts that Plaintiffs' negligent misrepresentation cause of action may not be brought based upon information disseminated to public shareholders.

1. Aider and Abettor Liability, Counts IV, VI, and VII

For the reasons discussed above in section II.B.3., Counts IV, VI, VII, and VIII based on aider and abettor liability will be dismissed as against HW & D for failure to state a claim.

2. Statute of Limitations

a. Federal Securities Law Claim, Count III

As the Court determined above in section II.B.4., Plaintiffs' cause of action against HW & D under section 10(b) of the 1934 Act and Rule 10b–5 is governed by the 1 year from date of discovery, three year repose statute of limitations. *Lampf,* 501 U.S. at ——, 111 S.Ct. at 2782; *In re Data Access Systems Sec. Litig.,* 843 F.2d 1537 (3d Cir.) (en banc), ***553** *cert. denied,* 488 U.S. 849, 109 S.Ct. 131, 102 L.Ed.2d 103 (1988). HW & D was added as a defendant in Plaintiffs' second consolidated amended complaint filed on April 27, 1993. Plaintiffs purchased their interest in the Funds on November 10, 1989. It appears, therefore, that plaintiff's claim is barred by the three year repose time period.

Plaintiffs attempt to circumvent the statute of limitations bar by arguing that the amendment adding HW & D as a defendant relates back to the date of Plaintiffs' original pleading. Pursuant to Rule 15(c) of the Federal Rules of Civil Procedure an amendment adding a party relates back to the date of the original pleading if the party

> (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

The four criteria for relation back are:

1) the claim must have arisen out of the conduct set forth in the original pleading;

2) the party to be added must have received notice so that it will not be prejudiced in maintaining a defense;

3) the party to be added must have known that, but for a mistake concerning identity, the action would have been brought against it;

4) the second and third requirements must have been fulfilled within the period provided by Rule 4(j). *Schiavone v. Fortune,* 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986); Fed.R.Civ.P. 15(c).

The claims asserted against HW & D arise out of the same conduct that Plaintiffs set forth in their original pleading. In addition, as HW & D appeared in this litigation as defense counsel for the Funds and the Lee Defendants early in 1992, HW & D could not dispute that it had sufficient notice of the action within the limitations period. Moreover, the lack of prejudice to HW & D in maintaining a defense to this lawsuit is beyond dispute. It has been involved in defending the lawsuit since early 1992.

The real dispute between the parties centers on the third requirement—but for a mistake concerning identity, HW & D should have known that it would have been named as a defendant. Plaintiffs do not assert that they made a "mistake" in not naming HW & D in the original pleading. Rather, they appear to be asserting that during discovery they were provided with evidence of HW & D's alleged wrongdoing. A similar argument was rejected by the District Court for the Northern District of California.

> [T]his Court cannot adopt plaintiffs' novel argument that culpability constitutes identity. Plaintiffs argue that even though they knew that Ruffa provided legal services for Rexplore from the beginning of the litigation, they did not know of Ruffa's identity in terms of culpability. This is an unprecedented and unwarranted extension of Rule 15(c).

In re Rexplore, Inc. Sec. Litig., 685 F.Supp. 1132, 1145 (N.D.Cal.1988). The Court agrees. To accept Plaintiffs' liberal reading of Rule 15(c)'s requirements—essentially that notice is sufficient—would render statutes of limitations virtually meaningless.

Plaintiffs rely on two cases to support their relation back argument. *See* *Sorrels v. Sears, Roebuck & Co.,* 84 F.R.D. 663, 667 (D.Del.1979); *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.,* 621 F.Supp. 310, 313 (D.Del.1985). In both cases, the Court granted Plaintiffs leave to amend the complaint to add an additional party. However, unlike the present case, the plaintiffs in both *Sorrels* and *E.I. DuPont de Nemours & Co.* alleged that the party to be added was not named in the original complaint due to a "mistake." In *Sorrels,* the newly added defendant would have been named in the original pleading but for the plaintiff's mistake concerning its formal corporate identity. In *E.I. DuPont de Nemours & Co.,* "but for DuPont's mistaken assumption that Phillips would produce documents within the possession, custody or control of [the newly added defendant], DuPont would have moved to add [this defendant] at an earlier stage in this ***554** action." *E.I. DuPont de Nemours & Co.,* 621 F.Supp. at 315.

In contrast, Plaintiffs make no allegation that its failure to name HW & D as a defendant in the original pleadings was due to a mistake of any sort. As the Court of Appeals for the Ninth Circuit has stated, "Rule 15(c) was never intended to assist a plaintiff who ignores or fails to respond in a reasonable fashion to notice of a potential party, nor was it intended to permit a plaintiff to engage in piecemeal litigation." *Kilkenny v. Arco Marine, Inc.,* 800 F.2d 853, 857–58 (9th Cir.1986), *cert. denied,* 480 U.S. 934, 107 S.Ct. 1575, 94 L.Ed.2d 766 (1987). Therefore, the Court will dismiss Count III of the Complaint as against HW & D.

b. State Law Claims, Counts IX, X

HW & D also contends that Plaintiffs' state law claims for common law fraud and negligent misrepresentation are barred by Delaware's three year statute of limitations. *See* Del.Code Ann. tit. 10, § 8106. Alternatively, HW & D seeks dismissal of Plaintiffs' state law claims under the Court's discretionary power to dismiss state law claims against a defendant when the federal law claims are dismissed. *Cooper v. Merrill,* 736 F.Supp. 552, 566 (D.Del.1990) (dismissing state-law claims against defendant where no federal claims against defendant remained, even though federal claims remained against co-defendant).

Plaintiffs do not dispute that the three year limitations period found in § 8106 is the appropriate limitations period. Rather they assert: (1) the three years does not accrue until "a person of ordinary intelligence and prudence would have facts sufficient to put them on [inquiry notice]"; (2) even if the causes of action accrued on November 10, 1989, Plaintiffs' claims are not time-barred because they relate back under Rule 15(c). As the Court has already disposed of Plaintiffs' relation back arguments, the Court will discuss Delaware's three year statute of limitations.[21]

21 The Court declines to dismiss plaintiffs' state law claims against HW & D even though the federal law claims against HW & D no longer remain. In exercising its discretion to exercise supplemental jurisdiction over pendent state claims, a court should consider principles of comity, judicial economy, convenience and fairness to the litigants. *Carnegie–Mellon Univ. v. Cohill,* 484 U.S. 343, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988). Because numerous counts remain against a substantial number of defendants, and the remaining counts focus on the same conduct, the Court finds that judicial economy warrants retaining jurisdiction. Furthermore, comity is not implicated where it appears, at this stage of the proceeding, that the Court will preside over the same state law claims as against the other defendants.

Under Delaware law, a statute of limitations begins to run when a cause of action arises, even when a plaintiff is ignorant of the facts. *Isaacson, Stolper & Co. v. Artisan's Savings Bank,* 330 A.2d 130 (Del.Supr.1974). However, Delaware has developed an exception to this general rule where the action is "inherently unknowable." In this instance, the statute of limitations is tolled until such time that a "person of ordinary intelligence and prudence would have facts sufficient to put them on 'inquiry which, if pursued, would lead to the discovery' of the injury." *Studiengesellschaft Kohle, mbH v. Hercules, Inc.,* 748 F.Supp. 247, 252 (D.Del.1990) (quoting *Wilson v. Simon,* 1990 WL 63922 (Del.Super.1990)). Plaintiffs are entitled to rely on the tolling under the inherently unknowable exception if they can demonstrate that they were blamelessly ignorant of the acts or omissions and the injury.

Although HW & D argues that Plaintiffs have failed to allege that the alleged fraud was inherently unknowable until February 1991, the Court disagrees. Reading the Complaint as a whole, and drawing all reasonable inferences therefrom, the Court finds that Plaintiffs have pleaded facts sufficient to demonstrate that the injury resulting from Defendants' alleged misrepresentations was unknowable until April 1, 1991. Thus, HW & D's motion to dismiss Plaintiffs' state law claims on the ground that it is time-barred will be denied.

3. Failure to Plead Fraud With Particularity

HW & D also argues that Count III, which asserts a violation of section 10(b) of the 1934 Act and Rule 10b–5, and IX, which ***555** asserts common-law fraud, should be dismissed on the basis that Plaintiffs fail to satisfy Rule 9(b) of the Federal Rules of Civil Procedure's requirement of particularity. HW & D asserts that the Complaint fails to link HW & D to the alleged misrepresentations in the Funds' Prospectus. HW & D cites cases where courts have dismissed complaints where there were no allegations linking certain Defendants to the fraudulent misrepresentation or omission, and where the allegations of scienter were general and broad.

The Court does not find HW & D's argument persuasive. Rule 9(b) of the Federal Rules of Civil Procedure states in full "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." The Court of Appeals for the Third Circuit has stated that the particularity requirement is designed to "place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.,* 742 F.2d 786, 791 (3d Cir.1984), (Rule 9(b) satisfied where each allegation of fraud described the nature and subject of the alleged misrepresentation), *cert. denied,* 469 U.S. 1211, 105 S.Ct. 1179, 84 L.Ed.2d 327 (1985). While conclusory allegations that do nothing more than mirror language of statutes and rules are not sufficient under Rule 9(b), the requirement of particularity does not require " 'an exhaustive cataloging of facts but only sufficient factual specificity to provide assurance that plaintiff has investigated ... the alleged fraud and reasonably believes that a wrong has occurred.' " *Temple v. Haft,* 73 F.R.D. 49, 53 (D.Del.1976) (quoting *DuPont v. Wyly,* 61 F.R.D. 615, 631 (D.Del.1973)).

With the above considerations in mind, the Court concludes that the Complaint alleges the circumstances of fraud with sufficient particularity to satisfy Rule 9(b). Whether or not Plaintiffs will be successful in proving that HW & D aided and abetted the misrepresentations and omissions alleged with regard to the Prospectus, they have adequately plead the circumstances constituting the fraud, i.e. that HW & D allegedly misrepresented to the SEC that the Funds would not make any initial investment in companies already controlled by the Lee company, and that HW & D concealed from the SEC Lee's presumed control over Petco. Thus, HW & D's motion to dismiss Counts III and IX for failure to plead fraud with particularity will be denied.

4. Negligent Misrepresentation, Count X

Finally, HW & D argues for the dismissal of Plaintiffs' negligent misrepresentation claim on the ground that Plaintiffs do not have standing, or in the alternative that the allegations in the complaint related to Plaintiffs' reliance on the alleged misrepresentation and the economic harm suffered by Plaintiffs is insufficient as a matter of law. Under Delaware common law, persons who negligently misrepresent material facts are liable to those who justifiably rely on those misrepresentations to their economic detriment. However, a claim of negligent misrepresentation may be brought only by members of " 'a limited group of persons for whose benefit and guidance' the information is intended." *Brug v. Enstar Group, Inc.,* 755 F.Supp. 1247, 1258 (D.Del.1991) (quoting *Insurance Co. of North America v. Waterhouse,* 424 A.2d 675, 678 (Del.Super.1980) and *Restatement (Second) of Torts* § 552(2)(a) (1977)); *see also* *In re Delmarva Sec. Litig.,* 794 F.Supp. 1293, 1310–11 (D.Del.1992).

In *Brug* and *In re Delmarva,* as in the present case, the only documents which plaintiffs identified as containing the alleged misrepresentations were ones released to the public at large. *Brug,* 755 F.Supp. at 1258 (the publicly disseminated documents included press releases, filings with SEC, Registrations Statements, Annual Reports); *In re Delmarva Sec. Litig.,* 794 F.Supp. at 1306, 1310 (the publicly disseminated documents included SEC filings and press releases). In both cases, this Court found that the plaintiffs were not members of a limited class for ***556** whose benefit the press releases and SEC filings were disseminated.

Similarly to the plaintiffs in *Brug* and *In re Delmarva Sec. Litig.,* Plaintiffs allege that they were induced to purchase their interests in the Funds by publicly-disseminated documents, including an alleged misleading Prospectus and Registration Statement. Although Plaintiffs successfully argue that Delaware no longer requires that Plaintiffs be in privity with alleged Defendants, Plaintiffs cite no Delaware decision extending liability for negligent misrepresentation to the general investing public. As this Court has stated, "[i]f any member of the public who might choose to invest in [the defendant's] stock were to qualify as part of a protected class, the 'limited group' requirement would be meaningless." *Brug,* 755 F.Supp. at 1258; *In re Delmarva Sec. Litig.,* 794 F.Supp. at 1310 (quoting *Brug*).[22] The Court finds this reasoning persuasive, and will therefore, dismiss Plaintiffs' negligent misrepresentation claim for lack of standing.

22 Plaintiffs' reliance on *Shapiro v. UJB Fin. Corp.,* 964 F.2d 272 (3d Cir.), *cert. denied,* 506 U.S. 934, 113 S.Ct. 365, 121 L.Ed.2d 278 (1992) is misplaced. In *UJB,* the Third Circuit held that New Jersey common law extended liability for negligent misrepresentations to foreseeable individual investors. However, this is clearly a minority view. Moreover, Delaware's adherence to Restatement (Second) of Torts § 552 leads this Court to believe that Delaware would not extend liability for negligent misrepresentation quite as expansively.

C. Plaintiffs' Motion to Disqualify Hutchins Wheeler & Dittmar as Attorneys for the Lee Defendants

Plaintiffs seek to have HW & D disqualified from representing any defendant in this action due to HW & D's dual position as both advocate and material witness, as well as HW & D's conflict of interest with its clients. HW & D originally entered as counsel for both the Funds and the Lee Defendants. It has since withdrawn from presentation of the Funds.

A district court has the authority to supervise the conduct of attorneys appearing before it. *Richardson v. Hamilton Int'l Corp.,* 469 F.2d 1382, 1385–86 (3d Cir.1972), *cert. denied,* 411 U.S. 986, 93 S.Ct. 2271, 36 L.Ed.2d 964 (1973). This includes the power to disqualify attorneys. *United States v. Miller,* 624 F.2d 1198, 1201 (3d Cir.1980). In determining whether to disqualify an attorney, the Court should balance the purposes to be served by the particular rule against such countervailing interests as a litigant's right to retain counsel of his choice. *Id.* at 1201.

Plaintiffs argue that HW & D's disqualification is mandated by the advocate/witness rule of both the Delaware Rules of Professional Responsibility (Rule 3.7) and Massachusetts' disciplinary rules (DR 5–102(B)). In addition, Plaintiffs contend that disqualification is mandated under Rule 1.7(b) because a conflict exists between the interests of the Lee Defendants and HW & D.

Rule 1.7(b) states that "a lawyer shall not represent a client if the representation of that client may be materially limited by ... the lawyer's own interests." At the outset, the Court notes that Plaintiffs have failed to satisfy their burden of demonstrating that an actual conflict of interest exists between HW & D and the Lee Defendants. Although HW & D faces potential liability for the same fraudulent conduct attributed to the Lee Defendants, the papers before the Court do not reveal any adverse defensive positions. Moreover, other than broad arguments, Plaintiffs have not demonstrated how these alleged conflicts of interest have interfered with HW & D's representation of the Lee Defendants. [23]

23 Plaintiffs have provided the Court with deposition excerpts to demonstrate that HW & D has contradicted Lee on the issue of the disclosure made in the Fund II prospectus. Having read the excerpt, the Court does not agree that the testimony is in conflict. Both witnesses testify that they disclosed everything that was required. HW & D further testified that they decided not to disclose "extra" information. This is not necessarily inconsistent with Lee's testimony.

To the extent that a potential conflict of interest exists, the Court is satisfied that HW & D has adequately discussed the matter with its client, Thomas H. Lee, and has obtained the necessary consent after full disclosure as required by Rule 1.7. The Court ***557** is also satisfied, at this juncture, that HW & D might reasonably believe that its representation of the Lee Defendants will not be adversely affected by HW & D being named in the suit.

Therefore, the issue remaining is whether the possibility that some HW & D attorneys may be called to testify at trial mandates that HW & D be disqualified at this time. Rule 3.7(a) generally prohibits a lawyer from acting as advocate at a trial in which the lawyer is likely to be a necessary witness. However, Rule 3.7(b) permits another lawyer in the lawyer-witness's firm to "act as advocate in a trial in which the [lawyer-witness] is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9." [24]

24 An example of a situation offered in the Comment to Rule 3.7 which would be improper under Rule 1.7 is when "there is likely to be substantial conflict between the testimony of the client and that of ... a member of the lawyer's firm."

The applicable Massachusetts disciplinary rule, DR 5–102(A) provides that if "a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial, and his firm, if any, shall not continue representation in the trial." Courts have articulated various standards to determine when a lawyer "ought" to testify on behalf of a client. *See Brotherhood Ry. Carmen v. Delpro Co.,* 549 F.Supp. 780, 788 (D.Del.1982) (discussing various standards). In *Universal Athletic Sales Co. v. American Gym, Recreational & Athletic Equip. Corp.,* 546 F.2d 530, 538 (3d Cir.1976), *cert. denied,* 430 U.S. 984, 97 S.Ct. 1681, 52 L.Ed.2d 378 (1977), the Third Circuit suggested that a lawyer ought to testify within the meaning of DR 5–102(A) when he "has crucial information in his possession which must be divulged." *See also Brotherhood Ry. Carmen,* 549 F.Supp. at 787–88 (motion to disqualify base on DR 5–102(A) of the Model Code of Professional Responsibility).

The Court is unable to determine at this time whether HW & D attorneys "ought" to testify, or if they should testify, whether the possibility of prejudice to the Plaintiffs requires that the entire firm be disqualified. For these reasons, determination of disqualification of HW & D on these grounds would be premature. Therefore, the Court will deny Plaintiffs' motion to disqualify HW & D. However, Plaintiffs will be permitted to renew the motion, no later than the discovery cut-off date, if it appears that HW & D ought to testify. While the Lee Defendants have been permitted to retain the counsel of their choice, they and HW & D may wish to consider the possibility of HW & D being disqualified later in these proceedings should the Court be presented with facts sufficient to determine that HW & D's participation encroaches upon this Court's ethical rules.

D. Motion for Class Certification

Plaintiffs have moved pursuant Rules 23(a) and 23(b)(3) of the Federal Rules of Civil Procedure for certification of a plaintiff class consisting of:

> all persons and entities who purchased units in ML–Lee Acquisition Fund II, L.P. and ML–Lee Acquisition Fund (Retirement Accounts) II, L.P. (together "Funds") during the period from November 10, 1989 and January 5, 1990, excluding the defendants, their subsidiaries and affiliates, and members of the immediate family of each of the individual defendants.

(D.I. 341 at 1). Defendants oppose the class certification, arguing that a class action is not the superior method of adjudicating Plaintiffs' claims as required by 23(b)(3), and that Plaintiffs Goldstein and Seidel are not adequate and typical class representatives as required by 23(a)(3) and 23(a)(4). For the reasons set forth, the Court will certify the class as proposed.

Plaintiffs, as the proponents of class certification, have the burden of establishing a right to class certification. *Davis v. Romney,* 490 F.2d 1360, 1366 (3d Cir.1974). Rule 23 governs class actions in the federal courts. Subsection (a) lists the prerequisites to maintaining a class action. It provides that one or more members of a class may sue as representative parties on behalf of the entire class only if (1) the class is so numerous that joinder of all members is impracticable (numerosity), ***558** (2) there are questions of law or fact common to the class (commonality), (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class (typicality), and (4) the representative parties will fairly and adequately protect the interests of the class (adequacy).

Rule 23(b) describes when class actions may be maintained if the prerequisites of subsection (a) are satisfied. Subsection (b)(3) provides that an action may be maintained as a class action if the prerequisites of subsection (a) are satisfied and, in addition:

> [1] the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [2] that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

1. Rule 23(a)

a. Numerosity

Defendants do not dispute that Rule 23(a)(1)'s numerosity requirement has been satisfied. Courts generally consider the estimated number of parties in the proposed class, the expediency of joinder, and the practicality of multiple lawsuits when determining whether the numerosity requirement is met. *See In re Data Access Sys. Sec. Litig.,* 103 F.R.D. 130, 137 (D.N.J.1984); *Peil v. Nat'l Semiconductor Corp.,* 86 F.R.D. 357, 365 (E.D.Pa.1980). In this case, Plaintiffs allege that there are over 33,000 investors, excluding Defendants, who purchased units in the Funds between November 10, 1989 and January 5, 1990. The Court finds this number of alleged investors in the Funds is sufficient to satisfy the numerosity requirement of 23(a)(1).

b. Common Questions of Law or Fact

Defendants also do not dispute that there are common questions of law and fact which predominate over any questions affecting only individual members of the class. Plaintiffs allege there are common issues of law and fact related to Defendants' alleged violations of sections 11, 12(2), and 15 of the 1933 Act, section 10(b) of the 1934 Act, sections 17(j), 36, 56, and 57 of the Investment Company Act and various state laws. Defendants' alleged misrepresentations or omissions and breaches of fiduciary duties that underlie Plaintiffs' allegations are common questions as to all investors. Accordingly, the Court finds that Plaintiffs have satisfied the common-question requirement of 23(a)(2).

c. Typicality

Defendants contend that Rule 23's typicality requirement cannot be satisfied because "the claims of Goldstein and

Seidel are subject to unique defenses that would dominate the trial of this case and detract from the claims of the putative class." Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification, D.I. 351, at 25. In support of this contention, Defendants cite *Zenith Lab., Inc. v. Carter–Wallace, Inc.,* 530 F.2d 508, 512 (3d Cir.), *cert. denied,* 429 U.S. 828, 97 S.Ct. 85, 50 L.Ed.2d 91 (1976) ("[s]ince these unique defenses could conceivably become the focus of the entire litigation and divert much of Zenith's attention from the suit as a whole, the remaining members of the class could be severely disadvantaged by Zenith's representation"). More specifically, Defendants allege that Goldstein and Seidel both face significant statute of limitations defenses to their claims, and Goldstein further faces unique lack of reliance defenses.

The focus of Rule 23(a)'s typicality inquiry is whether "the named Plaintiffs' individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based." *Weiss v. York Hospital,* 745 F.2d 786, 809 n. 36 (3d Cir.1984), *cert. denied,* 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985); *accord* *Gruber v. Price Waterhouse,* 117 F.R.D. 75, 79 (E.D.Pa.1987) (quoting *Weiss*); *see also* *In re Data Access Systems Sec. Litig.,* 103 F.R.D. 130, 138–40 (D.N.J.1984) (whether the named Plaintiffs and the other members of the class, can "point to the same broad course of alleged fraudulent conduct" to support a claim for relief). Rule 23(a)(3) does not require Plaintiffs to show that their claims are identical on ***559** every issue to those of the class, but merely that significant common questions exist.

At the outset, the Court notes that the claims of the named representatives and the class are, as the District Court for the District of Massachusetts stated, "in a common sense way" typical of the claims of all class members. The claims allege that the Defendants engaged in a common course of conduct with respect to all members of the class. Defendants do not dispute this point. Defendants assert, however, that because Goldstein and Seidel were on inquiry notice as early as February 5, 1990 their claims are time-barred, and thus they are atypical Plaintiffs.

The Court acknowledges that dispositive defenses that are unique to the named Plaintiffs may render their claims atypical. *Zenith,* 530 F.2d at 512. However, Defendants' statute of limitations defenses are not as clearly dispositive or particular to one small group of plaintiffs as was the *res judicata* defense asserted in *Zenith.* Moreover, in contrast to the *res judicata* defense in *Zenith,* Defendants' statute of limitations defenses are not unique to Seidel and Goldstein. Similar statute of limitations arguments may be raised against all class members. [25]

25 The Court is not persuaded by defendant's reliance on *U.S. Healthcare, Inc. Sec. Litig.,* [1992 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 94,063 (E.D.Pa. Sept. 28, 1988) or *Leroy v. Paytel III Management Assoc., Inc.,* [1992–1993 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 97,352 (S.D.N.Y. Nov. 24, 1992) both of which refused to certify named plaintiffs as class representatives, in part, because the named plaintiffs were subject to statute of limitations defenses. In both of those cases, the courts found that the particular facts of the case supported a statute of limitations defense that was truly unique to the named representatives.

The Defendants also object to the typicality of plaintiff Goldstein's claims under the 1934 Act, as well as the common law fraud and negligent misrepresentation claims on the ground that Goldstein did not rely on the allegedly fraudulent prospectus in deciding to invest in Retirement Fund II. As with the statute of limitations defense, the question of whether Goldstein relied on the prospectus directly or whether he relied on his broker who read the prospectus is likely to be a question typical of all class members. [26]

26 For the same reasons, the court also finds Goldstein's common law fraud claims typical under Rule 23(a)(3) even though he must prove direct reliance. *Peil v. Speiser,* 806 F.2d 1154, 1163 (3d Cir.1986).

In addition, Plaintiffs' allegations of "fraud-on-the-market" and "fraud-created-the-market" may vitiate the necessity of proving reliance with regard to the federal securities fraud claims. Although Defendants proffer a lengthy argument that these theories are not available to Goldstein because he allegedly never read the prospectus; this argument goes to the merits of the case, and is best left for consideration at a later date.

Moreover, even without considering the merits, the Court is not persuaded that the fact that Goldstein allegedly did not read the entire prospectus renders him an atypical representative. The issue regarding the availability of a presumption of reliance is likely to be an issue common to the entire class. Accordingly, the Court finds that Goldstein's claims are not atypical because of possible differences in reliance defenses, and that neither Goldstein's nor Seidel's claims are rendered atypical by Defendants' statute of limitations arguments.

d. Adequacy of Representation

Defendants also argue that Plaintiffs are inadequate class representatives as required by Rule 23(a)(4). In support of their argument, Defendants assert that (1) Goldstein is a professional plaintiff, (2) Goldstein and Seidel have delegated all responsibility for the conduct of the lawsuit to their attorneys, and (3) Goldstein and Seidel have abrogated financial responsibility for the case.

Rule 23 (a)(4) requires Plaintiffs and their attorneys to demonstrate that they will "competently, responsibly and vigorously prosecute the suit." *Bogosian v. Gulf Oil Corp.,* 561 F.2d 434, 449 (3d Cir.1977), *cert. denied,* 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978). The Court of Appeals for the Third Circuit's adequacy-of-representation standard is succinctly articulated in ***560** *Wetzel v. Liberty Mutual Ins. Co.,* 508 F.2d 239, 247 (3d Cir.), *cert. denied,* 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975):

> Adequate representation depends on two factors: (a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class.

Defendants do not contest the qualifications of Plaintiffs' attorneys, and the Court is satisfied that Plaintiffs' attorneys are sufficiently qualified and experienced to manage the proposed class litigation. Furthermore, while Defendants cite to Plaintiffs' deposition testimony, which Defendants allege demonstrates a lack of control and knowledge in the litigation, Defendants do not argue that Plaintiffs have antagonistic interests. Courts in this circuit hold Plaintiffs to a very minimal requirement of knowledge about the litigation and the facts upon which it is based. *See* *Lewis v. Curtis,* 671 F.2d 779, 789 (3d Cir.) (class representative adequate even where he "displayed a complete ignorance of the facts concerning the transaction that he was challenging), *cert. denied,* 459 U.S. 880, 103 S.Ct. 176, 74 L.Ed.2d 144 (1982); *In re Data Access,* 103 F.R.D. 130, 141 (D.N.J.1984); *Peil v. Speiser,* 97 F.R.D. 657, 660 (E.D.Pa.1983).

The Court may find antagonism between the interests of the Plaintiffs and those of the class when Defendants assert unique defenses against the named plaintiff, or when the plaintiff's situation is unique. *Lerch v. Citizens First Bancorp, Inc.,* 144 F.R.D. 247, 251 (D.N.J.1992). However, as the Court determined above in the discussion of the typicality of Plaintiffs' claims, the defenses asserted by Defendants are not so unique as to defeat class certification.

Finally, the Court declines to accept Defendants' characterization of the deposition testimony of Goldstein and Seidel. A review of the deposition testimony demonstrates that while Goldstein and Seidel do not possess a detailed knowledge of all of the facts underlying each defendant's liability and the legal basis for that liability, they both have a clear layperson's understanding of the nature of the action, and the conduct of certain Defendants that forms the basis of the allegations. This is more than sufficient to qualify them as adequate representatives under Rule 23(a)(4).

Defendants also argue that Goldstein and Seidel are inadequate representatives because they have abrogated financial responsibility of the case. Goldstein and Seidel have each entered into retention agreements with their respective counsel which provide that counsel will advance most or all of the litigation expenses on a contingent basis.

As Plaintiffs note, this is ethically proper under Delaware's Rules of Professional Conduct. However, even though ethical rules generally permit counsel to advance litigation costs on a contingent basis, such arrangements must be subjected to special scrutiny in the context of large class actions. In this situation, the risk that a class representative could be coerced into complying with an attorneys' advice is particularly acute.

Defendants seek to defeat the certification of the class by arguing that Seidel and Goldstein are unwilling to pay the expenses necessary to litigate this class action. However, the mere fact that Goldstein and Seidel testified that they are unwilling to advance costs in light of their retention agreements is not sufficient to render them inadequate Plaintiffs. Defendants have failed to demonstrate that Goldstein's and Seidel's resources are insufficient to allow them to proceed with substitute counsel without a contingent expense agreement should they disagree with counsel's tactics. Therefore, the Court has no basis to conclude that there exists a risk of Plaintiffs being coerced into complying with counsels' advice because of the potential threat of funding revocation.

Finally, Defendants contend that Goldstein and Seidel lack standing to represent the proposed class and that this lack of standing subjects them to another potentially debilitating unique defense rendering them inadequate class representatives. Defendants argue that because Goldstein has never owned Fund II securities, he cannot represent investors who do own or have owned Fund II securities. Defendants likewise argue that ***561** because Seidel has never owned Retirement Fund II securities, he cannot represent investors who do own or have owned Retirement Fund II securities. The Court does not agree.

It is undisputed that Fund II and Retirement Fund II securities are substantially identical. Both of the Funds were marketed pursuant to the same Prospectus which is the subject of many of Plaintiffs' allegations of wrongdoing. Moreover, Defendants do not contend that combining Fund II investors and Retirement Fund II investors in the same class would destroy commonality or for some other reason render the maintenance of the class unfair. *Accord* *Green v. Wolf Corp.,* 406 F.2d 291, 299 (2d Cir.1968), *cert. denied,* 395 U.S. 977, 89 S.Ct. 2131, 23 L.Ed.2d 766 (1969) (an investor who purchased securities pursuant to a third prospectus was an adequate representative of a class which included investors who purchased securities pursuant to an earlier prospectus because the same misstatements were present in both). Accordingly, the Court finds that the fair and efficient administration of the litigation would be served by certifying the class as proposed with Plaintiffs Goldstein and Seidel as class representatives.

2. Rule 23(b)

In addition to the prerequisites found in Rule 23(a), Rule 23(b)(3) requires the Court to find that the common questions of law or fact predominate over any questions affecting individual members, and that the class action is the superior method of adjudicating the controversy. Defendants advance two arguments that a class action is not the superior method for adjudicating this case: (1) Plaintiffs' claims seeking rescission would actually harm the class because the Funds' units are worth far more than class members would receive through rescission; and (2) Plaintiffs' claims challenging the operation of the Funds under the 1940 Act are derivative claims and not amenable to class treatment.

a. Plaintiffs' Claims Seeking Rescission of Their Investment Would Harm the Class

Counts I and II of the Complaint allege that the Funds' prospectus misrepresented and omitted material information in violation of sections 11 and 12 of the 1933 Act. Under Section 12 an injured plaintiff who still owns his security is entitled to recover his purchase price plus interest, less any income received. 15 U.S.C. § 77*l* (2). The Third Circuit has held that rescission is the appropriate remedy for a section 12 claim. *In re Craftmatic Sec. Litig.,* 890 F.2d 628, 637 (3d Cir.1989).

Defendants assert that the Fund II units and past cash distributions are worth $1,532.38, while the Retirement Fund II units and cash distributions are worth $1,770.48. If granted rescission, class members would exchange their Funds' units and cash distributions in order to receive back their $1000 purchase price plus interest. Thus, assuming Defendants' valuation of the Funds' units is accurate, class members would not benefit from the class action, at least with respect to Count II.[27]

27 Defendants seek to bolster their argument that rescission would harm the class members by contending that Goldstein and Seidel themselves are unwilling to accept rescission. Once again, the Court finds that defendants have characterized the deposition testimony too narrowly.

Under section 11 of the 1933 Act, a plaintiff who still owns his security may recover "the difference between the amount paid for the security" and "the value thereof as of the time such suit was brought." 15 U.S.C. § 77k(e). Once again, Defendants argue that the value of the Funds' units, including cash distributions exceeded the $1,000 paid for each unit, and therefore rescission would not benefit the class members.

Defendants contend that because Plaintiffs are unable to show any loss from the resulting transactions, class certification should be denied. Defendants cite a number of cases in which courts denied class certification, in part, on the basis that some of the class members might not have been injured by the alleged misrepresentations or omissions. *See* *Romano v. Merrill Lynch, Pierce, Fenner & Smith,* 834 F.2d 523, 530–31 (5th Cir.1987); *Spivak v. Petro–Lewis Corp.,* 120 F.R.D. 693 (D.Colo.1988); ***562** *Zimmerman v. Bell,* 800 F.2d 386, 389 (4th Cir.1986); *Hahn v. Breed,* 606 F.Supp. 1557 (S.D.N.Y.1985).

These authorities are unpersuasive. In *Hahn,* the Court denied certification because there was no evidence that the class members would benefit in any substantial way from the litigation. However, the court's conclusion was based, in part, on the court's belief that plaintiff was attempting to enhance his bargaining power by a claim that he was acting for a class of litigants. *Hahn,* 606 F.Supp. at 1563. In *Zimmerman,* the court denied class certification primarily because individual issues, such as knowledge of the omitted information, reliance defenses, and disparity in injury suffered by the various class members, rather than common ones predominated. *Zimmerman,* 800 F.2d at 390. Similarly, in *Romano,* the court denied class certification because *none* of the requirements of 23(a) had been met, and the plaintiff could show no loss resulting from the challenged transaction.

Unlike the cases cited by the Defendants, the Court has determined that Plaintiffs have satisfied the other requirements found in Rule 23. Moreover, it is by no means certain that Plaintiffs will be unable to show a loss resulting from the alleged misrepresentations and breaches of fiduciary duty by the Defendants. Defendants offer their valuation of the Funds' units. However, Plaintiffs vigorously contest this valuation as being self-serving and unsupported. The court is not willing to delve into what could be a protracted inquiry to settle this contested issue of fact at the class certification stage.

b. Plaintiffs' Investment Company Act claims are derivative claims not appropriate for resolution as class action

Defendants also contend that the class action is not the superior method of adjudicating this controversy because Plaintiffs' Investment Company Act claims challenging the operation of the Funds are derivative in nature. Whether a claim is individual or derivative in nature is determined from the nature of the harm inflicted and the nature of the rights violated. "Where the injury is personalized to a shareholder and flows from a violation of rights inherent in the ownership of stock, suit may be brought by the shareholders. On the other hand, where the injury is to the corporation and only affects the shareholders incidentally, the action is derivative." *Dowling v. Narragansett Capital Corp.,* 735 F.Supp. 1105, 1113 (D.R.I.1990) (citing *Vincel v. White Motor Corp.,* 521 F.2d 1113, 1118 (2d Cir.1975)).

Defendants characterize Plaintiffs' allegations as claiming solely that the Hills, Petco and Stanley transactions caused a decrease in the value of Plaintiffs' partnership units. Contrary to Defendants' characterization, Plaintiffs' claims extend much beyond a mere diminution in the value of the Funds' units. Plaintiffs have alleged a plethora of violations of numerous securities laws. Among other things, Plaintiffs allege that the Defendants breached the partnership agreement with the individual investor Plaintiffs, and that each independent breach of contract resulted in a direct injury to each individual investor.

Moreover, the facts of this case, as alleged in the Complaint, convince the Court that a direct class action is more appropriate than a derivative action. In broad terms, Plaintiffs allege that Defendants, some of whom are Funds partners, used the Funds partnerships, and the class investors' money, to bolster other failing investments of Defendants. Plaintiffs are not merely alleging that the Funds partnerships were injured by Defendants' conduct, rather that the Funds were created to serve Defendants' purpose of defrauding Plaintiffs. Thus, if damages were recoverable by only the Funds' partnerships, the Defendants would actually be compensated for their own wrongdoing. This is a scenario in which other courts have found warrants the maintenance of a direct action as opposed to a derivative one. *See* *Dowling,* 735 F.Supp. at 1113. Accordingly, the Court concludes that the class action is the superior method of adjudicating this controversy.

3. State Law Claims

Defendants also argue that Plaintiffs' request for certification of a nationwide class based upon their pendent state law claims also should be denied. Defendants advance two reasons why the court should ***563** decline to certify a class based on Plaintiffs' state law claims: (1) a nationwide class action will require the court to apply the laws of many different states to three separate substantive state law claims; (2) individual questions of reliance would render Plaintiffs' state law claims inappropriate for class treatment.

Addressing Defendants' second point first, the Court has already concluded above that the individual reliance issues do not predominate over the substantial common questions of law and fact with regard to liability. To the extent that individual issues of reliance are presented, the Court can deal with those through separate hearings.

The Court is similarly unpersuaded by Defendants' first point. First, as the Plaintiffs argue, it is likely under the "most significant relationship" test, *see Niemann v. Rogers,* 802 F.Supp. 1154, 1156 n. 1 (D.Del.1992), that Delaware law will govern Plaintiffs' pendent state law claims. Most of the defendant entities are Delaware corporations and partnerships, and as reflected in the Prospectus and partnership agreement, the parties agreed that Delaware law would govern.

Second, even if Delaware law does not govern, the Court finds that the state law claims are appropriate for class treatment because the state law claims involve the same issues, including the same alleged omissions and misrepresentations and other wrongful conduct, as the federal law claims. Clearly, the primary focus of this litigation is the federal law claims. Certification of the state law claims in addition to the federal law claims will at most add incremental burden to the class litigation. *Accord, In re IGI Secur. Litig.,* 122 F.R.D. 451 (D.N.J.1988); *In re New York City Shoes Secur. Litig.,* [1987–1988 Transfer Binder], Fed.Sec.L.Rep. (CCH) ¶ 93,670 (E.D.Pa. February 25, 1988).

Having concluded that all of the requirements of Rule 23(b) have been satisfied, the Court will certify the class as proposed by the Plaintiffs.

E. Motions to Compel

Plaintiffs have also filed two motions to compel. In the first motion (D.I. 247), Plaintiffs seek an order compelling Defendants to produce all notes, memoranda, correspondence, drafts and other documents concerning a variety of issues related to the formation of the Funds. Defendants maintain that the requested documents are protected from discovery by the attorney-client privilege.

Plaintiffs advance five arguments as to why the attorney-client privilege does not protect the requested documents from discovery: (1) the Defendants may not assert the attorney-client privilege against limited partners; (2) the limited partners have good cause to undertake the discovery in question; (3) the matters in question relate to public disclosures in required filings; (4) Defendants have waived the privilege by repeatedly asserting a reliance on counsel defense; (5) the crime-fraud exception applies to the requested documents.

Plaintiffs first argue that Defendants as general partners can not assert the attorney-client privilege against the limited partners. Plaintiffs argue that limited partners of a partnership are considered clients of the law firm that represents the general partners. Moreover, contend Plaintiffs, because general partners owe a fiduciary duty to limited partners to act in the best interests of the limited partnership, the limited partners are entitled to full disclosure of all matters concerning the business of the limited partnership. This rationale has been applied to overcome the attorney-client privilege where the privileged communications were between a general partner and a law firm representing the partnership. *See Roberts v. Heim,* 123 F.R.D. 614, 625–26 (N.D.Cal.1988); *Abbott v. Equity Group,* No. 86–4186, 1988 WL 86826 (E.D.La. Aug. 8, 1988) (partners cannot assert privilege against other partners).

Defendants, on the other hand, cite to a line of cases where courts have distinguished the availability of attorney-client communications available to limited partners as opposed to general partners. *See Ferguson v. Lurie,* 139 F.R.D. 362, 366 (N.D.Ill.1991) (distinguishing the rights of general partners from those of limited partners with respect to disclosure of privileged communications). Rather than granting limited partners an absolute right to disclosure of privileged ***564** communications, these cases require disclosure only where the party seeking disclosure demonstrates "good cause." *See Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir.1970), *cert. denied,* 401 U.S. 974, 91

S.Ct. 1191, 28 L.Ed.2d 323 (1971). The parties have cited no case in this Circuit that addresses this issue.

The Court finds the better approach is to afford privileged communications between general partners and limited partnership counsel qualified protection. Requiring Plaintiffs to demonstrate good cause protects the purposes that underlie the attorney-client privilege while recognizing that disclosure of privileged communications may be necessary in certain instances to ensure that those in fiduciary positions, such as general partners, are acting in the best interests of their beneficiaries. Therefore, Plaintiffs must demonstrate good cause for disclosure of the privileged documents.

Plaintiffs argue that even if they do not have an absolute right to disclosure of the requested documents, they have demonstrated good cause for such disclosure under the principles set forth in *Garner v. Wolfinbarger,* 430 F.2d 1093, 1103 (5th Cir.1970), *cert. denied,* 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). In *Garner,* the Court held that "where [a] corporation is in a suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and the public require the availability of the [attorney-client] privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance." As stated above this principle has been applied to instances where a partnership is being sued by one or more of its partners.

In deciding whether good cause has been shown, *Garner* instructs the Court to consider a variety of factors, such as:

(a) the number of shareholders and the percentage of stock they represent;

(b) the nature of the shareholders' claim and whether it is colorable;

(c) the necessity of the shareholders having the information and the availability of it from other sources;

(d) whether the communication related to past or prospective actions;

(e) whether the communication is of advice concerning the litigation itself;

(f) the extent to which the shareholders are blindly fishing;

(g) the extent to which the communication, the confidentiality of which the corporation has an interest for independent reasons.

Applying these factors, the Court finds that Plaintiffs have demonstrated cause sufficient for the Court to order an in camera review of the requested documents. The plaintiff class, as certified by the Court's order of this same date, is substantial in number. Their claims are substantial and at least colorable. The information sought is not available from other sources, and may prove to be necessary to cross-examine a number of witnesses who have testified in depositions that they acted on advice of counsel. The communications requested do not involve the litigation itself.

Defendants argue that *Garner* is inapplicable because this is not a derivative action, and further that there was no mutuality of interests between the general partners in forming the Funds and the limited partners. Whether the suit is a derivative action or a class action is not determinative on the issue of whether the Funds and the general partners will be entitled to assert the privilege against the limited partners. It is merely one factor for the Court to consider in deciding whether there is good cause to overcome the privilege.

Defendants also argue that the key element in deciding the availability of the attorney-client privilege to a corporation, or as is the case here, a limited partnership, is the mutuality of interest between the fiduciary and beneficiary. Defendants assert that before the *Garner* rationale is to apply, the Court must find that mutuality of interest existed at the time the communications were made. Defendants argue that *Garner* does not apply because there was no mutuality of ***565** interest between the Plaintiffs and Defendants during the formation stages of the Funds.

The Court will assume, without deciding, that Defendants are correct in their assertion that *Garner* applies only after the Court finds that there was a mutuality of interest between the Plaintiffs and Defendants at the time of the communications. Nonetheless, the Court does not agree that this mutuality of interest was lacking. Obviously, during the formation of the limited partnerships, Plaintiffs had not yet purchased their interests in the Funds. However, it is beyond question that during the formative stage, the Defendants and their counsels' communications related to matters which directly impacted subsequent investors in the limited partnership. *Accord* *Roberts,* 123 F.R.D. at 625–26. Moreover, the

Court finds that the *Garner* balancing test weighs in favor of disclosure.

However, before Defendants will be required to produce the requested documents, Plaintiffs must identify, based on Plaintiffs' privileged document log, each document requested, the asserted relevance of the document, and the issue in the case to which the document will be addressed. Based upon Plaintiffs' submission, the Court will then determine what documents it will require Defendants to produce documents to the Court for in camera review. The Court will review any such documents to ascertain whether Plaintiffs have demonstrated good cause to overcome the privilege.

Plaintiffs also contend that Defendants should be compelled to produce the withheld documents because Defendants have waived the privilege by asserting a reliance on counsel defense. Both parties agree that Defendants have not formally pled a reliance on counsel defense. Plaintiffs, however, argue that Defendants' witnesses have repeatedly answered questions related to the legality or appropriateness of certain conduct by stating that they relied on counsels' guidance. Defendants contend that until they answer the Complaint, ordering production of documents based on an anticipated defense is premature.

The Court agrees with Defendants that it is premature to order Defendants to produce privileged documents based upon a defense which they have not yet asserted. To do so would allow Plaintiffs to place in issue confidential attorney-client communications, perhaps forcing Defendants to waive their privilege. In this regard, the Court is not convinced that Defendants' responses to questions regarding certain acts taken or not taken amounts to an assertion of reliance on counsel.

However, the Court will revisit the issue once it receives Plaintiffs' submission regarding the specific documents it seeks. If, after a review of the documents in light of Defendants' witnesses deposition testimony as cited by the Plaintiffs, the Court determines that Defendants are using the privilege as a shield to liability, or if Defendants subsequently raise a reliance on counsel defense, the Court will order Defendants to produce the requested discovery.

Plaintiffs' final contention raised in the first motion to compel, is that the crime-fraud exception to the attorney-client privilege applies to the requested documents. Indisputably, communications between an attorney and client made in the commission or furtherance of a crime or fraud are not protected by the attorney-client privilege. A party seeking discovery of otherwise privileged materials on the grounds that they are subject to the crime-fraud exception must make a prima facie showing of fraudulent or criminal conduct. *Haines v. Liggett Group, Inc.,* 975 F.2d 81, 95 (3d Cir.1992); *Hercules, Inc. v. Exxon Corp.,* 434 F.Supp. 136 (D.Del.1977). This requires the party seeking discovery to "present evidence which, if believed by the fact-finder, would be sufficient to support a finding that the elements of the crime-fraud exception were met." *Haines,* 975 F.2d at 95–96.

Plaintiffs have clearly failed to meet this standard. Plaintiffs have merely provided the court with an appendix of documents which they argue supports the multitude of allegations contained in the Third Amended Complaint. Plaintiffs have not, however, ventured to provide any argument as to what fraud the documents tend to prove, or even ***566** to what allegations in the Complaint they relate.

Moreover, contrary to Plaintiffs' contentions, this presentation is insufficient for the Court to order an in camera review of the requested discovery. The decision to review materials protected by the attorney-client privilege implicates a much more lenient standard of proof than the determination to apply the crime-fraud exception. *Id.* at 96. In camera review is appropriate if the Court is convinced that the Plaintiffs have provided " 'a factual basis adequate to support a good faith belief by a reasonable person' ... that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." Plaintiffs have certainly *alleged* sufficient facts to warrant the application of the crime-fraud exception. However, mere allegations are not sufficient, and Plaintiffs have not provided the requisite factual basis. Accordingly, the Court concludes that the crime-fraud exception is inapplicable.

Plaintiffs' second motion to compel (D.I. 254) seeks an order compelling: (1) John M. Baker, an attorney from HW & D, to respond to deposition questions concerning facts upon which HW & D relied in rendering legal advice, and ordering Defendants to cease use of the attorney-client privilege as a bar to discoverable facts; (2) production of the "Hills Section 57 Memorandum" and any similar documents concerning due diligence by HW & D of the Funds' investments; (3) production of documents, including but not limited to minutes, notes, memoranda and recordings, relating to meetings between the Managing General Partner of the Funds and Advisers II concerning investments by the Funds; (4) HW & D to identify representatives of HW & D who attended such meetings; (5) Baker to identify documents he reviewed in preparing for his deposition; and (6) Baker to identify the areas of his deposition testimony discussed with his counsel and other Defendants' counsel while he was under oath.

To the extent that Plaintiffs seek disclosure of documents which Defendants allege are protected by the attorney-client privilege on the grounds that they have demonstrated good cause, or that Defendants have asserted a reliance on counsel defense, the Plaintiffs shall proceed as ordered above with respect to the documents requested in the first motion to compel.

In addition to a broad request for documents, Plaintiffs specifically argue that HW & D should be compelled to produce the "Hills Section 57 Memorandum" because Defendants have produced other privileged due diligence materials. A review of the other documents, however, reveals that there was no selective production of privileged material on the part of Defendants. Therefore, HW & D will not be compelled to produce this document, or other similar due diligence documents on this basis. [28]

28 In this regard, the Court grants HW & D's Motion to File Sur-reply Brief (D.I. 337). Plaintiffs did not provide the documents which served as the basis of their argument in their original submission, but included them in their reply brief. Accordingly, the Court deems it appropriate to provide HW & D with an opportunity to respond to essentially "new" arguments.

Plaintiffs also seek to compel John M. Baker to respond to questions relating to the underlying facts on which he based his legal advice given to his clients. Plaintiffs argue that "it is the communication which is protected, not the facts underlying the communications." This is a mostly, but significantly not completely accurate, statement of the law. A fact, in and of itself is not protected just because it was communicated to an attorney. However, if the only reason the attorney has knowledge of the fact is by communications with a client, then the attorney can not be compelled to reveal it absent some exception to the attorney-client privilege. This goes to the heart of the attorney-client privilege. *See* *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981).

Therefore, to the extent that Mr. Baker refused to reveal facts underlying his legal conclusions because he learned of those facts *solely* through communications with his client, he can not be compelled to disclose them. However, if Mr. Baker is aware of facts that he learned independently, even if also revealed in communications with his ***567** client, he must reveal those facts. *See* *Synalloy Corp. v. Gray,* 142 F.R.D. 266, 268 (D.Del.1992). As HW & D represents that Mr. Baker conducted himself in accordance with these principles, and the Court has no basis for questioning HW & D's representations, Plaintiffs' motion to compel Mr. Baker to further disclose facts upon which he legal advice was based will be denied.

Plaintiffs next seek to compel Mr. Baker to identify the topic areas of communications he had with his counsel during his deposition and while he remained under oath. In *Deutschman v. Beneficial Corp.,* 132 F.R.D. 359 (D.Del.1990), this Court set out an approach for questioning a deponent regarding any consultation with the deponent's attorney concerning his testimony or anticipated testimony. Under this approach, Plaintiffs are entitled to inquire into the topic areas that the deponent discussed with his attorney. The Court finds the approach outlined in *Deutschman* to be an appropriate means of monitoring the potential of improper coaching during a deposition. Therefore, Mr. Baker will be ordered to respond to Plaintiffs' inquiries regarding the topic areas of discussions he had with his counsel during his deposition while under oath. Moreover, in future depositions, all parties are instructed that counsel are not to consult with their clients regarding the subject of their testimony while questions are pending and while deponents remain under oath.

Finally, Plaintiffs seek to compel Mr. Baker to reveal those documents he used in preparation for his deposition. The Court declines to order a blanket production of all documents Mr. Baker reviewed in preparation for his deposition. *See* *Sporck v. Peil,* 759 F.2d 312, 316 (3d Cir.1985) (selection and compilation of documents by counsel in preparing for pretrial discovery constitutes attorney work product). However, in accordance with *Sporck,* the Court will order Mr. Baker to produce those documents which he testified refreshed his recollection of certain facts. *Id.* at 318–19 ("identification of such documents under Rule 612 should only result from opposing counsel's own selection of relevant areas of questioning, and from the witness' subsequent admission that his answers to those specific areas of questioning were informed by documents he had reviewed").

F. Plaintiffs' Motion to File Third Consolidated Amended Complaint

Plaintiffs also seek leave to file a Third Consolidated Amended Complaint (D.I. 233). Rule 15(a) of the Federal Rules of Civil Procedure provides, in relevant part, that after a party has amended its pleading once, or after the other side has filed a responsive pleading, "a party may amend the party's pleading only by leave of court ... and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). In *Foman v. Davis,* 371 U.S. 178, 181–82, 83 S.Ct. 227, 229–30, 9 L.Ed.2d 222 (1962), the United States Supreme Court articulated the policy that informs Rule 15(a), which is to ensure that claims are decided on the merits rather than on the technicalities of pleading. The Supreme Court further stated:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the amendment, futility of the amendment, etc.—the leave sought should, as the rules require, be "freely given".... [O]utright refusal to grant the leave without any justifying reason appearing for the denial is ... an abuse of [the district court's] discretion and inconsistent with the spirit of the federal rules.

Id. at 182, 83 S.Ct. at 230. Defendants argue that filing of the proposed Third Consolidated Amended Complaint would severely prejudice Defendants by enlarging the scope of this case when discovery is near completion. Defendants argue that they should not be forced to devote resources to defending what is in large measure a new lawsuit.

Moreover, Defendants argue that Plaintiffs' motion is untimely and made in bad faith. Defendants note that Plaintiffs' motion comes 18 months after the case was ***568** commenced, more than three years after they invested in the Funds and less than one month before the discovery cut-off date. Defendants urge the Court to examine Plaintiffs' delay in light of what Defendants characterize as Plaintiffs' "ulterior motive" for the proposed amendment, i.e. to litigate Fund I issues here since a separate Fund I action would be time-barred.

For their part, Plaintiffs argue that Defendants will not be prejudiced by the filing of the Third Consolidated Amended Complaint. Plaintiffs contend that Defendants can not show that they would be " 'unfairly disadvantaged or deprived of the opportunity to present facts or evidence which [they] would have offered' had the amendments been more timely."

In re ML–Lee, slip op. at 6 (quoting *Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing, Inc.,* 663 F.2d 419, 426 (3d Cir.1981), *cert. denied,* 455 U.S. 1018, 102 S.Ct. 1714, 72 L.Ed.2d 136 (1982)). With regard to the new Fund I allegations, Plaintiffs point out that they support and supplement Plaintiffs' existing disclosure claims. With regard to the new count—that the Funds do not qualify as business development companies—Plaintiffs note, and the Defendants agree, that the facts upon which the Count is based were set forth in the Second Consolidated Amended Complaint.

Finally, Plaintiffs assert that they have not delayed in amending their complaint. Plaintiffs contend that through "further discovery and analysis of the facts" they determined to add allegations to support the disclosure claims. Moreover, they contest Defendants characterization of their "ulterior motive."

The Court would agree with Plaintiffs' contentions if Plaintiffs' motion involved a simple amendment to add a new cause of action, or a few new factual allegations to support an old cause of action. But, Plaintiffs' proposed amendments are not simple, nor minor. This is Plaintiffs' third attempt to amend its complaint; each time expanding not only the legal basis for its claims, but the factual underpinnings as well. The Court is cognizant that leave to amend is to be freely given, but there comes a time when the Defendants and the

Court are entitled to know upon what grounds the litigation is to proceed. Plaintiffs' new allegations are so extensive as to encompass wholly new areas of inquiry. Contrary to Plaintiffs' contention, the Court finds that Defendants will be "unfairly disadvantaged" by the filing of the proposed complaint. Accordingly, the Court will deny Plaintiffs' motion for leave to file the proposed Third Consolidated Amended Complaint.

However, the Court will order Plaintiffs to file an Amended Complaint which reflects the Court's rulings on Defendants' Motions to Dismiss. In addition, Plaintiffs are granted leave to add the new cause of action and factual allegations corresponding to Plaintiffs' contention that the Funds are not business development companies under the Investment Company Act.

III. CONCLUSION

For the reasons outlined in the Court's discussion of Defendants' motions to dismiss, all Counts against HW & D are dismissed with the exception of Count IX, common law fraud. Count X is dismissed as against all Defendants. Insofar as any of the claims in Counts IV–VIII are premised on secondary liability for aiding and abetting, those claims will be dismissed.

HW & D will be permitted to remain in the suit as counsel for the Lee Defendants until such time as the Court determines that the ethical rules prohibit them from continuing.

The Court will certify the class as proposed by the Plaintiffs.

Plaintiffs' motion to compel the production of documents being withheld by Defendants as protected by the attorney-client privilege will be denied. However, the Defendants will be ordered to produce the withheld documents to the Court for in camera review. In addition, Plaintiffs' motion to compel certain responses from Mr. Baker will be granted in part and denied in part as detailed in this Memorandum Opinion.

Finally, Plaintiffs' motion for leave to file proposed third amended complaint will be denied.

An appropriate Order will be entered.

All Citations

848 F.Supp. 527, Fed. Sec. L. Rep. P 98,198

End of Document

– Deposition Practice
– no "coaching"
– script Q's re: coaching

2/20/90

FEB 20 1990

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

ROBERT M. DEUTSCHMAN, Plaintiff,

v.

BENEFICIAL CORPORATION, FINN M. W. CASPERSEN, and ANDREW C. HALVORSEN Defendants.

Civil Action No. 86-595 MMS

Robert D. Goldberg, Esq., of Biggs & Battaglia, Wilmington, Delaware; Of Counsel: Richard B. Dannenberg, Esq., of Lowey, Dannenberg, Bemporad, Brachtl & Selinger, P.C., New York, New York; attorneys for plaintiff.

Charles F. Richards, Jr., Esq., Kevin G. Abrams, Esq., and William P. Bowden, Esq., of Richards, Layton & Finger, Wilmington, Delaware; Of Counsel: Dewey, Ballantine, Bushby, Palmer & Wood, New York, New York; attorneys for defendants.

MEMORANDUM OPINION

Dated: February 20, 1990
Wilmington, Delaware

SCHWARTZ, Senior District Judge

This is a motion to compel discovery filed by defendants Beneficial Corporation, Finn M.W. Caspersen and Andrew C. Halvorsen (hereinafter referred to collectively as "Beneficial" or "defendants") on January 16, 1990. The parties have briefed these discovery issues and have agreed that oral argument is not necessary. For the reasons set forth in this opinion, defendants' motion will be granted in part and denied in part. Each issue will be addressed in turn.

<u>Production of Documents</u>

Defendants move that the court order plaintiffs to produce the following documents:

> 15. All documents which support or relate to the allegations contained in ¶ 17 of the amended complaint that "[p]laintiff's claims are typical of the claims of the members of the class . . . ."
>
> 16. All documents which support or relate to the allegations contained in ¶ 18 of the amended complaint that plaintiff "will fairly and adequately protect the interests of the members of the Class . . . ."

Documents Requested to Be Produced Nos. 15 & 16, Notice of Deposition of Robert M. Deutschman (Dkt. 53). Although information as to typicality and adequacy of representation is discoverable in a class action such as this, these requests are overly broad and vague. As the requests are now worded, they seek any document related to any issue relevant to the typicality of plaintiff's claim or to the adequacy of his proposed representation of the class. Defendants' motion will be denied. Defendants will be granted leave, however, to amend the requests to specify further the types of documents they seek.[1]

<u>Consultation With Counsel During Deposition</u>

Defendants complain of two instances during plaintiff's deposition in which plaintiff was "coached" by his attorney during a recess. Immediately after the luncheon recess plaintiff requested that he be allowed to clarify his final response prior to the break. He then gave a clarified answer. Plaintiff's Deposition at 123 (Dkt. 56A) (hereinafter cited as "Dep. at __"). Plaintiff's counsel allowed him to respond to questioning concerning whether he and his attorney had discussed his testimony during the lunch recess. Dep. at 123-30. At a later point in the deposition, plaintiff's attorney requested a recess just as defendants' attorney was reformulating a question. Dep. at 189-

1. Plaintiff's original objection to these requests for production was based upon the qualified privilege for attorney work product. In the event plaintiff seeks to raise this objection to any amended request made by defendants, plaintiff must do more than assure the court of the validity of his work product assertion. At minimum, the plaintiff must identify any documents as to which the privilege is claimed sufficiently to allow the court to determine for itself whether his assertion of the privilege is well-founded. <u>Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc.</u>, 707 F. Supp. 1429, 1439 (D. Del. 1989); <u>International Paper Co. v. Fibreboard Corp.</u>, 63 F.R.D. 88, 94 (D. Del. 1974). In the event defendant requests documents plaintiff considers privileged, plaintiff should at minimum supply the following information so as to enable the court to make a determination: (i) the nature of the privilege claimed; (ii) the type of document; (iii) the general subject matter of the document; (iv) the date of the document; (v) the author of the document; (vi) the addressee of the document; and (vii) if not apparent, the relationship of the author and the addressee. <u>See</u> <u>Sloan v. Collings & Co.</u>, C.A. No. 85-3315, slip op. at 5 (E.D. Pa. July 22, 1986).

90. Upon resumption of the deposition, plaintiff testified that he and his attorney had discussed the subject matter of his testimony during the break. Dep. at 190. Asserting the attorney-client privilege, plaintiff's attorney instructed him not to answer questions concerning the substance of their conversation. Dep. at 190-191 (the "Recess Questions"). It is improper for counsel during a recess to "coach" a deponent off the record regarding deposition testimony already given or anticipated. Rose Hall, Ltd. v. Chase Manhattan Overseas Banking Corp., C.A. No. 79-182 (D. Del. Dec. 12, 1980) (order directing counsel to refrain during a deposition from communicating with deponent or directly or indirectly suggesting an answer); Cascella v. GDV, Inc., C.A. No. 5899, slip op. at 2-3 (Del. Ch. Jan. 15, 1981) (Brown, V.C.) (same; also stating counsel cannot discuss an answer or assist in giving an answer to the deponent off the record); In re Asbestos Litigation, 492 A.2d 256 (Del. Super. 1985) (entering an order prohibiting attorney-client consultation regarding client's deposition testimony during the course of the deposition and providing a procedure for questioning the deponent subsequent to a recess as to any consultation with his attorney concerning his testimony or anticipated testimony). Although a client certainly has a right to consult with his or her counsel on other matters during a recess, the client does not have the right to advice or assistance concerning his or her ongoing testimony. The usefulness of depositions as a way to discover facts would be impaired if counsel were allowed to suggest an answer

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off the record to a question anticipated or already asked. Further, Rule 30(c) provides that during a deposition "[e]xamination and cross-examination of witnesses may proceed as permitted at trial . . . ." (emphasis added). A judge may instruct a trial witness not to discuss testimony with his counsel until the trial is complete, see Perry v. Leeke, ___ U.S. ___, ___, 109 S. Ct. 594, 600 (1989), and certainly a blatant request for a recess at trial so that counsel may assist the witness off the record would be improper. Therefore, a deposition witness should not be permitted to consult with his attorney regarding his testimony until it is completed.

That is not to say, however, that the deponent should be barred from consulting with his attorney at all during a recess. The court should balance the need for a client to consult with his attorney on various other aspects of the litigation with the need to protect against coaching deposition witnesses. Consequently, I will order plaintiff's deposition to be reconvened. Defendant's counsel will be allowed to ask the following questions upon resumption of the plaintiff's deposition and after every recess during the plaintiff's deposition testimony:

> A. Did you consult with your attorney, an employee of your attorney and/or agent of your attorney (hereinafter "said person") during the recess and/or continuance?
>
> --If answer is "no," end questioning.
>
> --If answer is "yes," identify the person by name and proceed to question B.

B. Did you consult with said person regarding to your deposition testimony either already given and/or expected or which may be anticipated to be given?

--If answer is "no," end questioning.

--If answer is "yes," proceed to question C.

C. Did you consult with said person, and/or did said person give you any instruction and/or advice, regarding how you should answer questions during the remainder of the deposition? (This question does not require deponent to reveal the substance of the conversation.)

--If answer is "no," end questioning.

--If answer is "yes," proceed to question D.

D. About what areas of your testimony already given and/or expected or which may be anticipated to be given did you consult with said person? (Deponent need only reveal the areas discussed, not the substance of the conversation.)[2]

This approach takes into account the interests protected by the attorney-client privilege because the substance of the conversations between attorney and client are never revealed, merely the fact that they took place. At the same time, the approach allows defendant a full opportunity to get on the record any instances of improper coaching. Upon resumption of the deposition, defendant's counsel may invoke the procedure set forth above in lieu of the "Recess Questions" to determine whether the recess was requested so that plaintiff's attorney could assist his client in giving answers. I will not at this time issue an order prohibiting plaintiff's counsel from discussing with plaintiff the anticipated subject matter of his deposition prior to

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2. See generally In re Asbestos Litigation, 492 A.2d 256, 260 (Del. Super. 1985).

its resumption. However, defendant's attorney will be allowed to follow the procedure set out above upon the resumption of the deposition and after any recess taken during the reconvened deposition to determine whether such a discussion has taken place.

Plaintiff's clarified answer, Dep. at 123, and all questioning regarding the clarified answer, Dep. at 123-130, will be ordered stricken. His original answer, Dep. at 122, will remain on the record. Plaintiff's argument that Federal Rule of Civil Procedure 30(e) allows him to clarify his response does not fly. Rule 30(e) clearly contemplates clarification only after completion of the deposition: "When the testimony is fully transcribed the deposition shall be submitted to the witness . . . ." The Rule does not provide for clarification during the deposition of a response previously given. I note the copy of plaintiff's deposition lodged with the court is unsigned. If it is in fact the case that plaintiff has not yet signed the deposition, nothing prevents him from clarifying his response pursuant to Rule 30(e). In the event plaintiff has signed the deposition, he will be given leave to clarify his response in accordance with the procedures set forth in Rule 30(e).

The Reserve Addition Question

Defendants next move that the court compel plaintiff to respond to the following question:

> Q. Mr. Deutschman, if Beneficial had disclosed in August 1986 that the proposed $250 million reserve addition would be insufficient to deal with the problem and the price of Beneficial stock had moved upwards

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> during the fall of 1986 in the manner that it did, would you have purchased any securities in Beneficial?

Dep. at 256 (the "Reserve Addition Question"). Defendants' motion to compel Mr. Deutschman to answer the Reserve Addition Question as it is presently worded will be denied. Although under certain circumstances a deponent may be asked what he would have done, the question as it is now phrased calls for too much speculation. Leave will be granted, however, for defendants' attorney to rephrase the question.[3] When plaintiff's deposition is reconvened, defendant's attorney may rephrase the question along the following lines:

> Mr. Deutschman, if you had possessed information in August 1986 that the proposed $250 million reserve addition would be insufficient to deal with the problem and the price of Beneficial stock had moved upwards during the fall of 1986 in the manner that it did, would you have purchased any securities in Beneficial?

-- or --

> Mr. Deutschman, if you had possessed information in August 1986 that the proposed $250 million reserve addition would be insufficient to deal with the problem, would you have believed that the price of Beneficial stock during the fall of 1986 was an accurate reflection of the company's value?

<u>The Class Allegation Questions</u>

The parties next dispute whether plaintiff should be compelled to answer the following questions (numbered for convenient

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3. I note that defendants' attorney had the opportunity to rephrase the question during the deposition and failed to do so. Rephrasing a question is preferred over resorting to the court.

reference) which defendants refer to collectively as the "Class Allegation Questions":

[1] Do you contend that each member of the class relied in the same manner on the misrepresentations or omissions of Beneficial in making their decisions to purchase or sell Beneficial securities during the class period? Dep. at 221.

[2] Mr. Deutschman, do you contend that any member of the class relied on any statement of Beneficial in determining to purchase or sell securities? Dep. at 222.

[3] Speaking generally, what would be the measure of damages for a member of the class? Dep. at 224.

[4] How do you compute the measure of damages for a stockholder of Beneficial who bought securities during the class period? Dep. at 225.

[5] What criteria do you use to define whether a person is a member of the purported class? Dep. at 225.

[6] What issues of fact in this case are common to the members of the class? Dep. at 226.

Defendant's motion to compel answers to questions 3, 4 and 5 will be granted. Defendants' motion to compel responses to questions 1 and 6 will be denied because, insofar as I can tell, they relate to the legal rebuttable presumption of reliance based upon plaintiff's fraud on the market theory. Defendants' motion to compel a response to question 2 will also be denied; however, defendant's attorney will be granted leave to rephrase the question so as to limit its scope to Mr. Deutschman's personal knowledge.

<u>The Expense Agreement Questions</u>

The parties fifth and final dispute involves whether plaintiff should be compelled to answer certain questions (the "Expense Agreement Questions") regarding payment of litigation costs:

> Q. Have your attorneys given you any indication as to whether they expect to be reimbursed for their expenses in connection with this case? Dep. at 234.
>
> Q. What was [the substance of your communications with your attorneys concerning your obligation to be responsible for the payment of expenses in this case]?
>
> Dep. at 235.

Although these questions may be repetitive in light of plaintiff's extensive testimony regarding his financial arrangements with his attorneys, Dep. at 228-40, and his amended answer to Interrogatory 6, Answering Brief at A-3, plaintiff will be compelled to answer them. Deutschman's arrangement with his attorney may be relevant to certification of the class.[4] As such, it is discoverable. Such agreements are not generally subject to the attorney-client privilege. <u>In re Semel</u>, 411 F.2d 195, 197 (3d Cir.), <u>cert. denied</u>, 396 U.S. 905 (1969) ("In the absence of unusual circumstances, the fact of a retainer, . . . the conditions of employment and the amount of the fee do not come within the privilege of the attorney-client relationship"); <u>Ferraro v. General Motors Corp.</u>, 105 F.R.D. 429, 433 & n.3

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4. I decline to decide whether the agreement between Deutschman and his counsel is relevant prior to briefing and argument on the class certification issue. Rather, I decide only that the agreement <u>may</u> be relevant under Rule 26's broad relevancy standard.

<u>Example Form of *Deutschman* Questions</u>

A. Did you consult with your attorney, employee of your attorney and/or agent of your attorney (hereinafter "said person") during the recess and/or continuance?

- If answer is "no," end questioning.

- If answer is "yes," identify the person by name and proceed to question B.

B. Did you consult with said person with regard to your deposition testimony either already given and/or expected or which may be anticipated to be given?

- If answer is "no," end questioning.

- If answer is "yes," proceed to question C.

C. Did you consult with said person, and/or did said person give you any instruction and/or advice regarding how you should answer questions during the remainder of the deposition? (Note - not what was said.)

- If answer is "no," end questioning.

- If answer is "yes," proceed to question D.

D. About what areas of your testimony already given and/or expected or which may be anticipated to be given did you consult with said person? (Note – not what was said.)"

Faculty

Victoria A. Guilfoyle is a partner with Blank Rome LLP in Wilmington, Del., where she concentrates her practice on corporate bankruptcy and business reorganization matters and related litigation. She represents chapter 11 debtors, creditors' committees, lenders, private-equity funds and other secured creditors, chapter 11 and chapter 7 trustees, asset-purchasers, equipment lessors, utility providers, software licensors, landlords, liquidation and litigation trusts, and e-commerce service providers. She also prosecutes and defends against avoidance and fraudulent-transfer actions brought in large chapter 11 cases. In addition to her bankruptcy practice, Ms. Guilfoyle focuses her practice in corporate and commercial litigation matters. She is serving as the post-confirmation trustee of the Solyndra Residual Trust and Solyndra Settlement Trust in connection with the chapter 11 bankruptcy of Solyndra LLC, a solar energy start-up company that declared bankruptcy after receiving $535 million in loans guaranteed by the U.S. Department of Energy. Ms. Guilfoyle previously was an adjunct professor at Delaware Technical and Community College. She was listed from 2014-21 as a *Super Lawyers* "Delaware Rising Star" in Business Bankruptcy, and she received "40 Under 40" recognition by ABI in 2020 and the *Philadelphia Business Journal* in 2018. Ms. Guilfoyle is a member of ABI and the American, Delaware and Pennsylvania Bar Associations, the Delaware Bankruptcy American Inn of Court, and the Philadelphia/Wilmington Chapter of the Turnaround Management Association. She serves as a volunteer tax-preparer at low-income taxpayer clinics and has served as court-appointed counsel for several low-income parents in custody disputes in the Family Court of the State of Delaware. In addition, she serves as a member of Blank Rome's Pro Bono and Diversity & Inclusion Committees and is a past member of the firm's Associates Committee. Ms. Guilfoyle received her B.A. *magna cum laude* with honors from Washington College and her J.D. from Rutgers University School of Law at Camden, where she served as an articles editor for the *Rutgers Law Journal.*

Matthew B. Harvey is a partner with Morris, Nichols, Arsht & Tunnell LLP in Wilmington, Del., and focuses his practice on chapter 11 business bankruptcy, bankruptcy litigation, reorganization and restructuring. He represents international, national and regional clients, including debtors, official and ad hoc committees, asset-purchasers, debtor-in-possession (DIP) lenders, secured and unsecured creditors, petitioning creditors in involuntary bankruptcy filings, and other parties in interest. Mr. Harvey's experience includes in- and out-of-court restructuring transactions for publicly traded and private companies, and he has represented clients in bankruptcy litigation and appeals, as well as commercial litigation. He also has substantial experience representing debtors, foreign representatives and others in cross-border cases. Mr. Harvey devotes a portion of his time to *pro bono* matters, such as serving as an attorney guardian *ad litem* in the Family Court for the State of Delaware. He is also a volunteer attorney for the Federal Civil Panel of the U.S. District Court for the District of Delaware. Mr. Harvey is a 2021 honoree of ABI's "40 Under 40" program, and he also was one of a dozen corporate restructuring lawyers under the age of 40 recognized as a 2021 outstanding young restructuring lawyer in *Turnarounds & Workouts*. In 2022, *Chambers USA* ranked him as being among leading Delaware attorneys in the bankruptcy and restructuring area. In 2017, Mr. Harvey participated in the renowned National Conference of Bankruptcy Judges (NCBJ) Next Generation Program. Also in 2017, he was one of eight attorneys selected for the Bankruptcy Trial Practice Seminar sponsored by the U.S. District Court for the District of Delaware and the Delaware Chapter of the Federal Bar Association. Mr. Harvey is admitted to practice in Delaware and Maine, before the U.S. District Courts for the Districts of Delaware and Maine, and before the U.S. Supreme Court. He received his B.A. *magna cum laude* and Phi Beta Kappa in English literature from Florida State University in 2005 and his J.D. in 2008 from Boston College Law School, where he participated in the Duberstein National Bankruptcy Memorial Moot Court Competition.

Michael R. Herz is a partner with Fox Rothschild LLP in Morristown, N.J., and centers his practice on complex bankruptcy and insolvency matters. His represents chapter 7 and chapter 11 trustees, creditor committees, post-confirmation trusts, individual creditors (including financial institutions, loan-servicers and landlords) and debtors in all phases of the bankruptcy process. He also has experience in adversary proceedings and other bankruptcy-related litigation, and he has facilitated the recovery and administration of millions of dollars in assets and claims. An active member of the ABI, Mr. Herz is a contributing editor to the *ABI Journal* and serves on the advisory board for ABI's Mid-Atlantic Bankruptcy Workshop. He is also a prolific industry thought leader who has published articles in the *ABI Journal*, *Law360*, *Bloomberg Law*, *The Legal Intelligencer* and the *New Jersey Law Journal*, among others. In trustee cases, Mr. Herz has earned a reputation for uncovering fraudulent conduct and tracking down hidden assets. For businesses in the cannabis sector that encounter financial difficulties, he advises and has written and presented on alternatives to traditional bankruptcy, including assignments for the benefits of creditors, receiverships and workouts. Mr. Herz also represents student loan servicers as creditors in bankruptcy court and in defending claims under the Fair Credit Reporting Act and the Telephone Consumer Protection Act, and he has written and spoken on this and other bankruptcy-related topics. In addition, he is an editor of and a frequent contributor to his firm's "In Solvency" blog, which covers bankruptcy and financial restructuring issues. Mr. Herz received his B.A. with high honors in 2003 from Brandeis University and his J.D. in 2008 from Brooklyn Law School.

Hon. Karen B. Owens is a U.S. Bankruptcy Judge for the District of Delaware in Wilmington. Prior to her appointment, she was a director in the Bankruptcy and Insolvency group of Ashby & Geddes, P.A., where she maintained a diverse practice, representing corporate debtors, estate professionals, various secured and unsecured creditor constituencies, and other interested parties in reorganization and liquidation proceedings and bankruptcy-related litigation. Prior to joining Ashby & Geddes, Judge Owens started her career at Skadden, Arps, Slate, Meagher & Flom as a corporate restructuring associate, and later went on to clerk for Hon. Brendan Linehan Shannon of the U.S. Bankruptcy Court for the District of Delaware. She received her Bachelor's degree from Pennsylvania State University, where she was Phi Beta Kappa, and her J.D. *summa cum laude* from American University's Washington College of Law, where she served as an associate managing editor for the *American University Law Review* and as legal intern to Hon. Stephen S. Mitchell of the U.S. Bankruptcy Court for the Eastern District of Virginia.

Brett S. Theisen is vice chair of Gibbons P.C.'s Financial Restructuring & Creditors' Rights Group in New York. He has experience in all aspects of debtor/creditor relations, with a particular focus on complex corporate reorganizations and liquidations, and bankruptcy and insolvency-related litigation and appeals. Mr. Theisen's clients include debtors-in-possession, trustees and other fiduciaries, official committees of unsecured creditors, secured creditors and lenders, indenture trustees, insurers, asset-purchasers, landlords and trade creditors. His litigation experience covers a broad range of matters in federal and state courts, including Ponzi scheme litigation, complex fraudulent transfer and preference actions, alter-ego/veil-piercing litigation, shareholder disputes such as fraud, negligence, breach of fiduciary duty and related claims, and general commercial and contract disputes. Prior to practicing law, Mr. Theisen was an analyst in the equities-trading division at a leading international investment bank. He also worked for a Manhattan-based national sports agency, where he assisted in recruiting new clients, conducting due diligence in connection with contract negotiations, and securing endorsement and marketing opportunities for existing clients. Mr. Theisen is listed in *Chambers USA Guide to America's Leading Lawyers* for Business and Bankruptcy/Restructuring, and selected to the both the *New Jersey Super Lawyers* and the *New York Super Lawyers* Rising Stars lists for Creditor/Debtor Rights, and he is an ABI "40 Under 40" honoree. He also received the Turnaround Awards "Restructuring of the Year" by The M&A Advisor in 2020. Mr. Theisen received his A.B. from Dartmouth College and his J.D. *magna cum laude* from Seton Hall University School of Law.