

## Current Topics in Ethics for In-House Counsel

2014-2015 ethics decisions applicable to businesses

Presented by David Slarskey  
Founder, Slarskey LLC  
on behalf of Priori Legal  
[dslarskey@slarskey.com](mailto:dslarskey@slarskey.com)  
(212) 658-0661

## Outline of Presentation

- Introduction
- Lawyer as Witness: Administrative Investigations and Beyond
- The Ethics of Technology: the Duty of “Reasonable Care”
- Restrictive Covenants and the Ethics of Settlement
- Choice of Ethics Rules in *Non-Court* Matters

## Lawyer as Witness: Administrative Investigations and Beyond

- Issue: May a lawyer be interviewed in an administrative investigation without violating ethical duties to the client? **(N.Y. State 1045 (2015).)**

## Lawyer as Witness: Administrative Investigations and Beyond

- YES. Subject to certain considerations:
  - Lawyer does not disclose confidential information.  
**(Rule 1.6)**
    - Privileged information
    - Information detrimental to the client
    - Information the client has requested be kept confidential

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## Lawyer as Witness: Administrative Investigations and Beyond

- YES. Subject to certain considerations:
  - Lawyer does not intentionally prejudice or damage the client during the course of the representation
    - Interview might help avert formal charges
    - Client does not object to the in-house lawyer being interviewed
  - Attorney is not being asked to breach privilege or disclose confidential information

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## Lawyer as Witness: Administrative Investigations and Beyond

- IN ADDITION. If the agency brings charges, the lawyer will need to determine if he is likely to be a witness on a significant issue of fact. *MacArthur v. Bank of New York*, 524 F.Supp. 1205, 1208 (S.D.N.Y. 1981)
  - If likely to appear as a fact witness, in-house lawyer may not also appear as an advocate
  - Considerations: Is testimony cumulative? Unique role of attorney as fact witness. Whether jury would speculate on attorney absence
  - Doubts should be resolved in favor of testimony and against lawyer continuing as advocate.

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## The Ethics of Technology: the Duty of “Reasonable Care”

- Issues: May a lawyer access client data remotely?  
May a lawyer use cloud storage for transactions  
(e.g., hosting drafts, contracts, confidential documents)
- N.Y. State 1019 (2014) (remote access); N.Y. State 1020 (2014) (cloud storage)

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## The Ethics of Technology: the Duty of “Reasonable Care”

- Background Opinions
  - N.Y. State 680 (1996): Electronic imaging/retention
  - N.Y. State 709 (1998): Practicing over internet/email
  - N.Y. State 782 (2004): E-docs and metadata
  - N.Y. State 820 (2008): Generating ads from emails
  - N.Y. State 833 (2009): Response to unsolicited email
  - N.Y. State 842 (2010): Use of cloud back-up/storage
  - N.Y. State 940 (2012): Offsite back-up storage
  - N.Y. State 950 (2012): Electronic storage of emails

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## The Ethics of Technology: the Duty of “Reasonable Care”

- The “Reasonable Care” Standard
  - Special security measures not required if there is a “reasonable expectation of privacy.” *But*
  - “Special circumstances ... may warrant special precautions.”

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## The Ethics of Technology: the Duty of “Reasonable Care”

- Reasonable Expectation of Privacy
  - **Rules 1.0 and 1.6**
    - Lawyer “shall not knowingly reveal confidential information” unless client “gives informed consent.”
    - Lawyer must “exercise reasonable care to prevent ... others whose services are utilized by the lawyer from disclosing or using confidential information of a client.”

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## The Ethics of Technology: the Duty of “Reasonable Care”

- Reasonable Expectation of Privacy
  - Ethics opinions impose on *the lawyer* a duty to determine that the technology affords reasonable protection against disclosure.
  - Duty of attorney competence, in particular for litigators, may require attorneys to “possess a basic or even more refined understanding of electronically stored information.” (*N.Y. State 1020 at n.3.*)
  - Informed consent may be relied upon for the use of certain technologies if the lawyer has concerns about satisfying the reasonable care standard

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## The Ethics of Technology: the Duty of “Reasonable Care”

- Reasonable Expectation of Privacy
  - Factors to consider
    - Contractual obligations of online data storage providers
    - Attorney’s investigation of online data storage provider’s security measures, policies, recoverability methods, procedures
    - Use of existing technology to infiltrate storage data
    - Ability to purge or wipe copies of data
    - Whether the lawyer has periodically reviewed the provider’s procedures
    - Consideration of frequency of cyberattacks.

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## The Ethics of Technology: the Duty of “Reasonable Care”

- “Special Circumstances” may warrant “special precautions”
  - Sensitivity of the information
  - Extent to which the privacy of the information is protected by law or confidentiality agreement
  - Client expectations
  - Informed consent

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## Restrictive Covenants and the Ethics of Settlement

- Issue: May a lawyer settle or offer to settle a claim, with the understanding that the lawyer for the claimant will not solicit or refer prospective clients against the settling party.

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## Restrictive Covenants and the Ethics of Settlement

### ▪ Background

- Previous determination that an attorney for an employment discrimination plaintiff could not agree to non-disclosure of “broad categories of information, including facts about the business and operations of the defendant corporation and ‘any matters relating directly or indirectly’ to the settlement agreement.”  
**(N.Y. State 730 (2000).)**

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## Restrictive Covenants and the Ethics of Settlement

- General Rule: A settlement that would restrict a lawyer’s right to practice is an unethical agreement
  - Includes broad non-disclosure terms related to (non-confidential) business and operations
  - *Includes agreement not to solicit or refer clients with similar claims*

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## Restrictive Covenants and the Ethics of Settlement

- **Rule 5.6(a)(2)** provides “[a] lawyer shall not participate in offering or making ... an agreement in which a restriction on a lawyer’s right to practice is part of the settlement of a client controversy.”
  - Protects public’s access to attorneys and avoidance of conflicts (among current clients, potential future clients, and counsel) (**ABA 93-371 (1993).**)
  - “Right to practice” of claimant’s attorney is at stake
  - Rule 5.6 applies to *both* claimant and defendant’s attorneys – “participate in offering or making”

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## Restrictive Covenants and the Ethics of Settlement

- Rule 5.6(a)(2) provides “[a] lawyer shall not participate in offering or making ... an agreement in which a restriction on a lawyer’s right to practice is part of the settlement of a client controversy.”
  - Solicitation now viewed as an “important or even crucial” aspect of “a lawyer’s ability to engage meaningfully in the profession.” (N.Y. State 1006 (2014) ¶ 8.)
  - Departs from case law that found solicitation ethically suspect and thus upheld an agreement not to solicit clients. *Feldman v. Minars*, 658 N.Y.S.2d 614
  - Referral is also “integral to the practice of law” and an “important function” because it “facilitate[s] the process of intelligent selection of lawyers,” and “assist[s] in making legal services fully available.” (N.Y. State 1006 ¶¶ 10-11 and Rule 7.1)

## Choice of Ethics Rules in Non-Court Matters

- Issue: Which ethical rules apply to attorney conduct in *non-court* matters? (N.Y. State 1027 (2014).)

## Choice of Ethics Rules in Non-Court Matters

- Rule 8.5(a): Provides for “disciplinary authority” in New York, regardless of where misconduct occurs.

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## Choice of Ethics Rules in Non-Court Matters

- “Non-court” refers to any conduct other than that which is “in connection with a proceeding *in a court* before which a lawyer has been admitted to practice.” (**Rule 8.5(b)**.)

- Arbitration
- Administrative proceedings
- Transactional work
- Intellectual property advice
- Estate planning, tax advice, other counseling

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## Choice of Ethics Rules in Non-Court Matters

- Is lawyer licensed to practice *only* in New York?
  - If yes, then New York rules apply in all non-court proceedings
- If lawyer is licensed in multiple jurisdictions
  - Apply ethical rules for jurisdiction where the conduct has its *predominant effect*, if the lawyer is licensed in that jurisdiction
  - Apply ethical rules for the jurisdiction where the lawyer *principally practices*, for all other cases

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## Choice of Ethics Rules in Non-Court Matters

- “Predominant Effect” Factors
  - Where the client resides
  - Where the payments will be deposited
  - Where contract will be performed
  - Where business will operate

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## Choice of Ethics Rules in Non-Court Matters

- “Principal Practice” Factors
  - Calendar days working in each jurisdiction
  - Hours billed in each jurisdiction
  - Location of clients
  - Activities performed by lawyer in each jurisdiction

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## Conclusion

Any questions?

- Lawyer as Witness: Administrative Investigations and Beyond
- The Ethics of Technology: the Duty of “Reasonable Care”
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- Choice of Ethics Rules in *Non-Court* Matters

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