

South Carolina Bar Ethics Presentation

January 27, 2013

1. The Script

The negotiations have been hard fought. Our client is convinced that our offers are not getting through to the client on the other side. “If our adversaries knew of our generous offers, I am sure we would have settled this long ago. Is there anything I can do?” Lawyer responds, “You can contact your adversary directly.” “Great,” says the client. “And if you give me a written agreement, I will get our adversary to sign it.”

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Model Rules 4.1, 4.2 and 8.4(a)

ABA Opinion 11-461 (August 4, 2011)

RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 99, comment *k* (2000)

2. The Advance Waiver

Old Gray Head receives a phone call from an irate client at Computer Ideas, Inc. Client is outraged because Computer Ideas, Inc. has just been sued by its biggest competitor, Micro Computers, represented by Martyn & Fox. “How can you sue your own client?” screams the CEO. Old Gray Head responds, “When you signed the retainer letter, you agreed we could take on any matter adverse to you as long as the matter was unrelated to the work we were doing for you. Don’t you remember that?”

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Model Rule 1.0(e) and comments 6 and 7

Model Rule 1.7 and comment 22

ABA Formal Opinion 05-436 (May 11, 2005)

RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS, § 122, cmts. *c* and *d*

Celgene Corporation v. KV Pharmaceutical Company, 2008 WL 2937415
(D.N.J. July 29, 2008) (Arleo, M.J.)

3. The Investigation

Clean Energy, Inc. operates multiple coal-fired power plants. Its CEO is concerned whether the company is meeting air quality standards. He suggests they do an audit. The General Counsel responds, “Let’s have the lawyers do it, and that way it will be privileged, just in case the results are not so favorable.” Clean Energy’s General Counsel later decides to hire an outside law firm to conduct the investigation. “That will help secure the privilege.”

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In re *Vioxx Product Liability Litigation*, 501 F.Supp.2d 789 (E.D. La. 2007)

3.a. The Investigation Continues

Outside counsel interviews the head of the quality control lab, a woman he knows because they worked on a patent application together two years ago. When asked whether the company’s testing can be relied upon, she drops her voice and says, “I know you will keep this confidential, but the truth is I haven’t been myself lately. I have gotten addicted to this pain medication.”

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Model Rules 1.4, 1.6

4. Make Him Go Away

Your client has been bedeviled by one claim after another for employment discrimination, all brought by the same pesky law firm. As to the latest case, your client comes to you with a great idea. We’ll pay this latest group of plaintiffs \$1 million to settle all claims, or we will pay them \$2 million if that damn lawyer promises never to bring another case.

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Model Rule 5.6

5. It is Our Computer

Martyn & Fox is defending Apex & Co. in a class action racial discrimination lawsuit brought by Sally Hemmings, an assistant vice-president recently passed over for promotion. Martyn suggests that the company do some investigating. “Perhaps there’s valuable information to be had on Sally’s office computer. We could look at her voicemail, too.” The company follows her suggestion and, on a weekend, makes a copy of Sally’s hard drive and voice mail memory, disclosing numerous communications between Sally and class action counsel. Martyn, drooling, reviews them carefully. “This really helps our defense.” Any issues?

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Model Rule 4.4

6. Privileged Document?

It’s the eve of trial. Parties are making last minute exchange of trial exhibits. Defendant Apex inadvertently sends you a privileged document with emails between the general counsel of Apex and the head of the quality control laboratory at Apex. “Guidelines for your testimony.” First Guideline: “Sometimes it’s better to just say you don’t remember.” You explain to your associate, “Wait ‘til we use this to cross-examine the QC guy.”

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Model Rules 3.1, 4.4

7. The Document Production

The Excelsior Corporation is conducting in-house a huge document production on a big case. General Counsel is supervising the production, which is being handled by the company’s cracker jack paralegals. General Counsel tells one paralegal, “I want you to put this document on our privilege log.” Paralegal protests saying, “I was told not to list any documents that went to the accountants.” General Counsel responds, “Just do it this one time. You don’t have to put the accountants down as getting a copy. I don’t think they did.”

8. The Disappearing Conflict

Colossus Corporation is represented by Martyn & Fox, the international law firm in an antitrust case brought in the United States and a parallel claim before the EU. Two years into the case lawyers from Martyn & Fox's Berlin office bring an unrelated contract action against Colossus. When Colossus protests, Martyn & Fox responds, "Our lawyers in Germany are not subject to the rules of imputation."