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LITIGATION FINANCING AND ATTORNEY ETHICAL PITFALLS: PART 2

We begin this month's *Forum* by finishing our answer to Richie Referral's June *Forum* question about litigation financing. *See* Vincent J. Syracuse, David D. Holahan, Carl F. Regelmann & Alexandra Kamenetsky Shea, *Attorney Professionalism Forum*, N.Y. St. B.J., June 2018, Vol. 90, No. 5.

CONFIDENTIALITY CONSIDERATIONS WHEN REFERRING CLIENTS TO LITIGATION FINANCING ENTITIES

What happens to attorney-client privilege when lawyers refer a client or potential client to a litigation financing firm? Lawyers must take special care to not run afoul of their confidentiality obligations under New York Rule of Professional Conduct (RPC) 1.6 by disclosing any client confidences without the informed consent of the client. *See* New York State Bar Association (NYSBA) Committee on Professional Ethics, Op. 666 (1994); NYSBA Comm. on Prof'l Ethics, Op. 769 (2003); NYSBA Comm. on Prof'l Ethics, Op. 1145 (2018).

As part of the decision to invest in a case, the financing firm will likely require the lawyer or the client to disclose certain information to evaluate the matter. *See* Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, *Report on the Ethical Implications of Third-Party Litigation Funding*, April 16, 2013 at 7. In making these disclosures to the litigation financing firm, clients should be warned that communications with an outside financing source may result in a waiver of the attorney-client privilege. *See id.* The risk of waiver of the attorney-client privilege is significant and some out-of-state courts have ordered the production of communications and documents shared with potential litigation investors, finding that the attorney-client privilege was waived with regard to the documents and communications shared. *See* Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, *supra*, at 6–8 (citing *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373 (D. Del. 2010) (The court held that the plaintiff waived the attorney-client privilege and work-product protection with regard to documents shared with potential TPLF entities. The court also found that since the TPLF firms' interests in the litigation were commercial in nature, the common interest privilege did not apply.); *see also Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711 (N.D. Ill. 2014) (The court held that documents shared with TPLF firms lost their attorney-client privilege protections because the common interest privilege did not apply. The court found that the work-product protection had not been waived, finding that the lawyers' conclusions, opinions and legal theories were not discoverable even if disclosed to potential funders.); *Acceleration Bay v. Activision Blizzard*, 2018 WL 798731 (D. Del. 2018) (The court held that both the work-product protection and attorney-client privileges were waived and the common interest doctrine did not apply.); *but see Devon It, Inc. v. IBM Corp.*, No. CIV.A. 10-2899, 2012 WL 4748160 (E.D. Pa. Sept. 27, 2012) (The court held that the documents turned over to a TPLF investor pursuant to a "Confidentiality, Common Interest, and Non-Disclosure Agreement" did not result in a waiver of the attorney-client or work-product privileges.).

The common-interest doctrine is an exception to the general rule that the sharing of information with a third party destroys the attorney-client privilege. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 628 (2016). The N.Y. Court of Appeals in *Ambac* held, "an attorney-client communication that is disclosed to a third party remains privileged if the third party shares a common legal interest with the client who made the communication, the communication is made in furtherance of that common legal interest, and any such communication relates to litigation, either pending or anticipated." *Id.* at 620. The Court in *Ambac* reasoned that, "When two or more parties are engaged in or reasonably

anticipate litigation in which they share a common legal interest, the threat of mandatory disclosure may chill the parties' exchange of privileged information and therefore thwart any desire to coordinate legal strategy. In that situation, the common interest doctrine promotes candor that may otherwise have been inhibited. The same cannot be said of clients who share a common legal interest in a commercial transaction or other common problem but do not reasonably anticipate litigation." *Id.* at 38. After the significant *Ambac* decision was issued, attorneys have been warning clients to exercise great caution when sharing privileged communications and work product with third parties or their attorneys in a commercial transaction, if no litigation is pending or anticipated. *See* Maryann C. Stallone, Amanda M. Leone & Richard W. Trotter, *The* Ambac *Decision and the Future of the Common Interest Privilege Under New York Law,* NYLitigator, Spring 2017, Vol. 11, No. 1.

Plaintiffs in the TPLF context have attempted to argue, with mixed results, that financing firms and plaintiffs should indeed have a common legal interest: success in the underlying litigation. When considering whether to apply the common interest doctrine, many courts have required that the parties have a common legal, rather than commercial, interest and "the disclosures are made in the course of formulating a common legal strategy." Michele DeStefano, *Claim Funders and Commercial Claim Holders: A Common Interest or a Common Problem?,* 63 DePaul L. Rev. 305, 343 (2014) (citations omitted). We are not aware of post-*Ambac* New York cases addressing the common interest doctrine in the context of litigation financing. It will certainly be interesting how the issue is ultimately resolved and whether the courts find that the relationship between a TPLF entity and a potential plaintiff more closely resembles a commercial transaction or a common legal interest in anticipation of litigation.

The New Jersey Advisory Commission on Professional Ethics has opined that when dealing with a factor concerning a possible financial advance against an anticipated personal injury judgment or settlement, an attorney "must ensure that the client fully understands the risks of disclosure of such information, including the possible loss of the attorney-client privilege, before securing the client's authorization to disclose information the financial institution may require in order to assess the risk of the transaction. Upon securing such authorization, the attorney should still endeavor to limit, to the extent possible, the amount of information provided to the institution." *See* NJ Advisory Comm. on Prof'l Ethics, Op. 691 (2001). This NJ Advisory Comm. on Prof'l Ethics opinion also suggests that an attorney should limit the information disclosed only to that which is discoverable by an adversary in order to limit any risk of waiver of the attorney-client privilege. *See id.; see also* Ethics Committee of the Commercial and Federal Litigation Section of the New York State Bar Association, *supra*, at 9.

Based upon the foregoing, we suggest utmost caution when disclosing any information to an outside funding source and that clients be apprised of the potential risks.

THE JULY-AUGUST FORUM

To the Forum:

A commercial client recently approached me about New York's adoption of the Compassionate Care Act (CCA) which permits the possession, use and distribution of medical marijuana in New York in certain circumstances. I have worked extensively on Department of Health legal issues and other aspects of the medical industry in the past, but I have no experience with the legalization of marijuana. After I started looking into the New York law for my client, I thought about a recent news article discussing how the federal marijuana laws conflicted with various state laws. It suddenly dawned on me: Am I assisting an illegal drug operation?

I certainly don't want to break any laws or risk losing my license to practice law. Even an *allegation* of being complicit in an illegal drug operation would be disastrous for my career. I also don't want to assist my client in breaking any laws. I feel very strongly, however, that an inconsistency between state and federal laws is a minefield for my client to navigate even with legal representation. This is a relatively new law with little precedent and guidance for its enforcement. At the same time, due to its politically charged and divisive subject matter, I imagine that there will be strict enforcement of the statute. I can't imagine telling any client that as a New York lawyer, I am prohibited from giving him any advice about complying with a New York law!

Am I violating any rules of professional conduct by providing legal advice to my client on the CCA? Are there any limitations on what aspects of a marijuana business I can advise my client? If the policies for federal enforcement of marijuana laws change, will my ability to advise clients on the CCA also change? If my client starts to pay my legal fees from income derived from a marijuana business, am I permitted to accept those fees? Are there any other pitfalls I should be considering when advising a client on a marijuana business?

Sincerely,
Cheech N. Chong

DEAR CHEECH N. CHONG:

There is no doubt that advising clients on any issues associated with the sale, cultivation or distribution of marijuana is an ethical minefield. This is made especially difficult when the enforcement of marijuana laws can quickly and drastically change based on the policies of new presidential administrations.

We begin with RPC 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client." We discussed this rule briefly in prior *Forums* in the context of clients who were arguably being deceitful. *See* Vincent J. Syracuse, Amanda M. Leone & Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9; Vincent J. Syracuse & Maryann C. Stallone, *Attorney Professionalism Forum*, N.Y. St. B.J., July/August 2015, Vol. 87, No. 6. The sale of marijuana, however, is in a whole other league due to evolving public opinion on whether marijuana should be legal and changes in the federal enforcement of marijuana laws.

Many states have modified their versions of RPC 1.2 to address the discrepancies between state and federal marijuana laws to permit attorneys to provide some form of legal advice to their clients. *See* Reinhart, Bruce E., *Dazed & Confused*, Criminal Justice, Winter 2017, Vol. 31, No. 4, at 5. The modified rules of professional conduct in those states generally allow lawyers to advise and/or assist clients where the lawyer reasonably believes the conduct is lawful under state law as long as the lawyer also advises on the related federal law and policy. *See id.* Oregon's Rule of Professional Conduct 1.2(d), for example, specifically includes a reference to marijuana: "[A] lawyer may counsel and assist a client regarding Oregon's marijuana-related laws. In the event Oregon law conflicts with federal or tribal law, the lawyer shall also advise the client regarding related federal and tribal law and policy." *See id.* In other states, such as Ohio and Washington, bar associations have issued similar advisory opinions opining that lawyers can provide legal advice on the marijuana industry as long as they also advise the client about the federal law and policy. *See id.*, citing Ohio Bd. of Prof'l Conduct, Op. 2016-6 (2016); Wash. State Bar Ass'n Comm. on Prof'l Ethics, Advisory Op. 201501 (2015). Prior to these advisory opinions, the New York State Bar Association Committee on Professional Ethics issued its own advisory opinion that is highly relevant to your inquiry. *See* NYSBA Comm. on Prof'l Ethics, Op. 1024 (2014).

In 2014, New York adopted the CCA, which "regulates the cultivation, distribution, prescription and use of marijuana for medical purposes." *See id.* Although the CCA had already been adopted by 22 other states when it was enacted in New York, the statute conflicted with federal law that prohibits the possession, distribution, sale or use of marijuana and does not provide an exception for medical use. *See id.* The Committee was faced with an inquiry as to whether the RPC permitted lawyers to provide legal advice and assistance to doctors, patients, public officials, hospital administrators and others to aid in their compliance with the CCA and the federal enforcement policy. *See id.* One of the key factors that the Committee relied upon in reaching its ultimate conclusion was the U.S. Department of Justice's (DOJ) policy restricting the federal enforcement of marijuana laws. *See id.* The Committee cited to the U.S. Deputy Attorney General's August 29, 2013 memorandum titled, "Guidance Regarding Marijuana Enforcement" ("2013 DOJ Memo"). *See id.* The 2013 DOJ Memo directed its attorneys and federal law enforcement to focus their resources and efforts on issues such as preventing distribution of marijuana to minors, criminal enterprises accumulating revenue through marijuana sales, and the use of marijuana activity as a cover for the trafficking of other drugs. *See id.* The 2013 DOJ Memo further noted that these priorities are less likely to be a threat in jurisdictions with laws legalizing medical marijuana and strict enforcement systems in place. *See id.* The Committee apparently read the 2013 DOJ Memo to say that the federal government would not enforce federal criminal marijuana laws with regard to otherwise legal medical marijuana activities carried out in accordance with strict state regulatory laws such as the CCA. *See id.*

In reliance on the 2013 DOJ Memo, the Committee opined that the RPC permitted "a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana." *See id.* The Committee noted that the federal policy articulated in the 2013 DOJ Memo actually "depends on the availability of lawyers to establish and promote compliance" with the states' regulatory and enforcement systems and cautioned that "[i]f federal enforcement were to change materially, [its] Opinion might need to be reconsidered." In concurring with this opinion, Professor Simon agreed with the Committee's comment that this was a "highly unusual if not unique" question and this opinion "should have little impact outside the narrow context of medical marijuana laws." Roy Simon, *Simon's New York Rules of Professional Conduct Annotated*, at 115 (2016 ed.). This guidance offered to us by the Committee may now have gone up in smoke because of a recent DOJ opinion.

On January 4, 2018, the U.S. Attorney General issued a memo ("2018 DOJ Memo") rescinding the 2013 DOJ Memo and noting the federal prohibition for the cultivation, distribution and possession of marijuana, and the significant penalties for those crimes. *See* Jefferson B. Sessions, Att'y Gen., *Memorandum for All United States Attorneys: Marijuana Enforcement* (Jan. 4, 2018). This rescission severely undermined the basis for the Committee's 2014 advisory opinion. Through a March 2018 budget rider, however, Congress effectively continued to bar the DOJ from enforcing any federal laws against the use, distribution, possession or cultivation of medical marijuana in New York through September 23, 2018 when the rider expires. *See* Robert A. Mikos, *Congress Renews DOJ Spending Rider*, Marijuana Law, Policy, and Authority (March 28, 2018) https://my.vanderbilt.edu/marijuanalaw/2018/03/congresss-renews-doj-spending-rider/.

Now what do we do? Based on the 2018 DOJ Memo, and the current language of the RPC, we recommend using caution when advising clients on any aspect of a marijuana business. Pursuant to RPC 1.2(d), lawyers are permitted to advise a client about the reach of the CCA and whether undertaking certain activities would be a violation of federal laws. *See* RPC 1.2(d); RPC 1.2(d) Comment [9] (The prohibition in RPC 9.2 "does not preclude the lawyer from giving an honest opinion about the consequences that appear likely to result from a client's conduct."); NYSBA Comm. on Prof'l Ethics, Op. 1024 (2014). *Encouraging or assisting* the client in conduct that violates federal law in light of the 2018 DOJ Memo, could be viewed as a violation of RPC 1.2(d). *See id.* Under the supremacy clause of the U.S. Constitution, federal laws supersede contrary state marijuana laws, including the CCA, and possessing, growing, distributing, and prescribing marijuana is currently illegal throughout the United States. *See* Reinhart, Bruce E., *Dazed & Confused*, Criminal Justice, Winter 2017, Vol. 31, No. 4, at 4. In addition to risking a violation of the RPC, there are criminal risks that may apply if you assist your client with a marijuana business. *See id.* at 9. In addition, attorney malpractice policies usually have exclusions for criminal acts and carriers may attempt to deny coverage for any claims of improper legal advice to marijuana businesses. *See id.*

The fact that numerous states have passed legislation for the legalization of marijuana and that it has grown into a multi-billion dollar industry nationwide cannot be ignored. That being said, the DOJ has signaled a greater willingness to allow enforcement of federal marijuana laws to begin, even as against state-approved marijuana businesses, but this could only occur if the Congressional budget rider prohibiting such enforcement were allowed to expire. Implementation of the CCA is a long and complicated process that began when the federal government essentially permitted states to enact their own medical marijuana laws. New York's current governor not only supports the CCA, but has also supported a study for the legalization of recreational marijuana even after the issuance of the 2018 DOJ Memo. *See* Mort, Geoffrey A. & Desiree Gustafson, *New York's Medical Marijuana Law Comes of Age*, N.Y.L.J., April 3, 2018. To further complicate matters, as we were going to press, bipartisan legislation was introduced in both houses of Congress that would effectively hand to the states, U.S. territories and federally recognized tribes the right to regulate the manufacture, production, possession, distribution, dispensation, administration, and delivery of marijuana in all those places that so choose to regulate marijuana. If such legislation becomes law, the risk to legal practitioners advising state compliant marijuana businesses would be effectively mooted. Until such legislation passes or the RPC changes, however, lawyers will remain stuck in the proverbial minefield and face significant risks when representing marijuana businesses in New York. Only time will tell how the federal enforcement issues are resolved.

Sincerely,
The Forum by
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QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM:

I recently started supervising students in a law school clinic that assists indigent individuals. We provide a number of services, including evening programs, where people can seek quick legal advice, and they are often referred to other specialized not-for-profit groups that can further assist them. For certain individuals, however, we expect to represent them in court and in other administrative proceedings. I was so enthusiastic about this new position that I reached out to a few of my colleagues at law firms and other not-for profit organizations that I thought could help educate my law students and provide competent pro bono advice to our clients. They were excited to help.

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ATTORNEY PROFESSIONALISM FORUM

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But when I started to arrange our engagement letters, I realized that this was not going to be as easy as I anticipated. Do I need to run conflict checks with my colleague's law firms? Do I need to run conflict checks with the not-for-profit groups with which we are working? Are the conflict checks limited to the clients involved in the matters where we are acting as co-counsel, or do we have to run conflict checks against all of our respective clients? The law school has a few different clinics that focus on different areas of law and clients. Do we have to run conflict checks against all of the clients in each of the clinics? If we meet with someone in a drop-in session for a short period of time, is there a conflict if we later end up representing someone adverse? If there is a conflict, would it be imputed to any of the other firms or not-for-profits? Are there any other issues I should be concerned about?

Sincerely,
Ed U. Katz