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CPLR 5512(a): Hallmarks, Essential Requirements, Substance and Other Indicia of an Order

An appellant must satisfy three jurisdictional predicates before the Appellate Division may entertain the merits of the appeal: aggrievement (CPLR 5511); appealable paper (CPLR 5512) and timeliness (CPLR 5513). This article examines CPLR 5512(a), which provides, as pertains here: "An initial appeal shall be taken from the judgment or order of the court of original instance."

By **Elliott Scheinberg** | March 26, 2020

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"A decision is not an appealable paper." *Howell v. State*, 169 A.D.3d 1208, n.1 (3d Dept. 2019); *BNG Properties*

New York Law Journal

Professional Responsibility

Legal Ethics 'Through The Looking Glass'

Anthony E. Davis, New York Law Journal

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Sometimes—and especially at the end of a long hot summer—when it comes time to select topics for this column, the words of Lewis Carroll come to mind.

"The time has come," the Walrus said,
"To talk of many things
Of shoes—and ships—and sealing-wax—
Of cabbages—and kings—
And why the sea is boiling hot—
And whether pigs have wings."

(from Through the Looking-Glass and What Alice Found There, 1872)

Why Lewis Carroll? Because all too often the ethics opinions that expound on the meaning and proper application of the Rules of Professional Responsibility—and sometimes the rules themselves—seem to have the predominant effect of making the lives of lawyers and the practice of law as far removed from everyday reality as possible. In this article we will consider a few of the ethics opinions that have recently been handed down in New York. Some seem designed merely to complicate our professional lives. Others appear to ignore reality—and particularly the world outside the boundaries of New York State—entirely.

But first, before turning to the arguably ill-conceived (or merely confusing), an all too real cautionary tale to reinforce New York State Bar Formal Opinion 1032, previously discussed in the May 2015 article in this column "Ethics Committees Respond to New and Old Challenges" (New York Law Journal, May 4, 2015, p. 3). That opinion addressed the limitations on a lawyer's ability to counter a former client's negative online reviews, and explicitly advised that attorneys may not use confidential client information when responding to such postings.

And to remove any doubt, the opinion concluded that the "self defense" exception in New York Rule of Professional Conduct 1.6(b)—which permits lawyers to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary to...(5) defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct"—does not apply because, as used in the rule, an "accusation means

something more than just casual venting." For that exception to apply, there must be a "formal proceeding" or "the material threat of a proceeding" before permitting an attorney to reveal confidential information.

Although it comes from Colorado, a recent disciplinary decision suspending an attorney for 18 months for "internet postings that publicly shamed [a divorcing] couple by disclosing highly sensitive and confidential information gleaned from attorney-client discussions" (among several other violations of Colorado's Rules of Professional Conduct (RPCs)) demonstrates that however provoked and angry a lawyer may feel about clients or former clients, using the Internet to vent those feelings is a very bad idea. In *People v. James C. Underhill Jr.*, (2015 WL 4944102), decided Aug. 12, 2015, the Presiding Disciplinary Judge in Colorado suspended attorney James Underhill for 18 months, and also required that, in order to be reinstated, "Underhill will bear the burden of proving by clear and convincing evidence that he has been rehabilitated, has complied with disciplinary orders and rules, and is fit to practice law."

A married couple had retained Underhill to help with the husband's ongoing post-decree dispute with his former spouse. In the course of the engagement a fee dispute arose which led to the termination of the representation. The couple then posted complaints about Underhill on two websites. He responded with the offending Internet postings, in contravention of Colorado's RPC 1.6(a) and RPC 1.9(c)(2) (a lawyer shall not reveal information relating to the representation of a former client), as well as suing the clients for defamation. In addition, another dissatisfied couple, also former clients, posted a complaint about Underhill on the Better Business Bureau website, to which Underhill publicly replied by "publishing an attorney-client communication on the internet and making uncomplimentary observations about and accusations against the couple based on confidential information related to the representation."

As we noted in the May 4, 2015, article referred to above, these restrictions on lawyers' ability to respond to criticism do raise some troubling concerns. Negative online reviews by clients remain on the Internet indefinitely and may even dominate an attorney's search engine results for several years, available to anyone, anywhere there is Internet access with a few "clicks." So even though the New York State Bar Ethics Committee concluded in Opinion 1032 that the exception to RPC 1.6 should not be "interpreted in a manner that could chill...discussion," the reality is that prohibiting attorneys from fully defending against such potentially ruinous online comments does just that, by allowing the disgruntled client's side of the story to go unchallenged.

I believe the self-defense exception to the rule should be extended to allow lawyers to go online to defend themselves to the extent reasonably necessary in order to correct false or misleading reviews without having to fear potential disciplinary consequences. But until such a change is made, or the exception is reinterpreted, lawyers should remember the fate of Underhill when drafting online responses to client criticism on the Internet. It is worth noting that there are other approaches that attorneys may consider when faced with what they believe to be misplaced online criticism. One option is to make a cease and desist demand that the objectionable posting be taken down. If that approach fails and the lawyer continues to believe that he is being harmed by the posting there remains the option, after obtaining appropriate independent counsel, to bring a defamation action which may itself then be cited to counter the objectionable posting.

Partnering With Non-Lawyers

Another earlier article in this column, "Lawyer Regulation: Walking Backwards Into The Future, The Legal Services Act in 2007," New York Law Journal, May 5, 2014, p. 3, discussed the changes in the regulation of lawyers in England and Wales intended to permit greater competition in the delivery of legal services, and to improve the public's access to legal services. The centerpiece of those reforms was the new freedom for lawyers to share fees and enter into partnership with non-lawyers.

While there is beginning to be solid empirical evidence that these reforms have been successful (without harm to the legal profession and to the benefit of clients), the topic for consideration here is New York's response to these changes. There have been four ethics opinions from the New York State Bar Association, 889, 911, and most recently 1038 and 1041, all relating to the freedom of (or, more accurately, the prohibition upon) New York lawyers to take advantage of these reforms. When juxtaposed and taken together, the opinions seem ill-considered.

Opinion 1038 summarizes the two earlier opinions thus:

> In N.Y. State 911, a New York lawyer proposed to establish the New York office of a UK law firm that, as permitted by English law, included UK nonlawyers in ownership and supervisory positions. We concluded that New York Rule 5.4 prohibited the association because "[e]ven if the lawyers in question are also licensed in the UK, the predominant effect of their conduct, in practicing law from a New York office on behalf of New York clients, would be in New York."
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> Similarly, in N.Y. State 889, we were asked whether a lawyer licensed in New York and D.C. could practice in a D.C. firm with a nonlawyer member. Because the lawyer principally practiced in D.C. and received a majority of revenue from D.C. cases and matters, we concluded that Rule 5.4 did not prohibit the proposed arrangement, even if the lawyer undertook "occasional litigation in New York."

In Opinion 1038, the same committee addressed the following facts: "A law firm based in Washington, D.C. includes a nonlawyer partner, *which is permitted by the D.C. Rules of Professional Conduct.* The firm is interested in associating with a New York-admitted lawyer, who is also licensed in D.C., to handle New York cases, staff an office in New York and have a primarily New York-based practice. The firm is contemplating having the New York lawyer join the firm as a partner or forming a 'wholly-owned subsidiary law firm' in New York to be 'independently managed/operated' by the New York lawyer. We understand the term 'subsidiary law firm' to mean a firm whose partnership interests are owned entirely by the D.C. firm." (Emphasis added).The committee's conclusion: that a "New York lawyer with New York-based practice may not partner with nonlawyer or practice in law firm owned by parent firm that has nonlawyer partner."

Most recently, in Opinion 1041, the same committee considered a fourth set of circumstances, where a New York lawyer was working in England, and concluded, based in this instance on its interpretation of New York RPC 8.5 (choice of law), that a New York lawyer who practices principally in a foreign country but is not admitted to practice in that country may, without violating the New York Rules of Professional Conduct, (A) engage in

lawful conduct that does not require licensing in the foreign country but would constitute the practice of law in New York, and (B) practice in the foreign country in partnership or association with an entity that includes a non-lawyer as a supervisor or owner; provided in each case that such practice is permitted under the laws and rules of the foreign country and the predominant effect of the lawyer's practice is not in New York.

So let us summarize:

1. A New York lawyer may not practice in New York as a partner of an English firm that has non-lawyer owners (even though that relationship is permitted in England) (Opinion 911);

2. A New York lawyer may practice in D.C. as a partner in a D.C. firm that has non-lawyer partners (which is permitted in D.C.)—even if some of his practice involves litigation in New York (from which he—and, we may assume, the non-lawyer partner—presumably derive legal fees) (Opinion 899);

3. A New York lawyer may not practice in New York as a partner in a firm that is a subsidiary of a firm in D.C. that has non-lawyer partners (which is permitted in D.C.) (Opinion 1038); and

4. A New York lawyer who practices principally in England (even though he is not admitted to practice there—which is permitted in England), may do so in partnership with an entity that includes a non-lawyer as a supervisor or owner, provided that the predominant effect of the lawyer's practice is not in New York (Opinion 1041).

Let us examine the overall message of these opinions. You can be a "good" New York lawyer if you enter into business relationships with non-lawyers outside New York so long as you stay away from New York (except occasionally—see Opinion 899). But if you enter into exactly the same relationships but seek to practice inside New York, you will be violating New York's Rules of Professional Conduct.

Notably, since the adoption of those opinions, Washington State has created a special category of non-lawyers—licensed paralegals—with whom Washington State lawyers may now enter into partnership relationships. A number of other states, including New York, are considering the adoption of similar rules. In these circumstances, are we not living in New York, "Through the Looking Glass?"

Seeking a Balance

What is the inherent logic in permitting lawyers to behave in one way somewhere else, but to prohibit the same behavior when conducted in New York? If the answer is that this is what the New York Rules require, isn't the solution to change the rules? This is not the place for a review of the growing literature of the benefits the English public—both corporate and individual clients—are deriving from the new ways in which legal services are available there. But surely the inconsistencies (or, perhaps, the consistency) of these opinions suggest that it is time for New York's regulators to take a cold, hard look at the subject of what forms a law firm may take.

The question should not be whether change from the traditional model involves a deviation

from the pre-existing rules. The answer to that question is self-evident. Rather, the debate should be about how to create an appropriate balance. On one side of the scale are the potential benefits to both clients and lawyers from removing the old prohibitions against sharing fees with non-lawyers, and against permitting non-lawyers to be partners with lawyers or otherwise to own interests in law firms. And on the other is the need to develop appropriate forms of regulation in order to protect the public from any abuses that may be feared from such changes.

If the legal profession in New York is to continue to be a successful part of the global economy, it must be open to new models both of practice and of regulation. And if we fail to address these questions squarely we will be left in the increasingly untenable position of having rules that work in different ways depending solely on where a lawyer is physically located. In the age of the Internet, and the global economy, that does not make a lot of sense.

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