CLE SCHEDULE:

CHANCERY COURT: Best Litigation Practices 2022

11:00 a.m. – 12:00 p.m.

The Honorable Kathaleen St. Jude McCormick, Chancellor
The Honorable J. Travis Laster, Vice Chancellor
The Honorable Paul A. Fioravanti, Vice Chancellor
The Court of Chancery of the State of Delaware

Lakshmi A. Muthu, Esquire
Young Conaway Stargatt & Taylor, LLP

Robert W. May, Esquire
Morrison | Foerster (San Francisco)

Panelists Chancellor Kathaleen McCormick, Vice Chancellor Travis Laster and Vice Chancellor Paul Fiorvanti as they discuss best practices for litigating in the Delaware Court of Chancery. Topics will include lawyers' professional responsibilities to the Court, tips for presenting legal issues, and discovery obligations.

Court of Chancery: Best Litigation Practices

DSBA CLE 2022

Panelists

- Chancellor Kathaleen St. Jude McCormick
- Vice Chancellor J. Travis Laster
- Vice Chancellor Paul A. Fioravanti
- Robert May, Morrison & Foerster
- Lakshmi Muthu, Young Conaway Stargatt & Taylor, LLP

What We'll Cover Today

- Key Obligations of Attorneys to the Court and Opposing Parties as Set Forth in the Delaware Rules of Professional Conduct

- Best Practices for Meeting Your Duties to the Court and Notable Case Law

Delaware Rules of Professional Conduct

Ethical Obligations of Lawyers to the Court and to Opposing Parties

Preamble: A lawyer's responsibilities

"A lawyer, as a member of the legal profession, is a representative of clients, **an officer of the legal system** and a public citizen **having special responsibility for the quality of justice**."

"A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. **A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.** While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process."

Rule 3.1. Meritorious claims and contentions

"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . . ."

Rule 3.3. Candor Towards Tribunal

“(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. . . . .”

Rule 3.3. Candor Towards Tribunal (cont'd.)

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

Rule 3.4. Fairness to opposing party and counsel

"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; . . .

(d) in pretrial procedure, **make a frivolous discovery request or fail to make reasonably diligent efforts to comply with a legally proper discovery request** by an opposing party[.]"

Rule 4.1. Truthfulness in statements to others

"In the course of representing a client a lawyer shall **not** knowingly:

(a) make a false statement of material fact or law to a third person . . . ."

Rule 8.4. Misconduct

“It is professional misconduct for a lawyer to

(c) engage in conduct involving **dishonesty, fraud, deceit, or misrepresentation**;

(d) engage in conduct that is **prejudicial to the administration of justice**[.]”

Best Practices for Meeting Your Duties to the Court

Present adverse and controlling authority to the Court.

***Williams v. Toll Bros. Builders*, 257 A.3d 1022 (Del. 2021) (Table).**

- Neither party had brought relevant authority to the attention of the Court of Common Pleas. The appellee argued that it did not need to cite the adverse authority because at the time, the adverse case was pending appeal.
- The Delaware Supreme Court took the "opportunity to remind the bar of counsel's obligation to cite adverse authority."

Takeaways

- **The Supreme Court did not reach the question of whether counsel is excused from citing adverse legal authority where the case is pending appeal and may be overturned, but noted that other jurisdictions do not take such an approach.**
- **A case may be adverse and should be brought to the court's attention even where counsel reasonably believes the facts are distinguishable or that the decision does not control the case at hand.**

Controlling Authority

***In re Jeremy Paradise Dynasty Trust, et al.*, C.A. No. 2021-0354-KSJM, letter opinion (Del. Ch. Mar. 31, 2022).**

- In a dispute over whether the petitioner had standing to object to third-party discovery requests, both parties failed to cite Court of Chancery Rule 26(c), as amended in 2019, which squarely addressed the question.
- The Court reached an outcome consistent with the rule but subsequently issued a supplemental letter noting that the decision had failed to address this controlling authority because the parties did not cite to it when they presented their arguments to the Court.

Takeaways

- **Make a reasonable effort to carefully research and address controlling authority.**
- **"It is not only a part of your ethical obligations but also helpful to this busy court."**

Controlling Authority

In re VBR Agency, LLC, C.A. No. 2022-0328-JTL, opinion (Del. Ch. Apr. 20, 2022).

- The Court held that before the petitioner, a resident of New Hampshire, could be appointed as a receiver, he needed to address in his petition Court of Chancery Rule 150, which requires an appointed sole receiver to reside in Delaware at the time of appointment.
- The petitioner had simply stated in his proposed form of order that "Rules 149 through 168 shall not be applicable in this proceeding."
- The Court explained that while it is possible to obtain relief from Rule 150 (under Court of Chancery Rule 148), the petition or motion, "and ideally both," ought to identify such a baseline rule and then request that the Court grant relief from it.

Takeaway

- **When making an ex parte application, a lawyer has a duty to inform the court of controlling authority and all known material facts, whether or not the facts are adverse.**
- **While it is understandable that counsel may occasionally overlook authority, lawyers still must make a "diligent effort" to identify pertinent authority.**
- **"Common law adjudication is a cooperative exercise between counsel and the court. Failing to bring relevant authority to the court's attention risks generating rulings that diverge or even conflict with the main body of the law. Future cases may cite the divergent ruling, without engaging in the archeological digging necessary to determine what the court issuing the prior ruling did or did not consider."**

When presenting an argument to the Court or a legal opinion to a client, do not rely on facts known to be false, and immediately take remedial measures if you discover a false fact in evidence.

***Bay Cap. Fin., L.L.C. v. Barnes & Noble Educ., Inc.*, 2020 WL 1527784 (Del. Ch. Mar. 30, 2020), *aff'd*, 249 A.3d 800 (Del. 2021).**

- The Court granted the defendants' motion for summary judgment and held that they were entitled to two/thirds of their fees (excluding time spent on summary judgment) because the plaintiff's main claim in the litigation was based on a lie and the plaintiff obstructed discovery.
- Plaintiff's counsel doubled down on the false assertion even when the court noted at the preliminary injunction hearing that there was no evidence of it.

Takeaways

- **Verifications must be taken seriously.**
- **Once it becomes clear that a claim is based on false assertions, counsel should dismiss that claim.**

***AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929 (Del. Ch. Nov. 30, 2020), *aff'd*, 268 A.3d 198 (Del. 2021).**

- The Court held that a buyer did not need to close on a purchase agreement after the seller and its counsel for the transaction withheld information about fraudulent deeds on the assets to be sold.
- Seller's counsel knew the scheme of fraudulent deeds on the hotels was a material issue, but deliberately concealed this knowledge from the potential bidders and purposefully waited to disclose this information when the deal was at peak momentum in order to minimize questions.
- The Court noted that "[s]adly," the lawyers also misled the court about their investigation of the disputed deeds when the Court asked them if they knew more information.

Takeaways

- **Keep in mind ethical obligations to the other party and to the Court:**
  - **Rule 3.3(a)(1): "A lawyer shall not knowingly 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."**
- **There is a difference between making a persuasive argument based on the facts and misleading the Court.**

Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, 2021 WL 5267734 (Del. Ch. Nov. 12, 2021), *Pending Appeal

- The Court ordered Loews to pay nearly $690 million in damages to Boardwalk investors challenging a $1.5 billion buyout.
- The Court held that Loews obtained a “remarkable” bargain price because its lawyers drafted a “contrived” opinion.
- The Court discussed a number of issues with the legal opinion, finding that the totality of the evidence showed that it was not rendered in good faith.
- “Outside counsel knowingly made unrealistic and counterfactual assumptions, knowingly relied on an artificial factual predicate, and consistently engaged in goal-directed reasoning to get to the result that Loews wanted.”

Takeaways

- **To give a “good faith” legal opinion, an opinion giver should not rely on facts it knows to be false or on factual representations that essentially express the legal conclusion.**
- **Cite to relevant case law and statutes to support your analysis.**
- **When providing a legal opinion on more difficult questions of Delaware corporate law, it is a best practice to rely on an opinion of Delaware counsel.**

Avoid making frivolous or wasteful arguments.

Pettry v. Gilead Scis., Inc., 2021 WL 3087027 (Del. Ch. July 22, 2021).

- The Court noted a number of actions which, taken as a whole, constituted glaringly egregious conduct during this Section 220 action:
- making arguments that contradicted "ample support" for the plaintiffs' position;
- ignoring the unequivocal, low standard required for inspection and misrepresenting the record; and
- bringing forth a *Wilkinson* defense despite deposition testimony that stockholders were knowledgeable about their demands.

Takeaways

- **There is a fine line between zealous advocacy and making frivolous or wasteful arguments in the face of clear authority.**
- **Defense teams should look at the totality of the positions they are taking and ask whether the positions as a whole are reasonable.**

Page v. Oath Inc., 270 A.3d 833 (Del. 2022) (Table).

- The Delaware Supreme Court vacated the Superior Court's memorandum opinion and order that revoked its grant of a Georgia attorney's admission *pro hac vice*.
- The Georgia attorney was a plaintiff in a Georgia federal court case seeking to overturn the 2020 presidential election results. The Georgia federal court determined it was without basis in law or fact.
- The Delaware Superior Court concluded that the dismissal of the Georgia case indicated that it was frivolous. The Delaware Superior Court also suspected that the Georgia complaint contained materially false information and referred to a "questionable affidavit" which contained errors.
- On appeal, the Delaware Supreme Court held that a court's finding that a request for relief is without merit is not equivalent to a finding that it is frivolous.

Takeaways

- **"To the contrary, our own ethical rules, by prohibiting a lawyer from asserting claims 'unless there is a basis in law for doing so that is not frivolous,' implicitly recognize that a claim ultimately found to lack a basis in law and fact can nonetheless be non-frivolous."**
- **However, the Supreme Court re-affirmed that it is appropriate for an admitting trial court to issue a rule to show cause when a *pro hac* attorney is accused of serious misconduct in another state.**

Advise clients of their responsibilities to participate reasonably in discovery.

***Bay Cap. Fin., L.L.C. v. Barnes & Noble Educ., Inc.*, 2020 WL 1527784 (Del. Ch. Mar. 30, 2020), *aff'd*, 249 A.3d 800 (Del. 2021).**

- The plaintiff unreasonably made taking his deposition difficult:
  - he required it to be in London;
  - he was late and left in the middle for scheduled meetings;
  - he ended the deposition in the middle of questioning, stating that he did not need to answer any more questions (with his lawyer in agreement); and
  - "[w]orse yet," the plaintiff unreasonably evaded questions in his deposition.
    - Example: when asked the value of assets managed by the company, the plaintiff said "between one dollar and as much as a billion dollars," and when pressed by counsel, he refused to provide a more precise range.

Takeaways

- **Prior to a deposition, explain to your client their obligations to participate reasonably and to the best of their abilities.**

Pettry v. Gilead Scis., Inc., 2021 WL 3087027 (Del. Ch. July 22, 2021) & 2020 WL 6870461 (Del. Ch. Nov. 24, 2020).

- The defendant took "aggressive positions" during discovery, including blocking legitimate discovery, despite the summary nature of Section 220 proceedings.

Takeaways

- **Understand and acknowledge the differences in discovery obligations in expedited and summary proceedings as opposed to plenary proceedings.**

Inform yourself of any guidance the Court has provided on how to conduct specific types or aspects of litigation.

Conduct yourself in a professional and respectful manner towards the Court, both in and out of the courtroom.

Lendus, LLC v. Goede, 2018 WL 6498674 (Del. Ch. Dec. 10, 2018).

- Unprofessional and harassing deposition conduct.
- Behavior "indicat[ed] a systematic intent to intimidate the witness and to hector opposing counsel."
- Counsel misrepresented facts about the deposition in a later letter to the Court.
- Court allowed attorney to withdraw his *pro hac vice* admission, instead of revoking it.
- Court shifted fees associated with deposition and resulting motion for sanctions.

Takeaways

- **Sanctions confined to behavior that called into question the fairness or efficiency of the administration of justice *in the pending Delaware action*.**
- **Other behavior complained of was referred to attorney disciplinary bodies in Delaware and other states.**

Columbus Bar Assn. v. Bahan, Slip Opinion No. 2022-Ohio-1210.

- Reminder: You do not want to end up on Above the Law:
- Last month, the Ohio Supreme Court cited a member of the Ohio Bar for professional misconduct that "erode[d] the civility, dignity, and respect for the rule of law contrary to an attorney's duty described in [the Ohio Rules of Professional Conduct]."
- Among other incidents related to her alcohol use, the Ohio attorney had shouted profanities at a judge at a bar association holiday event in 2018 while the judge was presenting acceptance remarks for a mock award.

Thank You

2020 WL 6870461
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Deborah PETTRY and Gail Friedt, Plaintiffs,
v.
GILEAD SCIENCES, INC., Defendant.
Richard C. Collins, Plaintiff,
v.
Gilead Sciences, Inc., Defendant.
Hollywood Police Officers' Retirement System, Plaintiff,
v.
Gilead Sciences, Inc., Defendant.
Anthony Ramirez, Plaintiff,
v.
Gilead Sciences, Inc., Defendant.

C.A. No. 2020-0132-KSJM, C.A. No. 2020-0138-KSJM, C.A. No. 2020-0155-KSJM, C.A. No. 2020-0173-KSJM
|
Submitted August 26, 2020
|
Decided November 24, 2020

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MEMORANDUM OPINION

McCORMICK, V.C.

***1** Each of the five stockholder plaintiffs seeks to inspect books and records of Gilead Sciences, Inc. ("Gilead" or the "Company"). The stated purpose of their respective inspections is to investigate possible wrongdoing in connection with the Company's development, marketing, and sale of HIV drugs.[1] When a stockholder seeks inspection for the purpose of investigating wrongdoing, the stockholder must demonstrate a credible basis to suspect possible wrongdoing.

1 There are two forms of HIV, HIV-1 and HIV-2, and both can develop into the most severe phase of HIV infection, AIDS. While acknowledging that these are extremely important distinctions, this decision describes Gilead's products as "HIV" drugs or treatments to avoid overcomplicating an already complex set of facts.

To demonstrate a credible basis, the complaint tells a story as replete with inequity as the biblical verse that the Company's namesake brings to mind.[2] In 2001, Gilead received FDA approval for tenofovir disoproxil fumarate ("TDF"), a life-saving medication for persons living with HIV. TDF has generated billions in revenue for Gilead year after year. These revenues incentivized Gilead to protect the market for TDF by forestalling the market entry of generic TDF and delaying the development of Gilead's safer TDF-substitute drug called tenofovir alafenamide ("TAF"). The plaintiffs say that there is a credible basis to suspect that Gilead violated antitrust laws, committed mass torts, infringed on government patents, and defrauded government programs in its efforts to protect the TDF market.

2 *See, e.g.*, *Hosea* 6*Hosea* 6:8.

In stating their credible basis, the plaintiffs join in chorus with a host of other accusers. Gilead's activities have drawn lawsuits and investigations from persons living with HIV, activists, regulatory agencies, the Department of Justice, and Congress. As just one example, in 2019, activists and union benefit funds filed a class action complaint in federal court alleging that Gilead and its competitors violated federal and state antitrust laws by engaging in anticompetitive conduct to prevent competition in the market for TDF-based drugs. The plaintiffs in that case seek billions of dollars in damages. In March 2020, the federal court partially denied a motion to dismiss, allowing portions of the case to move forward.

The credible basis standard is widely described as the "lowest possible burden of proof" under Delaware law,[3] and Gilead does not meaningfully attack the plaintiffs' credible basis. Gilead half-heartedly argues that the plaintiffs' credible basis is merely an echo of unsubstantiated allegations made in other lawsuits and should be given no credence. But Gilead does not explain why a credible basis analysis should ignore allegations forming the basis of other lawsuits, and there is no principled ground for categorically disregarding such information.

3 *See, e.g.*, *Seinfeld v. Verizon Comm'ns, Inc.*, 909 A.2d 117, 123 (Del. 2006).

Gilead's main strategy is to launch a number of peripheral attacks designed to chip away at the plaintiffs' proper purposes. Gilead asserts a defense based on *Wilkinson v. A. Schuman, Inc.*, in which this court denied inspection where the defendant proved that the plaintiff was a passive conduit in a purely lawyer-driven inspection effort.[4] As multiple subsequent decisions of this court have made clear, *Wilkinson* involved extreme facts, and Gilead's argument that five separate plaintiffs represented by four separate sets of counsel committed the same blunders found in *Wilkinson* borders on absurd. A corporation is entitled to assert defenses in a Section 220 action and probe the bona fides of a plaintiff's stated purpose. In this case, however, Gilead's pursuit of the *Wilkinson* defense raises more questions about Gilead's purposes than the plaintiffs'.

4 *See* 2017 WL 5289553, at *3–4 (Del. Ch. Nov. 13, 2017).

***2** Gilead asserts myriad other defenses, arguing that the plaintiffs should be denied inspection because any follow-on derivative claims they might pursue would not pass the pleading stage. Gilead peddles these points as "standing" arguments, presumably because this court recently rejected a series of nearly identical points when framed as "proper purpose" deficiencies.[5] This semantic sleight of hand is unsuccessful, and Gilead's so-called "standing" arguments fare no better.

5 *See* *Lebanon Cnty. Emps. Ret. Fund v. AmerisourceBergen Corp.*, 2020 WL 132752, at *6–24 (Del. Ch. Jan. 13, 2020).

As a fallback, Gilead makes a series of arguments concerning the scope of inspection, contending that inspection should be limited to formal board materials. This decision rejects those arguments because multiple other categories of documents are necessary and essential to the plaintiffs' stated purposes.

Regrettably, Gilead's overly aggressive defense strategy epitomizes a trend. As described recently by a group of scholars, defendants are increasingly treating Section 220 actions as "surrogate proceeding[s] to litigate the possible merits of the suit" and "place obstacles in the plaintiffs' way to obstruct them from employing it as a quick and easy pre-filing discovery tool."[6] Defendants like Gilead adopt this strategy with the apparent belief that there is no real downside to doing so, ignoring that this court has the power to shift fees as a tool to deter abusive litigation tactics. Gilead's approach might call for fee shifting in this case, and the plaintiffs are granted leave to move for their expenses, including attorneys' fees, incurred in connection with their efforts to obtain books and records.

6 James D. Cox et al., *The Paradox of Delaware's "Tools at Hand" Doctrine: An Empirical Investigation*, 75 Bus. Law. 2123, 2150 (2020).

I. FACTUAL BACKGROUND

The facts are drawn from the factual stipulations in the parties' pre-trial order, the testimony of each plaintiff (all by deposition and one also at trial), and the 262 joint trial exhibits submitted by the parties.[7]

7 Unless otherwise noted, pleadings are cited by reference to items docketed in C.A. No. 2020-0173-KSJM ("Dkt."). Factual citations are to: the Amended Pre-Trial Stipulation and Order, Dkt. 101 ("PTO"); Transcripts of Depositions of Richard C. Collins, Gail Friedt, Deborah Pettry, Anthony E. Ramirez, and Hollywood's Rule 30(b)(6) Representative, David M. Williams, Dkt. 82 (cited using the deponent's last name and "Dep. Tr."); the Trial Transcript, Dkt. 97 ("Trial Tr."); and Joint Trial Exhibits (cited by "JX" number).

A. Gilead's HIV Treatments

For more than a decade, Gilead has been a leader in the discovery, development, and commercialization of antiretroviral therapy for HIV.[8] Some estimate that Gilead controls approximately 75% of the HIV drug market.[9] Millions of people depend on Gilead's HIV treatments for their survival.[10] The corollary is that Gilead depends on the sale of HIV treatments for much of its financial survival. In 2019, for example, the sale of HIV treatments produced more than $16.4 billion in revenue or 73% of its top-line.[11]

8 JX-213.

9 *See, e.g.*, JX-250 at 2.

10 *See* JX-213.

11 *See* JX-135 at 34.

A brief history of the development and commercialization of Gilead's HIV treatments lays the backdrop for this lawsuit. Gilead received Food and Drug Administration ("FDA") approval for its ground-breaking HIV treatment—TDF—in 2001.[12] Initially sold commercially as Viread, TDF was a significant improvement over other drugs.[13] After TDF was approved, Gilead shifted its efforts toward reducing the number of pills a persons infected with HIV would take daily. Gilead developed a combined formulation of TDF and a drug called emtricitabine that could be administered as a fixed-dose, once-daily tablet.[14] The result, Truvada, was approved as an HIV treatment in 2004.[15] Truvada was later approved for use by high-risk, uninfected adults as part of an HIV-preventative strategy called pre-exposure prophylaxis ("PrEP").[16] In addition to Viread and Truvada, the FDA approved three of Gilead's other TDF-based HIV treatments: Atripla in 2006, Complera in 2011, and Stribild in 2012.[17]

12 JX-77 at 3.

13 *See id.*

14 *Id.* at 4.

15 JX-3 at 1.

16 JX-26 at 1.

17 JX-27 at 1.

***3** TDF poses safety risks for the patients' kidneys and bones.[18] In 2007, Gilead scientists published an article discussing TDF safety issues, which identified the most common adverse events as including renal failure, Fanconi syndrome, and serum creatinine increase.[19] In 2007, Gilead updated its labeling to recognize that TDFassociated renal damage also causes bone softening in patients.[20] A high dose of TDF is typically required to achieve the desired therapeutic effect.[21] The higher the dose of TDF, the greater are its toxic effects.[22]

18 JX-244 ¶ 215.

19 JX-68 ¶ 221.

20 *Id.* ¶ 224.

21 *Id.* ¶ 212.

22 *Id.*

Before the FDA approved Gilead's first TDF-based drug in 2001, Gilead had discovered another way of administering tenofovir—TAF.[23] TDF and TAF both deliver tenofovir to the target blood cells, but TAF delivers tenofovir more efficiently, which allows for a dose of less than one-tenth that of TDF.[24] The lower dosage in turn reduces toxicity levels and makes TAF safer than TDF.[25] Gilead highlighted the benefits of TAF-based drugs over its TDF-based drugs in a 2001 10-K,[26] and Gilead continued testing TAF through 2004, frequently touting positive results from clinical studies on the market.[27]

23 *Id.* ¶ 194.

24 JX-68 ¶ 195; JX-41 at 1–2.

25 *See id.*

26 JX-68 ¶ 243 (citing Gilead Sciences, Inc., Form 10-K 13, https://www.sec.gov/Archives/edgar/data/882095/000091205702011690/a2073842z10k.htm).

27 *Id.* ¶¶ 244–48.

Despite its safety benefits, Gilead shelved the development of TAF-based drugs in October 2004, attributing the decision to patients' increasing use of TDF-based Viread and the FDA approval of TDF-based Truvada, among other things. [28]

28 *Id.* ¶ 249 (quoting Press Release, Gilead, Gilead Discontinues Development of GS 9005 and GS 7340; Company Continues Commitment to Research Efforts in HIV (Oct. 21, 2004), https://www.gilead.com/news/press-releases/2004/10/gilead-discontinues-developmentof-gs-9005-and-gs-7340-company-continues-commitment-to-research-efforts-in-hiv).

Gilead did not renew development of TAF-based drugs until 2010, six years after it shelved the project. [29] Gilead did not submit a new drug application for a TAF-based drug until November 2014. [30] When rolling out its TAF products, Gilead repeatedly marketed TAF as a safer replacement for TDF. [31]

29 *Id.* ¶ 255.

30 JX-35 at 1.

31 *See, e.g.*, JX-40 (describing TAF as a product for patients who wanted to "replace their current antiretroviral treatment regimen" and touting the "safety and efficacy" of TAF, despite acknowledging that "TAF-based regimens are investigational products and have not been determined to be safe or efficacious"); JX-42 at 2 (Gilead's then-EVP of Commercial Operations, Paul Carter, stating that "[Genvoya] has been launched in the context of HIV patient around the world who are getting older and older. And the average age in the US now is actually over 50 years, for an HIV patient. And HIV in itself causes renal issues and can have impact on bone density. And so, I think everyone is very happy to see that we now have a new generation of HIV single-tablet regimens which have a much better safety profile and tolerability and can be used for many, many years."); *id.* (stating that Genvoya would replace Truvada as the "backbone" component of the combination therapies); JX-58 at 2 (Gilead's President and CEO, John Milligan, stating that he hopes TAF will be the "safest gentlest, yet most powerful option" available to HIV patients).

Gilead expanded its TAF franchise through 2015, submitting new drug applications for a fixed-dose combination of emtricitabine and TAF and a single-tablet TAF regimen in April and July 2015, respectively. [32] The FDA approved Gilead's TAF-based treatment, Genvoya, in November 2015. [33] Within two weeks of Genvoya's approval, TAF became listed as a preferred treatment option under the U.S. Department of Health and Human Services guidelines. [34] Gilead later received approval for the TAF-based drugs Odefsey, Descovy, and Biktarvy. [35]

32 *See* JX-39 (fixed-dose combination TAF); JX-40 (single-tablet TAF regimen).

33 JX-41 at 1.

34 *See* JX-42 at 2 (noting that becoming listed that quickly as a preferred treatment option was "unprecedented").

35 *See* JX-47 at 1 (Odefsey); JX-49 at 1 (Descovy); JX-64 at 1 (Biktarvy); *see also* JX-90 at 1 (press release announcing approval of Descovy for PrEP use). Gilead also received approval for certain TAF-based drugs used to treat Hepatitis B. In January 2016, Gilead submitted an application for TAF to treat chronic Hepatitis B. JX-45 at 1. In November 2016, the FDA approved Vemlidy, a TAF-based regimen, for the treatment of chronic Hepatitis B. JX-55 at 1.

B. Criticisms of Gilead's Development and Commercialization of HIV Treatments

***4** Gilead's development and commercialization of its HIV treatments has drawn extensive criticism from persons living with HIV, regulatory agencies, HIV activists, the Department of Justice (the "DOJ"), and Congress. Gilead has faced antitrust lawsuits, mass tort claims, patent infringement litigation, and False Claims Act investigations.

1. Anticompetitive Activities

Gilead is accused of delaying the launch of generic versions of its TDF-based HIV treatments by entering into anticompetitive licensing agreements with several branded drug manufacturers and collusive settlement agreements with generic drug manufacturers. [36]

36 *See* JX-244.

Gilead is regulated by multiple agencies, including the FDA. [37] After a new drug is approved, federal law provides certain exclusivity benefits to pharmaceutical companies, such as a five-year new chemical exclusivity. [38] After four years of exclusivity, a generic manufacturer can file an Abbreviated New Drug Application ("ANDA") showing, among other things, that the generic drug contains the same active ingredients as the branded drug and does not infringe on the branded drug's patent. [39] If the branded drug manufacturer brings a claim against the generic drug manufacturer for patent infringement within the first 45 days after the filing of the ANDA, then the FDA stays the ANDA until the earlier of (a) the passage of 30 months running from date that exclusivity ends, or (b) the issuance of a decision holding that the patent is invalid or there was no infringement. [40] Thus, seven and a half years is usually the longest that a new chemical exclusivity period will run.

37 JX-135 at 20 ("Our operations depend on compliance with complex FDA and comparable international regulations. Failure to obtain broad approvals on a timely basis or to maintain compliance could delay or halt commercialization of our products.").

38 JX-244 at ¶¶ 88–91 (citing 21 U.S.C. §§ 355(j)(5)(F)(ii), 355(c)(3)(E)(ii); 21 C.F.R. § 314.108(b)(2)). During this period, no other drug using that chemical as an active ingredient can obtain FDA approval.

39 *Id.* ¶¶ 73–76 (citing 21 U.S.C. § 355(j)(8)(B)).

40 *See id.* ¶¶ 78, 88–91, 280 (citing 21 U.S.C. § 355; 21 C.F.R. § 314.108(b)(2)).

Generally, the introduction of a generic drug on the market causes price declines and sales erosion of branded drugs. [41] Branded drug manufacturers therefore have incentives to restrict and impede generics from entering the market.

41 A Federal Trade Commission study found that, on average, within one year of generic entry into the market, generics capture 90% of sales and prices decrease 85%. *Id.* ¶ 93 (citing FTC, Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions at 8 (January 2010), https://www.ftc.gov/sites/default/files/documents/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff-study/100112payfordelayrpt.pdf). Gilead has recognized the potential for sales erosion in its public filings. *See, e.g.*, JX-135 at 12 ("[A]s new branded or generic products are introduced into major markets, our ability to maintain pricing and market share may be affected.").

Between 2004 and 2011, Gilead entered into a number of agreements with branded drug manufacturers, including Bristol-Myers Squibb Company ("Bristol-Myers"), Japan Tobacco, Inc. ("Japan Tobacco"), and Janssen R&D Ireland ("Janssen"), to create combination therapies that have multiple active ingredients or to license certain compounds for exclusive commercialization. [42] The agreements allegedly included "No-Generics Restraints" barring the creation of competing versions of the combination therapies that use generic TDF. [43]

42 In December 2004, Gilead and Bristol-Myers formed a joint venture to develop and commercialize a once-daily, fixed-dose combination HIV treatment regimen later named Atripla. *See* JX-6 at 1; JX-74 ¶¶ 114–18. In March 2005, Gilead and Japan Tobacco entered into a licensing agreement that gave Gilead the exclusive right to develop and commercialize a novel HIV integrase inhibitor in all countries except Japan. JX-7 at 1. In July 2009 and June 2011, Gilead entered into licensing agreements with Janssen to develop and commercialize once-daily

fixed-dose combination antiretroviral products. *See* JX-12 at 1 (press release announcing 2009 licensing agreement); JX-21 at 1 (press release announcing 2011 licensing agreement). (Janssen was formerly known as "Tibotec Pharmaceuticals." *See, e.g.*, JX-12; JX-21.) In December 2014, Gilead expanded its agreements with Janssen to allow for the development and commercialization of a new once-daily, single tablet regiment containing Gilead's TAF and emtricitabine, and Janssen's rilpivirine. JX-36 at 1. The agreement provided that the new product would be distributed by Janssen in "approximately 17 markets" and by Gilead in all other markets. *Id.* In October 2011, Gilead entered into a licensing agreement with BMS to develop and commercialize a fixed-dose combination of BMS's REYATAZ and Gilead's cobicistat—later named Evotaz. *See* JX-24 at 1; JX-242 at 23.

43 JX-74 ¶¶ 89–112.

***5** In 2013, Gilead entered into a settlement agreement with the largest generic manufacturer in the world, Teva Pharmaceutical Industries Ltd. ("Teva").[44] Under the terms of the settlement, Teva would be prevented from launching a generic version of Truvada until December 2017.[45] The settlement also reduced the incentives for ANDA second-filers to enter the market before December 2017 because the settlement allowed Teva to enter the market should a second-filer gain market entry.[46]

44 *See* JX-29. In 2008, Teva submitted an ANDA requesting permission to manufacture and commercialize a generic version of Truvada. JX-10. Teva alleged that two of the patents associated with Truvada were invalid, unenforceable, or would not be infringed by Teva's manufacture of the product described in its ANDA. *Id.* If Gilead agreed, then Teva could begin producing its generic product immediately. If Gilead sued for patent infringement within 45 days, however, Teva would be unable to produce its generic product until the earlier of 30 months or a district court decision that is adverse to Gilead. *Id.* Gilead sued Teva for patent infringement less than 45 days after Teva submitted its ANDA. *See* JX-11. In 2012, Lupin Limited ("Lupin") and Cipla Ltd. ("Cipla") both submitted an ANDA to manufacture and commercialize generic versions of Truvada and Viread, respectively. JX-32 at 23. Gilead filed patent infringement lawsuits in response to those ANDA submissions as well. *Id.*

45 *See* JX-29.

46 *See* JX-74 ¶¶ 321–55.

In 2017, a group of prominent HIV activists, including Peter Staley, implored the New York attorney general to investigate the Teva settlement and other agreements with generic drug manufacturers concerning the generic production of Truvada.[47] The activists accused Gilead of paying generic drug manufacturers to delay launching generics.[48]

47 JX-59; JX-60.

48 JX-59; JX-60.

In May 2019, Staley and others filed a thirteen count class action complaint against Gilead and other companies in the United States District Court for the Northern District of California (the "*Staley* Action").[49] The complaint alleges that Gilead and other branded drug manufacturers violated federal and state antitrust laws by engaging in anticompetitive conduct in the market for Gilead's TDF-based drugs.[50] Several additional class action lawsuits followed, and they were subsequently consolidated into the *Staley* Action.[51]

49 JX-74. On the same day that the *Staley* Action was filed, the House Committee on Oversight and Reform announced that it would hold a hearing to examine Gilead's pricing of Truvada. *See* JX-75. Gilead Chairman and CEO Daniel O'Day testified at the hearing on May 16, 2019. *See* JX-77. After discussing Gilead's contribution to the development of Truvada and related patents for PrEP, O'Day testified: "We priced Truvada, when it was originally approved, based on the price of its two component drugs, without adding a premium. We have increased its list price over the years at a rate consistent with average price increases in the industry." JX-77, at 2, 7–8. An expert later testified that "Gilead insisted on valuing drug shipments based on the commercial price in the United States, rather than the cost of manufacturing, which was at least 300 times less. ... PrEP [treatments] can be manufactured and distributed, including a profit, for about $6 per person per month. Gilead charges

more than $2100 per person per month, a 35000% markup." JX-76 at 3, 2–5. On June 26, 2019, the committee sent Gilead requests for documents and information regarding its pricing of Truvada. JX-81.

50 JX-74.

51 *See* JX-255.

***6** The plaintiffs in the *Staley* Action seek billions of dollars in damages on behalf of a class of persons who purchased or reimbursed purchasers of HIV treatments sold by Gilead and the other defendants. [52] On March 3, 2020, the United States District Court (the "District Court") in the *Staley* Action granted in part and denied in part Gilead's motion to dismiss, and granted leave to amend certain of the claims that were dismissed. [53]

52 *See* JX-74 ¶ 429; *see also* PTO ¶ 4 ("If plaintiffs are successful in their claims, [Gilead] could be required to pay significant monetary damages or could be subject to permanent injunctive relief.").

53 JX-242 at 85–87.

In relevant part, the District Court dismissed with leave to amend the claims that there was an overarching conspiracy among Gilead, Bristol-Myers, Japan Tobacco, and Janssen. [54] The court dismissed with prejudice the claims based on the Gilead/Japan Tobacco licensing agreement because the plaintiffs did not plead any specific allegations that "the exclusive license would be used in an anticompetitive way." [55]

54 *Id.* at 15–16.

55 *Id.* at 32, 31–33.

The District Court denied the motion to dismiss as to claims based on: the No-Generics Restraints in the Gilead/Bristol-Myers and Gilead/Janssen agreements; the Teva settlement agreement; and Gilead's commercialization of TAF. [56] As to the Gilead/Bristol-Myers and Gilead/Janssen agreements, the court found that a question of fact existed as to whether the No-Generics Restraints had sufficient anticompetitive effect to constitute an antitrust violation. [57] As to the Teva settlement agreement, the court cited several "yellow flag[s]" that could give rise to a finding of anticompetitive conduct. [58] As to Gilead's delayed commercialization of TAF, the District Court found that the plaintiffs have "a plausible argument that there is no procompetitive justification for" it. [59]

56 *Id.* at 85–86.

57 *Id.* at 26.

58 *Id.* at 41, 38–42.

59 *Id.* at 46. On April 21, 2020, the plaintiffs in the *Staley* Action filed an amended complaint, and on May 4, Gilead filed a motion to dismiss the amended complaint. *See* JX-175 (motion to dismiss amended complaint); JX-244 (amended complaint).

In January 2020, a group of healthcare insurers filed a class action against Gilead and other companies in a Florida federal court, asserting claims substantially similar to those in the *Staley* Action. [60]

60 *See* JX-117; *see also* JX-118 at 3 ("The allegations are similar to those made in four consolidated class actions against Gilead pending in the Northern District of California.").

2. Mass Torts

Gilead is accused of intentionally withholding from the market its safer and potentially more effective TAF-based HIV treatments in order to extend the sales window for its more dangerous and less effective TDF-based treatments. [61]

61 *See* JX-252; *see also* PTO ¶ 4 (noting that "Gilead has been named as a defendant in product liability lawsuits related to Gilead's HIV medications").

As discussed above, multiple parties have alleged that Gilead shelved the development of TAF after receiving approval for Truvada, even though Gilead knew that TAF was a safer product. [62] Gilead then allegedly waited to resume development and commercialization of TAF-based products until the introduction of generic TDF-based treatments was imminent. [63]

62 *See, e.g.*, JX-244 ¶¶ 236–98; JX-252.

63 *See* JX-244 ¶¶ 236–98; JX-252.

Gilead is the subject of at least 250 tort actions pending in state and federal courts in California, Delaware, and Florida. The actions involve more than 15,000 plaintiffs claiming that Gilead's TDF-based HIV medications caused them to suffer personal injury and economic loss. [64] If those claims are successful, Gilead "could be required to pay significant monetary damages." [65]

64 *See* JX-134 at 80; JX-255 at 2.

65 PTO ¶ 4; JX-134 at 80.

3. Patent Infringement

***7** Gilead is accused of infringing on government patents in the sales of its HIV PrEP treatments.

The U.S. government claims that when administered as a PrEP treatment, Truvada and Descovy rely on patents developed by the Centers for Disease Control and Prevention (the "CDC") and owned by the U.S. government. [66]

66 JX-73 at 1.

During a May 2019 hearing before the U.S. House Committee on Oversight and Reform, an expert in HIV research and clinical care testified:

> The US Government is by far the majority funder of PrEP research. PrEP regimen selection was guided by research conducted by scientists at the CDC who demonstrated that adding emtricitabine to a tenofovir regimen increased protection. ... The critically important research done by scientists at the CDC led to a US Government patent on the combined use of emtricitabine and tenofovir esters for PrEP.... Gilead Sciences did not provide leadership, innovation, or funding for these projects; Gilead's role was limited to donating study medication and placebos. Our protocols were shared with Gilead, in accordance with an agreement between the [National Institutes of Health] and Gilead; I do not recall receiving any comments. [67]

67 JX-76 at 2. The expert, Professor Robert M. Grant, is a credible source. As he explained to the committee, he had decades of experience "with research and clinical care related to HIV," "pioneered research on PrEP that led to FDA approval in 2012 [and] recommendations from the CDC in 2014," and "devoted ... 20 years of [his] career to the development of PrEP." *Id.*

On November 6, 2019, the U.S. government filed suit against Gilead. [68] The complaint alleges that Gilead has wrongfully denied the validity of the CDC's patents and refused to obtain a license from the CDC to use the patented regimens. [69]

68 JX-98; *see also* JX-99 (11/8/19 New York Times article discussing the lawsuit); JX-102 (11/8/19 Science Magazine article discussing the lawsuit).

69 *Id.* ¶¶ 8–9.

In February 2020, the Patent Trial and Appeals Board declined to institute Gilead's petitions for *inter partes* review of the four U.S. government-held patents, finding that Gilead "has not demonstrated a reasonable likelihood of prevailing." [70]

70 JX-246 at 21; JX-247 at 12.

In April 2020, Gilead filed a lawsuit against the U.S. government related to the use of the same anti-HIV regimens. [71] Gilead's complaint alleges that the CDC breached the agreements between the parties and the government's patents are therefore invalid and unenforceable. [72]

71 JX-170, *Gilead Scis., Inc. v. United States*, 1:20-cv-00499-CFL (Fed. Cl. Apr. 24, 2020).

72 *Id.* ¶¶ 1–21.

4. False Claims Act Violations

Gilead is currently facing a federal investigation and civil litigation related to alleged violations of the False Claims Act.[73]

[73] *See* JX-50; JX-88.

Under federal law, drug companies cannot provide direct copayment assistance to patients covered by Medicare.[74] Drug companies are permitted to donate to charities that help Medicare patients, so long as the companies' donations do not exert sway over the nonprofit's operations.[75] If a drug company uses donations to encourage a nonprofit to promote the company's products, however, that conduct may violate anti-kickback laws.[76]

[74] JX-51 at 1.

[75] *Id.*

[76] *Id.*

***8** On May 27, 2016, Gilead received a subpoena from the U.S. Attorney for the District of Massachusetts seeking documents related to the Company's relationship with nonprofits that provide financial assistance to patients.[77] Corporate disclosures "describe an expanding investigation by the U.S. Attorney's Office" into Gilead and other pharmaceutical companies' potential kickback violations.[78] In December 2017, one of the companies agreed to pay $210 million to resolve the Justice Department's claims.[79]

[77] JX-50.

[78] JX-51.

[79] JX-61. Gilead is also facing a *qui tam* action alleging False Claims Act violations related to the Company's TDF- and TAF-based Hepatitis-B treatments. JX-88. On September 19, 2019, a group of plaintiffs filed a second amended *qui tam* complaint against Gilead in Pennsylvania federal court, alleging multiple violations of the anti-kickback provisions of the False Claims Act. *See id.* ¶¶ 1, 12–13. The complaint alleges that Gilead used its speaker program and other methods to encourage healthcare providers to write prescriptions for Gilead's name-brand drugs as opposed to generics. *Id.* ¶¶ 1–6. In particular, the complaint alleges that Gilead used illegal kickbacks to encourage healthcare providers to transition patients from Viread, a TDF-based drug that was about to face generic competition, to Vemlidy, its new TAF-based drug. *Id.* ¶¶ 30–35.

C. The Inspection Demands

The plaintiffs are Deborah Pettry, Gail Friedt, Richard C. Collins, Hollywood Police Officers' Retirement System ("Hollywood"), and Anthony Ramirez (collectively, "Plaintiffs"). Each Plaintiff made a written demand on Gilead to inspect and copy certain books and records of the Company pursuant to Section 220 (collectively, the "Demands").[80] The Demands sought to investigate possible wrongdoing in connection with aspects of the development and commercialization of Gilead's HIV treatments.[81]

[80] *See* JX-103 (Collins's 12/2/19 inspection demand); JX-114 (Collins's 1/13/20 reply to Gilead's initial response); JX-128 (Collins's 2/18/20 supplemental demand); JX-108 (Pettry's 12/30/19 inspection demand); JX-113 (Friedt's 1/8/20 inspection demand); JX-120 (Pettry and Friedt's 1/29/20 consolidated reply to Gilead's initial response); JX-123 (Ramirez's 2/4/20 inspection demand); JX-136 (Ramirez's 2/27/20 reply to Gilead's initial response); JX-124 (Hollywood's 2/10/20 inspection demand).

[81] *See infra* note 95 and accompanying text.

Gilead declined to provide even a single document in response to any of the Demands, taking the position that each Demand was unfounded and deficient.[82]

[82] *See* JX-106 (Gilead's 12/10/19 response to Collins's initial demand); JX-130 (Gilead's 2/25/20 response to Collins's supplemental demand); JX-115 (Gilead's 1/15/20 response to Pettry's demand); JX-116 (Gilead's 1/15/20 response to Friedt's demand, containing multiple mistaken references to "Ms. Pettry" as opposed to "Ms. Friedt"); JX-126 (Gilead's 2/14/20 response to Pettry and Friedt's 1/29/20 communication); JX-125 (Gilead's 2/11/20 response to Ramirez's 2/4/20 demand); JX-139 (Gilead's 3/2/20 response to Ramirez's 2/27/20 communication); JX-127 (Gilead's 2/18/20 response to Hollywood's

demand); JX-131 (Gilead's 2/25/20 rejection of Hollywood's invitation to meet and confer).

D. This Litigation

Each Plaintiff filed suit under Section 220 to enforce their inspection rights, with Pettry and Friedt filing a joint complaint. [83] Gilead answered the complaints. [84]

83 *See* JX-132; JX-137; JX-140; JX-141; *see also* JX-129.

84 JX-142; JX-144; JX-261; JX-262.

***9** Gilead requested that the court enter an order requiring Plaintiffs to coordinate their efforts, [85] and the parties stipulated to a coordinated schedule and approach to discovery. [86]

85 Dkt. 5, Def.'s Resp. to Pls.' Mots. for Expedited Proceedings at 5–6 ("Gilead respectfully submits that the Court should enter an order coordinating the actions.").

86 Dkt. 8, Stipulation and Appointment of Counsel and Case Scheduling Order.

Gilead served interrogatories on, sought documents from, and moved to compel discovery from Plaintiffs. [87] Gilead also deposed each Plaintiff. [88]

87 *See* JX-147 (Def.'s First Set of Interrogs. Directed to Pls.); JX-148 (Def.'s First Set of Reqs. for Produc. of Docs. Directed to Pls.); Dkt. 38, Def.'s Mot. to Compel Disc. from Pls. Plaintiffs provided Defendants with responses and supplemental responses to these requests. *See* JX-155; JX-156; JX-157; JX-158; JX-159; JX-160; JX-161; JX-162; JX-163; JX-167; JX-169.

88 *See* Dkt. 82.

Gilead fought discovery directed to it and moved for a protective order, which the court denied. [89]

89 *See* Dkt. 17, Def.'s Mot. for Protective Order; Dkt. 65, May 8, 2020 Oral Arg. re Def.'s Mot. for Protective Order and the Ct.'s Ruling; *see also* JX-164 (Def's. Responses and Objs. to Pls.' Am. First Set of Interrogs. Directed to Def. Gilead Sciences, Inc.); JX-149 (Pls.' Am. Notice of Rule 30(b)(6) Dep. of Def. Gilead Sciences, Inc.).

The court held trial on June 23, 2020, and the parties completing post-trial briefing on August 26, 2020.

II. LEGAL ANALYSIS

To inspect books and records under Section 220, a plaintiff must establish by a preponderance of the evidence that the plaintiff is a stockholder, has complied with the statutory form and manner requirements for making a demand, and has a proper purpose for conducting the inspection. [90] If a stockholder meets these requirements, the stockholder must then establish "that each category of the books and records requested is essential and sufficient to the stockholder's stated purpose." [91]

90 *See* 8 *Del. C.* § 220(c); *Cent. Laborers Pension Fund v. News Corp.*, 45 A.3d 139, 144 (Del. 2012); *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 775 (Del. Ch. 2016), *abrogated on other grounds by Tiger v. Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019).

91 *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1035 (Del. 1996) (citing *Helmsman Mgmt. Servs., Inc. v. A & S Consultants, Inc.*, 525 A.2d 160, 167 (Del. Ch. 1987)).

Gilead disputes two of these requirements, arguing that Plaintiffs lack proper purposes and have failed to justify the scope of their inspections. Gilead also raises what it refers to as "standing" issues, arguing that Plaintiffs must overcome defenses to anticipated derivative claims in order to have standing to enforce their rights in this Section 220 action. Gilead's so-called "standing" arguments in substance speak to Plaintiffs' proper purposes and this decision addresses the arguments in that context.

A. Each Plaintiff Has Demonstrated a Proper Purpose.

"The paramount factor in determining whether a stockholder is entitled to inspection of corporate books and records is the propriety of the stockholder's purpose in seeking such inspection." [92] A purpose is "proper" under Section 220 where it is "reasonably related" to the stockholder's interest as a stockholder. [93] "In a section 220 action, a stockholder has the burden of proof to demonstrate a proper purpose by a preponderance of the evidence." [94]

92 *CM & M Gp., Inc. v. Carroll*, 453 A.2d 788, 792 (Del. 1982) (citing 8 *Del. C.* § 220(b); *Gen. Time Corp. v. Talley Indus.*, 240 A.2d 755 (Del. 1968); *Skoglund v. Ormand Indus.*, 372 A.2d 204, 207 (Del. Ch. 1976)).

93 8 *Del. C.* § 220(b).

94 *Seinfeld*, 909 A.2d at 121.

***10** The Demands state that they are for the purpose of investigating possible mismanagement, wrongdoing, or waste in connection with aspects of the development and commercialization of Gilead's HIV treatments, although each Demand uses slightly different verbiage to express this purpose. [95]

95 Collins seeks to "[i]nvestigat[e] whether any member of the Board or the Company's senior officers have mismanaged the Company and/or breached their fiduciary duties to the Company and its stockholders." JX-103 at 5; JX-128 at 15. Friedt and Petty seek to "investigate potential corporate mismanagement, wrongdoing, and waste by fiduciaries of the Company, including the [Board]." JX-108 at 1; JX-113 at 1. Hollywood seeks to investigate "possible breaches of fiduciary duty," "possible violations of positive law," "possible corporate misconduct by members of the [Board] and/or management in connection with ... core HIV products," and "possible prolonged concealment of the misconduct described herein." JX-124 at 1. Ramirez seeks to "investigate whether the [Board] and certain senior Gilead executives may have breached their fiduciary duties to the Company by engaging in massive and long-standing wrongdoing in connection with the Company's development, patenting, marketing of, and restraints related to, its antiviral HIV/AIDS drugs." JX-89 at 4. Some of the demands also state that they are for the purpose of assessing the independence and disinterestedness of the members of the Board with respect to the possible wrongdoing at issue, *see* JX-124 at 1; JX-103 at 5; JX-128 at 15, but Plaintiffs did not treat this as an independent purpose in briefing. *See* Dkt. 100, Pls.' Corrected Combined Post-Trial Br. ("Pls.' Opening Br.") at 3–45, 56; Dkt. 104, Pls.' Combined Post-Tr. Reply Br. at 3–24, 32. This decision treats Plaintiffs' desire to investigate the independence and disinterestedness of Gilead's Board members as a component of its investigation into possible wrongdoing. *See infra* Section II.C.2.e.

Although a stockholder's desire to investigate wrongdoing is a proper purpose under Delaware law, [96] a mere statement of that purpose without more will not entitle a stockholder to inspection. [97] To inspect documents for the purpose of investigating mismanagement or wrongdoing, a stockholder "must present some evidence to suggest a credible basis from which a court can infer that mismanagement ... or wrongdoing may have occurred." [98]

96 *E.g.*, *KT4 P'rs v. Palantir Techs. Inc.*, 203 A.3d 738, 758 (Del. 2019) ("One of the most traditional proper purposes for a § 220 demand is the investigation of possible wrongdoing by management. When a stockholder has made a colorable showing of potential wrongdoing, inspecting the company's books and records can help the stockholder to ferret out whether that wrongdoing is real and then possibly file a lawsuit if appropriate."); *City of Westland Police & Fire Ret. Sys. v. Axcelis Techs., Inc.*, 1 A.3d 281, 287 (Del. 2010) ("Our law recognizes investigating possible wrongdoing or mismanagement as a 'proper purpose.' "); *Seinfeld*, 909 A.2d at 121 ("It is well established that a stockholder's desire to investigate wrongdoing or mismanagement is a 'proper purpose.' Such investigations are proper, because where the allegations of mismanagement prove meritorious, investigation furthers the interests of all stockholders and should increase stockholder return.").

97 *Seinfeld*, 909 A.2d at 122 (quoting *Helmsman*, 525 A.2d at 166).

98 *Id.* at 118 (internal quotation marks omitted).

***11** Gilead argues that no Plaintiff has demonstrated a credible basis to suspect possible wrongdoing. [99] Gilead further argues that each Plaintiff is acting as a Manchurian candidate for a law firm such that none of Plaintiffs' stated purposes are their own.[100] Gilead additionally argues that legal defenses to a follow-on lawsuit challenging the wrongdoing foreclose Plaintiffs' ability to investigate possible wrongdoing under Section 220.[101]

99 Dkt. 102, Def. Gilead Sciences, Inc.'s Post-Trial Answering Br. ("Def.'s Answering Br.") at 5–15.

100 *Id.* at 22–36.

101 *See id.* at 36–44.

1. Plaintiffs Have Demonstrated a Credible Basis to Suspect Wrongdoing.

The credible basis standard imposes "the lowest possible burden of proof."[102] It does not require a stockholder to prove that the wrongdoing "actually occurred."[103] Nor does it require a stockholder "to show by a preponderance of the evidence that wrongdoing is probable."[104] Any such requirement "would completely undermine the purpose of Section 220 proceedings, which is to provide shareholders the access needed to make that determination in the first instance."[105] Rather, a stockholder need only establish by a preponderance of the evidence that there is a credible basis to suspect a *possibility* of wrongdoing.[106]

102 *Seinfeld*, 909 A.2d at 123.

103 *Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at *4 (Del. Ch. Apr. 28, 2004); *accord.* *Thomas & Betts*, 681 A.2d at 1031 ("While stockholders have the burden of coming forward with specific and credible allegations sufficient to warrant a suspicion of waste and mismanagement, they are not required to prove by a preponderance of the evidence that waste and mismanagement are actually occurring.").

104 *AmerisourceBergen*, 2020 WL 132752, at *8.

105 *La. Mun. Police Emps.' Ret. Sys. v. Countrywide Fin. Corp.* (*LAMPERS*), 2007 WL 2896540, at *12 (Del. Ch. Oct. 2, 2007), *order clarified*, 2007 WL 4373116 (Del. Ch. Dec. 6, 2007).

106 *See* *AmerisourceBergen*, 2020 WL 132752, at *8–9; *see also* *Seinfeld*, 909 A.2d at 118 (holding that a Section 220 plaintiff need only allege a " 'credible basis' from which a court can infer that mismanagement, waste or wrongdoing *may* have occurred" (emphasis added)).

In determining whether a plaintiff has presented a credible basis for inspection, the court looks at the allegations collectively.[107] The "threshold may be satisfied by a credible showing, through documents, logic, testimony or otherwise, that there are legitimate issues of wrongdoing."[108] When evaluating whether a credible basis exists, the court may consider on-going lawsuits, investigations, circumstantial evidence, and even hearsay statements evincing possible wrongdoing.[109]

107 *See, e.g.*, *In re Lululemon Athletica Inc. 220 Litig.*, 2015 WL 1957196, at *11–14 (Del. Ch. Apr. 30, 2015) (collectively assessing founder's inside knowledge based on company emails, suspicious timing and magnitude of founder's trades, and the speed at which founder hit his monthly trading cap); *Paul v. China MediaExpress Hldgs., Inc.*, 2012 WL 28818, at *4 (Del. Ch. Jan. 5, 2012) (determining that plaintiff had identified a credible basis for Section 220 demand based on evidence which included "numerous third-party media reports," "the noisy resignations of three board members" and a publicly announced "internal investigation").

108 *Seinfeld*, 909 A.2d at 123 (quoting *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563, 568 (Del. 1997)).

109 *See, e.g.*, *AmerisourceBergen*, 2020 WL 132752, at *9 ("Ongoing investigations and lawsuits can provide the necessary evidentiary basis to suspect wrongdoing or mismanagement warranting further investigation. This type of evidence is strong when governmental agencies or arms of law enforcement have conducted the investigations or pursued the lawsuits.");

LAMPERS, 2007 WL 2896540, at *10–12 (finding a news article and independent statistical analysis of stock option grant dates sufficient to suspect options backdating); *Elow v. Express Scripts Hldgs. Co.*, 2017 WL 2352151, at *5, *5–6 (Del. Ch. May 31, 2017) (finding "pleadings in the Anthem Action, the Securities Action complaints, and public statements by Express Scripts" sufficient to establish a credible basis), *abrogated on other grounds by Tiger*, 214 A.3d 933; *Carapico v. Phila. Stock Exch., Inc.*, 791 A.2d 787, 792 (Del. Ch. 2000) (finding an "SEC inquiry" and "SEC Order" were "sufficiently concrete" to suspect mismanagement).

***12** The Demands seek to investigate four categories of possible wrongdoing:

1. Anticompetitive activity resulting in a multi-billion dollar lawsuit accusing Gilead of violating federal and state antitrust laws by colluding with its competitors to unlawfully extend patent protection and drive up the price of its HIV drugs; [110]

2. Mass torts resulting in more than 15,000 claims by plaintiffs who allege that they were seriously harmed by Gilead's decision to intentionally delay the introduction of safer and more effective HIV treatments in order to protect the profitability of existing branded medications; [111]

3. Patent infringement resulting in a lawsuit by the DOJ against Gilead for its "deliberate" and "wanton" infringement of patents held by the federal government relating to PrEP treatment regimens; [112] and

4. Kick-back schemes resulting in DOJ investigations into False Claims Act violations. [113]

110 *See* JX-113 at 1; JX-123 at 1–2; JX-124 at 4; JX-128 at 1.

111 *See* JX-124 at 3–4; JX-128 at 1.

112 *See* JX-103 at 1; JX-113 at 1; JX-124 at 5–6; JX-128 at 1.

113 *See* JX-128 at 1.

At trial, Plaintiffs presented evidence to establish a credible basis to suspect possible wrongdoing in connection with each of these four categories.

To demonstrate a credible basis as to the anticompetitive activity, Plaintiffs rely primarily on the allegations and information contained in the *Staley* complaint as well as the federal court's decision on the motion to dismiss the *Staley* Action. [114] The *Staley* complaint spans 134 pages and outlines a litany of allegedly anticompetitive conduct, reflecting significant research by the plaintiffs in that action. [115] The parties to the *Staley* Action collectively filed thirty-eight exhibits during briefing on a motion to dismiss, including copies of the relevant agreements. [116]

114 *See* Pls.' Opening Br. at 7–9.

115 *See* JX-74.

116 *See* Decl. of Jayne A. Goldstein in Supp. of Pls.' Omnibus Mem. in Opp'n to Defs.' Mot. to Dismiss, *Staley v. Gilead Scis., Inc*., Case No. 3:19-cv-02573-EMC (N.D. Cal. 2019); Decl. of Heather M. Burke in Supp. Of Gilead's Mot. to Dismiss, *Staley*, Case No. 3:19-cv-02573-EMC. The court can take judicial notice of these filings because they are "not subject to reasonable dispute." *See, e.g.*, *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006) (citing D.R.E. 201(b)).

The *Staley* complaint discusses three broad categories of conduct that allegedly delayed the entry of generic competition: (i) No-Generics Restraints in agreements between Gilead and Japan Tobacco, Gilead and Bristol-Myers, and Gilead and Janssen; (ii) the Teva settlement; and (iii) the commercialization of TAF. [117] These categories of action are allegedly part of a broader scheme to restrain competition and increase the prices of HIV drugs. [118] The complaint contends that the No-Generics Restraints barred the creation of competing versions of combination therapies that use generic TDF. [119] The complaint further contends that the Teva settlement delayed Teva's entry into the TDF market and created disincentives for ANDA second-filers to launch their products. By thwarting the market entry of generic TDF, these agreements allowed Gilead to continue to charge high prices for TDF-based Stribild despite its toxicity and later helped Gilead shift prescriptions from Stribild to TAF-based Genvoya. [120] The agreements also allowed Gilead to avoid being pressured to release a standalone TAF product, because prescribers could not pair Gilead's standalone TAF with drugs offered by Gilead's competitors. [121] The plaintiffs allege that Gilead's actions, taken collectively, "unlawfully manipulated the regulatory framework in order to impair and delay ... competition." [122]

117 *See* JX-74 ¶¶ 88–355.

118 *Id.* ¶¶ 1–15.

119 *Id.* ¶ 4.

120 *Id.* ¶¶ 237–44.

121 *Id.* ¶ 245.

122 *Id.* ¶ 285.

***13** In response to Gilead's motion to dismiss, the District Court held that the plaintiffs' allegations regarding the Gilead/Bristol-Myers, Gilead/Janssen, and Gilead/Teva agreements and the commercialization of TAF stated a claim on which relief could be granted. [123] The federal motion-to-dismiss standard is higher than Section 220's credible basis standard. [124] It follows that allegations which survive a motion to dismiss under the federal standard are sufficient to meet the credible basis standard. Thus, the court finds that the allegations that survived the motion to dismiss in the *Staley* Action supply a credible basis to suspect possible wrongdoing as to the Gilead/Bristol-Myers, Gilead/Janssen, and Gilead/Teva agreements and the commercialization of TAF.

123 *See* JX-242 at 85–86. The court dismissed the overarching conspiracy claims and the claim related to the Gilead/Japan Tobacco agreement. JX-242 at 15, 33. Plaintiffs have since filed an amended complaint. *See* JX-244.

124 *Compare* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (requiring a plaintiff to plead facts sufficient to "nudge[ ] their claims across the line from conceivable to plausible"), *and* *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (requiring a Section 220 plaintiff seeking to investigate wrongdoing to holding that the *Twombly* plausibility standards applies to all civil cases in federal courts) *with* *Seinfeld*, 909 A.2d at 123 (describing the credible basis standard as "the lowest possible burden of proof" (internal quotation markets omitted)).

To demonstrate a credible basis as to the mass torts, Plaintiffs rely on the allegations and information in the pleadings in state and federal courts in California, Delaware, and Florida. [125] The mass tort class action in California, as of June 12, 2020, involved more than 15,000 plaintiffs. [126] The complaint in that action runs forty-four pages, alleges injuries stemming from Gilead's decision to intentionally delay its TAF-based HIV drugs, and asserts claims for negligence, strict product liability, breach of express warranty, breach of implied warranty, fraud, and concealment. [127] In particular, the complaint alleges that Gilead developed and marketed its toxic TDF-based medications and withheld the safer TAF-based medications from the market. [128] Rather than releasing the TAF-based medication, Gilead allegedly continued to add ingredients to its existing TDF-based medications "in order to extend its monopoly on tenofovir in the treatment of HIV-1." [129] The plaintiffs contend that Gilead did so knowing that reasonable alternatives were not available to patients. [130] The complaint references and quotes from papers that Gilead has published, submissions that Gilead made to U.S. and European patent offices, public announcements by Gilead representatives, statistics that have been corroborated by the CDC, studies conducted by third parties, and FDA findings. [131] The plaintiffs' complaint is cohesive and coherent, and the information and allegations in the complaint as well as the myriad evidence supporting it, supply a credible basis to suspect possible wrongdoing in the form of mass torts.

125 Pls.' Opening Br. at 9–11.

126 JX-255 at 2.

127 *See* JX-82. Further illustrating the scope of the litigation, Gilead produced nearly 2.6 million pages of documents in response to the plaintiffs' first and second requests for production—including FDA regulatory files, license agreements, a listing of clinical trials, and other documents—and trial is set for January 2022. *See id.*; JX-255 at 10–11.

128 JX-82 ¶¶ 12–14, 33–48.

129 *Id.* ¶¶ 76, 51–86.

130 *Id.* ¶ 2.

131 *See, e.g.*, *id.* ¶ 40 (quoting Gilead paper comparing the relative effectiveness and safety of TAF as compared to TDF); *id.* ¶ 41 (citing Gilead patent submission showing that TAF was more effective than TDF); *id.* ¶ 60 (citing an October 2004 company announcement regarding the future of TAF development); *id.* ¶ 67 (citing HIV-treatment statistics that have been corroborated by the CDC); *id.* ¶ 78 (citing an April 2012 HIV study conducted by researchers at San Francisco's Veterans' Administration Medical Center and the University of California, San Francisco); *id.* ¶ 79 (quoting FDA characterization of TDF's safety profile); *id.* ¶ 91 (quoting Gilead's Chief Scientific Officer during an October 2010 earnings call).

***14** To demonstrate a credible basis as to patent infringement, Plaintiffs rely on congressional testimony and subsequent litigation regarding Gilead's alleged infringement of U.S. government patents in the sales of Gilead's HIV PrEP treatments. [132] After an expert provided the U.S. House Committee on Oversight with a detailed description of his work with the CDC and Gilead, [133] the U.S. government filed a patent infringement lawsuit against Gilead. [134] The complaint totaled 1,739 pages including the ninety-two attached exhibits, and its filing was reported by multiple news outlets. [135] The exhibits included the relevant patents, various news articles, and relevant scholarship from the scientific community. [136] When Gilead sought review of the U.S. government's patents, the Patent Trial and Appeals Board held that Gilead "has not demonstrated a reasonable likelihood of prevailing." [137] The thoroughness of the U.S. government's complaint and the Patent Trial and Appeals Board's ruling easily clear the hurdle to establish a credible basis to suspect possible wrongdoing as to patent infringement.

132 Pls.' Opening Br. at 11–14.

133 *See supra* note 67 and accompanying text.

134 *See* JX-98.

135 *See id.* (complaint); JX-99 (11/8/19 New York Times article covering the litigation); JX-102 (11/8/19 Science Magazine article covering the litigation).

136 *See* JX-98 at 77–1739.

137 JX-246 at 21; JX-247 at 12.

To demonstrate a credible basis as to False Claims Act violations, Plaintiffs rely on the existence of four subpoenas issued by the DOJ. [138] By 2016, Gilead was the subject of an "expanding investigation" by the U.S. Attorney for the District of Massachusetts related to possible violations of the False Claims Act. [139] As disclosed in its public filings, Gilead received subpoenas in 2016 and 2017 requesting documents related to Gilead's relationship with certain charitable organizations, Gilead's copay coupon program, and Gilead's Medicaid price reporting methodology. [140]

138 *See* Pls.' Opening Br. at 14–15.

139 *See* JX-51 at 1.

140 JX-134 at 79.

Further, Gilead is facing a *qui tam* action in Pennsylvania federal court that alleges multiple violations of the anti-kickback provisions of the False Claims Act. [141] Although that action focuses on Hepatitis B-providers, one of the drugs at issue (Viread) is also used to treat HIV. [142] The complaint alleges that Gilead provided healthcare providers with illegal kickbacks in exchange for prescribing Gilead products. [143] It contains public payment information from relevant healthcare providers to Gilead, detailed information regarding the composition of Gilead's advisory boards, public pricing information regarding the drugs at issue, and quotes from internal emails referencing the speaker programs. [144] The combination of multiple government investigations relating to possible False Claims Act violations plus the ongoing *qui tam* litigation alleging the exact same conduct with respect to Gilead's Hepatitis B business, establishes a credible basis to suspect possible wrongdoing as to False Claims Act violations.

141 *See* JX-88 at ¶¶ 1, 13.

142 *See id.*; *see also* JX-55 (noting that Vemlidy is a TAF-based drug and an alternative to Viread).

143 JX-88 ¶¶ 58–99.

144 *Id.* ¶ 64 & n.2 (citing "Open Payment" information, which is defined as "payments that are not associated with a research study such as compensation, food and beverage and lodging");

id. ¶ 69 (listing 2017 advisory boards and each of their composition); *id.* ¶ 76 (listing prices of drugs at issue in the litigation); *id.* ¶ 134 (quoting an internal email that allegedly read: "Let them hear the Message for $3,000").

Gilead takes issue with Plaintiffs' reliance on the complaints in the other lawsuits, contending that unsubstantiated allegations cannot supply a credible basis to suspect possible wrongdoing.[145] As discussed above, however, the credible basis requirement does not require that allegations of wrongdoing be substantiated or even probable;[146] they only need be credible. One of the reasons why Delaware courts urge stockholders to conduct pre-suit investigations is to investigate allegations before filing plenary litigation to determine whether they are substantiated. In furtherance of that objective, this court attempts to avoid "placing an unduly difficult obstacle in the path of stockholders seeking to investigate ... mismanagement."[147] The allegations, information, and evidence in the complaints on which Plaintiffs rely meet this standard for the reasons discussed above. Requiring that Plaintiffs demonstrate more would place "an unduly difficult obstacle" in the path of stockholders.

145 *See* Def.'s Answering Br. at 5–22.

146 *See supra* notes 102–09 and accompanying text.

147 *See* *Thomas & Betts*, 681 A.2d at 1032.

***15** The parties also dispute whether Plaintiffs have presented evidence demonstrating that Gilead's board of directors and senior officers were aware of the categories of alleged wrongdoing.[148] Such a showing is not required to support a credible basis where, as here, Plaintiffs have not limited their purposes to pursuing derivative claims.[149] If Plaintiffs must demonstrate a credible basis to suspect wrongdoing at the level of the board or senior management, then they have done so. Gilead's HIV drugs generate 73% of Gilead's revenue and were thus "intrinsically critical to the company's business operation."[150] There is thus a credible basis to suspect that the board and senior management knew about the possible wrongdoing. If they did not, there is a credible basis to suspect that they failed to monitor a business segment that was "mission critical," as well as vitally important to the lives of millions of people.[151]

148 *See* Pls.' Opening Br. at 15–17; Def.'s Answering Br. at 14–15.

149 *See* *AmerisourceBergen*, 2020 WL 132752, at *15, *19.

150 *See* *Marchand v. Barnhill*, 212 A.3d 805, 822 (Del. 2019); *accord.* *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 967–70 (Del. Ch. 1996).

151 *See* *Marchand*, 212 A.3d at 824.

2. Plaintiffs' Purposes Are Their Own.

Only one Plaintiff must demonstrate a proper purpose for the court to grant some level of inspection. Thus, for Gilead to avoid inspection entirely, Gilead must accomplish the difficult task of undermining all five Plaintiffs' purposes. Gilead's primary argument toward this end is that each Plaintiff was a passive conduit in a purely lawyer-driven endeavor and thus lacks a proper purpose under *Wilkinson v. A. Schulman, Inc*.[152] Gilead bears the burden of proving this defense.[153]

152 *See* Def.'s Answering Br. at 22–36 (citing 2017 WL 5289553 (Del. Ch. Nov. 13, 2017)).

153 *See* *Inter-Local Pension Fund GCC/IBT v. Calgon Carbon Corp.,* 2019 WL 479082, at *9 (Del. Ch. Jan. 25, 2019) ("A corporate defendant may resist demand where it shows that the stockholder's stated proper purpose is not the actual purpose for the demand. However, in order to succeed, the defendant must prove that the plaintiff pursued its claim under false pretenses. Such a showing is fact intensive and difficult to establish." (internal quotation marks omitted)), *aff'd* 237 A.3d 818 (Del. 2020).

In *Wilkinson*, the plaintiff's deposition testimony revealed a discrepancy between the plaintiff's actual purpose and the stated purpose in the demand.[154] The plaintiff wanted to investigate the company's negative financial results, but the demand sought to investigate a board decision to accelerate equity awards.[155] Wilkinson's counsel had ignored his client's purpose and chose to send a demand concerning the counsel's purpose.[156] The disconnect between the client and counsel persisted through the Section 220 enforcement action.[157] Wilkinson verified the complaint, but he did nothing to confirm the accuracy of its allegations and knew nothing about the inspection process or litigation.[158] He failed to play any meaningful role in the litigation and testified that he was unaware of any facts concerning the wrongdoing that his counsel sought to investigate.[159] This confluence of unusual facts led the court to find that the plaintiff lacked a proper purpose.[160]

154 *See* *Wilkinson*, 2017 WL 5289553, at *2–3.

155 *Id.*

156 *Id.*

157 *See id.*

158 *Id.* at *3.

159 *Id.* at *2–3.

160 *See id.* at *2–4; *see also* *Calgon Carbon,* 2019 WL 479082, at *9 (noting that the "misalignment of goals between the stockholder and his counsel was a key factor in the [*Wilkinson*] Court's determination that there was no proper purpose for the demand.").

Gilead fails to prove that the facts of this case rise to the level seen in *Wilkinson*. In this case, Plaintiffs testified that they actually sought to investigate wrongdoing.[161] They reviewed their respective Demands and complaints prior to authorizing their service and filing.[162] For the most part, they were knowledgeable about the basis for their Demands.[163] They remained in contact with their respective counsel throughout the demand process and litigation.[164] This testimony is sufficient to establish that Plaintiffs' purposes are their own.

161 *See* Collins Dep. Tr. at 86:22–87:11; Friedt Dep. Tr. at 65:24–66:8; Pettry Dep. Tr. at 77:5–78:11; Trial Tr. at 12:23–13:15 (Ramirez); Ramirez Dep. Tr. at 87:15–19, 98:6–7, 119:9–22; Williams Dep. Tr. at 57:22–58:10.

162 *See* Collins Dep. Tr. at 67:21–24; Friedt Dep. Tr. at 74:18–22, 111:18–112:12, 124:42–125:2; Pettry Dep. Tr. at 59:15–61:21, 101:9–18; Trial Tr. at 12:20–22 (Ramirez); Ramirez Dep. Tr. at 58:22–24; Williams Dep. Tr. at 54:21–24, 77:5–18.

163 *See* Collins Dep. Tr. at 95:17–113:22; Pettry Dep. Tr. at 79:16–82:17; Trial Tr. at 12:23–13:15, 32:5–34:4 (Ramirez); Ramirez Dep. Tr. at 50:22–53:4, 87:15–93:18; Williams Dep. Tr. at 58:21–62:13. Although Friedt demonstrated a general understanding the subject matter of her demand (*see* Friedt Dep. Tr. at 65:24–66:8), her knowledge of the basis for her demand was exceptionally weak; this fact standing alone does not compare to the confluence of unusual facts present in *Wilkinson*.

164 *See* Collins Dep. Tr. at 40:3–122:9; Friedt Dep. Tr. at 61:9–125:2; Pettry Dep. Tr. at 53:6–81:18; Trial Tr. at 10:10–23, 14:8–15:8, 23:20–24:6, 41:20–42:20 (Ramirez); Ramirez Dep. Tr. at 56:5–213:9; Williams Dep. Tr. at 23:4–85:24. Gilead accuses Collins of lying about who initiated the process and his level of involvement based mostly on Collins' poor recall of demands he served on Gilead in 2016 and 2018 and his lack of direct contact with litigation counsel. *See* Def.'s Answering Br. at 28–31. But those demands are largely irrelevant, and Collins' sworn testimony established that he had reviewed the demand letters sent on his behalf and maintained contact with his referring counsel. *See* Collins Dep. Tr. at 40:3–122:9. This is sufficient to support the finding that Collins' stated purposes were his own.

***16** To be sure, Gilead proved that lawyers were heavily involved in the process, but that is to be expected considering the significant role lawyers play in representative litigation generally.

On that point, *In re Fuqua Industries, Inc. Shareholder Litigation*[165] is instructive. There, former Chancellor Chandler denied a motion to disqualify a derivative plaintiff who was unfamiliar with the basic facts of the case and largely deferred control of the litigation to counsel.[166] After canvasing state and federal case law concerning the adequacy standard imposed on derivative plaintiffs, the court held that the plaintiffs' bare knowledge of the "basic facts" was sufficient to meet the adequacy requirement, and that knowledge of "the particulars" was not required.[167] In reaching this conclusion, the court observed that Delaware law provides incentives for private attorneys to bring derivative suits as a solution to the collective action problem, that those attorneys naturally play a "dominant role in prosecuting litigation on behalf of clients," and that lawyer involvement is particularly appropriate "in cases involving fairly abstruse issues of corporate governance and fiduciary duties."[168]

165 752 A.2d 126 (Del. Ch. 1999).

166 *Id.* at 134–37.

167 *Id.* at 136 ("[The plaintiff] was at times quite lucid and able to independently communicate the basic facts and claims underlying her lawsuit. She did not know the particulars.").

168 *Id.* at 135; *id.* at 133 ("Our legal system has privatized in part the enforcement mechanism ... by allowing private attorneys to bring suits on behalf of nominal shareholder plaintiffs."); *see also In re Del Monte Foods Co. S'holders Litig.*, 2011 WL 2535256, at *14 (Del. Ch. June 27, 2011) ("Delaware courts recognize the value of representative litigation."); *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 959 (Del. Ch. 2010) ("[R]epresentative litigation serves as a valuable check on managerial conflicts of interest. Stockholder plaintiffs can and do achieve meaningful results." (citation omitted)); *Bird v. Lida, Inc.*, 681 A.2d 399, 402–03 (Del. Ch. 1996) (explaining that entrepreneurial plaintiff attorneys can "pursue monitoring activities that are wealth increasing for the collectivity (the corporation or the body of its shareholders)").

Of course, the adequacy requirement of Court of Chancery Rule 23.1 at issue in *Fuqua* and the proper purpose requirement of Section 220 at issue in this case are not the same. This decision does not suggest otherwise. The point is that Delaware courts have encouraged stockholders to pursue Section 220 actions in advance of derivative suits for decades.[169] It would be inconsistent with this policy to require that Section 220 plaintiffs know more than what is required of derivative plaintiffs. It would also be inconsistent with this policy to prohibit lawyers from playing a "dominant role" in Section 220 actions while permitting them to do so in derivative litigation. This is particularly so given the increasing complexities plaguing Section 220 actions.[170]

169 *See, e.g.*, *Cal. State Tchrs.' Ret. Sys. v. Alvarez*, 179 A.3d 824, 839 (Del. 2018) ("[T]his Court has repeatedly admonished plaintiffs to use the 'tools at hand' and to request company books and records under Section 220 to attempt to substantiate their allegations before filing derivative complaints."); *Sec. First Corp.*, 687 A.2d at 571 (Del. 1997) ("[A] Section 220 proceeding may serve a salutary mission as a prelude to a derivative suit."); *Ash v. McCall*, 2000 WL 1370341, at *15 n.56 (Del. Ch. Sept. 15, 2000) ("As the Delaware Supreme Court has repeatedly exhorted, shareholders plaintiffs should use the 'tools at hand,' most prominently § 220 books and records actions, to obtain information necessary to sue derivatively.").

170 *See, e.g.*, *Wilkinson*, 2017 WL 5289553, at *3 ("A stockholder obviously can use counsel to seek books and records. Section 220 expressly contemplates that a stockholder can make a demand 'in person or by attorney or other agent.' Indeed, given the complexity of Delaware's sprawling Section 220 jurisprudence, a stockholder is welladvised to secure counsel's assistance." (quoting 8 *Del. C.* § 220(b)); *Calgon Carbon*, 2019 WL 479082, at *10 (holding that stockholders are entitled to rely on counsel "to raise concerns, to advise them on how to remedy those concerns, and to pursue appropriate remedies"); *Kosinski v. GGP Inc.*, 214 A.3d 944, 951–52 (Del. Ch. 2019) ("The fact that Plaintiff sought and accepted the advice of counsel is to his credit, not his detriment."); *see also* Cox et al., *supra* note 6, at 2150 (attributing the increased complexity in Section 220 actions to the fact that "defendants have turned books and records litigation into a surrogate proceeding to litigate the possible merits of the suit where they place obstacles in the plaintiffs' way to obstruct them from employing it as a quick and easy pre-filing too").

***17** The incentives in representative litigation are imperfect, and judicial oversight is required in Section 220 actions as elsewhere. In *Fuqua*, the court went on to admonish the plaintiffs' counsel for effectively "supplanting" his client in a deposition, explaining that "extreme facts call for the court to exercise its discretion and to curb the agency costs inherent in private regulatory and enforcement mechanisms." [171] It was similarly extreme facts that drove the outcome in *Wilkinson*, where the attorneys disregarded their client's objectives entirely and pursued their own. [172]

171 *Fuqua*, 752 A.2d at 133–34.

172 *See* *Wilkinson*, 2017 WL 5289553, at *2–3.

In this case, the degree of lawyer involvement does not come close to the linecrossing conduct at issue in *Fuqua* or *Wilkinson*. This case reflects benign manifestations of the role that plaintiffs' law firms play generally in representative litigation.

Gilead singles out Pettry and Friedt because they were enrolled in a portfolio monitoring program and had no knowledge of alleged wrongdoing at Gilead before counsel contacted them. [173] But there is nothing inappropriate about such programs. They are voluntary and serve the purpose of keeping stockholders abreast of corporate developments that may affect the value of their stock holdings. They do not obligate participants to send Section 220 demands or file suits. [174]

173 *See* Def.'s Answering Br. at 24–28; Trial Tr. at 147:9–16; *id.* at 149:22–150:4; Friedt Dep. Tr. at 61:24–64:9; Pettry Dep. Tr. at 38:12–22, 40:19–41:22, 75:10–19.

174 *See* *Calgon Carbon*, 2019 WL 479082, at *10 ("Advice from counsel comes in many forms. Individual stockholders and smaller institutions cannot be expected to have an independent, in-house team to cultivate purely homegrown legal analyses of their investments. Stockholders are entitled to hire counsel to review and monitor their portfolios for potential mismanagement or wrongdoing. They are also entitled to rely on that counsel to raise concerns, to advise them on how to remedy those concerns, and to pursue appropriate remedies.").

Gilead also complains about Hollywood's involvement in portfolio monitoring programs, [175] but those arguments are similarly misguided. Hollywood is a police officers' retirement fund that is run by a seven-member Board of Trustees, all of whom are volunteers. [176] Hollywood works with portfolio monitoring counsel, who raise potential issues with Hollywood, first by bringing them the attention of Hollywood's outside general counsel. [177] If the general counsel determines that the matter is worthy of consideration, he elevates the discussion first to the Chairman of the Board and then to the Board to make the determination of whether to take action. [178] Hollywood followed its process in this case, [179] and that process is sound. Like boards of Delaware corporations, [180] boards of pension funds are encouraged to rely on professional advisors when fulfilling their duties to act in the best interests of the retirees. Hollywood's reliance on professional advisors, including portfolio monitoring counsel, strengthens the integrity of Hollywood's purpose, not the opposite.

175 *See* Def.'s Answering Br. at 31–33; Trial Tr. at 156:15–158:22.

176 *See* Williams Dep. Tr. at 22:23–23:3, 42:1–11; *see also id.* at 25:7–9 ("Q. Who at Hollywood has decision-making authority with respect to litigation decisions? A. That would be the board of trustees.").

177 *Id.* at 41:13–21.

178 *Id.* at 55:11–56:7.

179 *See* JX-129 at 1; Williams Dep. Tr. 56:8–57:3.

180 *See, e.g.,* 8 *Del. C.* § 141(e).

***18** Demonstrating how far Gilead was willing to go in attacking Plaintiffs, Gilead tries to impugn Ramirez's testimony based on a cut-and-paste error in Ramirez's retainer agreement with counsel. [181] The error (failing to replace the word "opioid") was made by counsel—not Ramirez. [182] Ramirez explained that he was caught by surprise when asked about the error at his deposition; the "curveball," as he called it, confused him because this case has nothing to with opioids. [183] Ramirez confirmed throughout his deposition and trial testimony that his aim in seeking records was true, even stating that he was inspired by an article he read related to wrongdoing related to Gilead's HIV drugs. [184]

181 *See* Trial Tr. at 39:21–40:8 (Ramirez).

182 *See id.* at 10:19–11:11, 40:16–21 (Ramirez).

183 *Id.* at 13:13–15, 32:5–34:4 (Ramirez).

184 *See id.* at 12:23–13:15 (Ramirez); Ramirez Dep. Tr. at 87:15–19, 98:6–7, 119:9–22.

In the end, Gilead failed to establish that any Plaintiff's lawyers' involvement undermined any Plaintiff's purpose (much less all of them). The record reflects that each Plaintiff genuinely holds its stated purpose of investigating possible wrongdoing in the development and commercialization of Gilead's HIV treatments.

B. Gilead's So-Called "Standing" Arguments

In its second attack on Plaintiffs' purposes, Gilead argues that "Plaintiffs' Demands are defective because Plaintiffs lack standing to investigate the claimed wrongdoing." [185] This is so, according to Gilead, because any derivative claims challenging the wrongdoing at issue would be dismissed for the following reasons: (i) Plaintiffs did not own shares at the time of the alleged wrongdoing; [186] (ii) the derivative claims they seek to pursue are time-barred; [187] and (iii) any derivative claims they seek to pursue would be barred by an exculpatory charter provision. [188]

185 Def.'s Answering Br. at 36.

186 *See id.* at 36 (citing *Graulich v. Dell Inc.*, 2011 WL 1843813, at *5 (Del. Ch. May 16, 2011) ("If plaintiff would not have standing to bring suit, plaintiff does not have a proper purpose to investigate wrongdoing because its stated purpose is not reasonably related to its role as a stockholder."); *W. Coast Mgmt. & Cap., LLC v. Carrier Access Corp.*, 914 A.2d 636, 641 (Del. Ch. 2006) ("If a books and records demand is to investigate wrongdoing and the plaintiff's sole purpose is to pursue a derivative suit, the plaintiff must have standing to pursue the underlying suit[.]")); *id.* at 37–38.

187 *See id.* at 36 (citing *Graulich*, 2011 WL 1843813, at *6 (denying Section 220 demand where "plaintiff ha[d] articulated no stated purpose other than to investigate wrongdoing in order to bring an appropriate suit against defendant, and plaintiff [was] time-barred from bringing that suit")); *id.* at 39–43.

188 *See id.* at 43 n.26 (citing *Se. Pa. Transp. Auth. v. Abbvie Inc.*, 2015 WL 1753033, at *13 (Del. Ch. Apr. 15, 2015) (investigating corporate wrongdoing and waste were not proper purposes when the facts alleged amounted to only a possible breach of the duty of care, damages for which would be barred by the corporation's exculpation clause)).

Gilead devoted extensive resources to this argument. To support it, Gilead served discovery, brought a motion to compel, and took five depositions. Gilead explored these issues at trial and devoted eight pages of post-trial briefing to them. [189]

189 *See* Trial Tr. at 185:4–190:15; Def.'s Answering Br. at 36–43.

There are a number of vexing aspects of this argument. For starters, although certain of these points may speak to a plaintiff's standing to pursue a derivative suit, they do not speak to a plaintiff's standing to pursue a Section 220 action. Under Delaware law, "[t]he issue of standing is concerned 'only with the question of *who* is entitled to mount a legal challenge and not with the merits of the subject matter in controversy.' " [190] Where the right at issue is statutory, "the real determinant" of standing "is the statutory language itself." [191] Section 220(c) answers the question of *who* has standing to pursue an enforcement action under Section 220(c)—a stockholder. [192] In this case, it is undisputed that each Plaintiff held stock when filing their complaints (and also for significant periods prior to filing the complaints). [193]

190 *Dover Hist. Soc'y v. City of Dover Plan. Comm'n*, 838 A.2d 1103, 1110 (Del. 2003) (quoting *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991)).

191 *Oceanport Indus., Inc. v. Wilm. Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994); *Newark Landlord Assoc. v. City of Newark*, 2003 WL 21448560, at *5 (Del. Ch. June 13, 2003).

192 *See* 8 *Del. C.* § 220(c) (providing that "[i]f the corporation ... refuses to permit an inspection sought by a stockholder ... *the stockholder* may apply to the Court of Chancery for an order to compel such inspection" (emphasis added)); *see also Weingarten v. Monster Worldwide, Inc.*, 2017 WL 752179, at *5 (Del. Ch. Feb. 27, 2017) ("[T]he legislature has made clear that only those who are stockholders at the time of filing have standing to invoke this Court's assistance under Section 220.").

193 Collins has held Gilead stock since 1999, except for a five-month period in 2008. JX-52. Friedt has held Gilead stock since 2013. *See* JX-157 at 9; Friedt Dep. Tr. at 31:15–19, 38:13–22. Pettry has held Gilead stock since 2016. *See* JX-155 at 9; Pettry Dep. Tr. at 43:7–16. Ramirez has held Gilead stock since 2016. *See* JX-46; Ramirez Dep. Tr. at 27:3–15. Hollywood has held Gilead stock since 2010. JX-161 at 9.

***19** Gilead's arguments speak not to Plaintiffs' standing to pursue a Section 220 action but, rather, to the viability of derivative claims that Plaintiffs might pursue in the future. "This Court has repeatedly stated that a Section 220 proceeding does not warrant a trial on the merits of underlying claims."[194] Yet Gilead pushes the court do just that—evaluate, in the context of a summary proceeding, defenses to causes of action that have not yet been asserted and might have never been asserted.

194 *In re UnitedHealth Gp., Inc. Section 220 Litig.*, 2018 WL 1110849, at *7 & n.95 (Del. Ch. Feb. 28, 2018) (Montgomery-Reeves, V.C.) (collecting cases); *see also Lavin*, 2017 WL 6728702, at *9 (Slights, V.C.) (holding that a *Corwin* defense will not impede an otherwise properly supported demand for inspection and observing that "when a stockholder demands inspection as a means to investigate wrongdoing in contemplation of a class or derivative action, Delaware courts generally do not evaluate the viability of the demand based on the likelihood that the stockholder will succeed in a plenary action"); *Amalgamated Bank v. UICI*, 2005 WL 1377432, *2 (Del. Ch. June 2, 2005) (Noble, V.C.) ("The potential availability of affirmative defenses to withstand fiduciary duty claims cannot solely act to bar a plaintiff under Section 220. First, these are summary proceedings; the factual development necessary to assess fairly the merits of a time-bar affirmative defense, for example, as to each potential claim, is not consistent with the statutory purpose. Second, courts should not be called upon to evaluate the viability of affirmative defenses to causes of actions that have not been, and more importantly may not ever be, asserted. Third, that a claim arising out of a particular transaction may be barred does not mandate the conclusion that documents relating to that transaction are not 'necessary, essential, and sufficient' for a shareholder's proper purpose with respect to more recent transactions.");

LAMPERS, 2007 WL 2896540, at *12 (Noble, V.C.) (rejecting, in a Section 220 proceeding, that no springloading ever occurred because "by raising such a defense, Countrywide seeks to litigate the ultimate issue in a possible future derivative suit that might eventually be filed by LAMPERS" and holding that "[t]his is neither the time nor the procedural setting to address that issue").

Beyond the obvious practical concerns raised by such an approach, the theoretical problems with Gilead's argument are rife, as Vice Chancellor Laster persuasively explained in *AmerisourceBergen*.[195] As the court held in *AmerisourceBergen*, a defense to a future derivative claim affects a stockholder's ability to invoke Section 220 only where the stockholder identifies pursuing a derivative claim as its *sole* purpose, as was the case in *Graulich* and *West Coast Management*.[196] In this case, Plaintiffs did not limit themselves to the sole purpose of pursuing derivative claims.[197] Rather, Plaintiffs expressly identified multiple potential end-uses for the information obtained through their investigations.[198]

195 *See AmerisourceBergen*, 2020 WL 132752, at *14–24; *see also Okla. Firefighters Pension & Ret. Sys. v. Citigroup Inc.*, 2014 WL 5351345, at *6 (Del. Ch. Sept. 30, 2014) ("Although Citigroup disclaims any effort to turn this proceeding into a trial on the merits of Plaintiffs possible derivative claims, Citigroup essentially seeks

that result by implying that Plaintiff must have specific, tangible evidence that Citigroup's Board or senior management was complicit in the fraud at Banamex. That argument ignores the inferences that this Court can—and must—draw under the credible basis standard, and would discourage the very behavior this Court has sought to encourage among would-be derivative or class plaintiffs.”).

196 *See* *Graulich*, 2011 WL 1843813, at *5 (“[P]laintiff's *only* purpose is to pursue potential derivative claims.” (emphasis added)); *W. Coast Mgmt.*, 914 A.2d at 641 (“It is clear that West Coast's *sole purpose* for investigating claims of wrongdoing is to obtain additional information to replead demand futility in order to pursue a second derivative suit.” (emphasis added)). To be clear, a Section 220 plaintiff is not required to limit the end-uses of the information they seek at the outset of their investigation. *AmerisourceBergen* 2020 WL 132752, at *12 (holding that the proper purpose requirement does not require a stockholder to pick one of these end-uses at the outset, or “commit in advance to what it will do with an investigation before seeing the results of the investigation”).

197 *See* Def.'s Answering Br. at 37 (acknowledging that “Plaintiffs claim that their purposes ‘are not limited to bringing a derivative lawsuit’ ” (citing Pls.' Opening Br. at 46)); JX-123 at 2 (Ramirez's demand stating that if the investigation supports doing so, he “*may* use the documents to pursue a shareholder derivative action” (emphasis added)); JX-128 at 15 (Collins's demand stating that the information sought will enable him “to determine whether wrongdoing or mismanagement has taken place such that it would be appropriate to initiate litigation”); JX-108 at 1 (Pettry's demand listing “presenting a litigation demand to the Board” or “suggesting corporate governance reforms” as other potential end uses of the fruits of their investigation); JX-113 at 1 (Friedt's demand listing “presenting a litigation demand to the Board” or “suggesting corporate governance reforms” as other potential end uses of the fruits of their investigation); JX-124 at 1 (Hollywood's demand expressly stating that Hollywood reserves the right to “take other action to seek appropriate relief”).

198 *See* Pls.' Opening Br. at 25–45.

***20** Gilead acknowledges that Plaintiffs have stated multiple potential end-uses for the information obtained through their investigations,[199] but Gilead pivots to argue that “it is *obvious* based on Plaintiffs' [i] deposition testimony, coupled with their [ii] retention agreements, that their *only true purpose is to pursue such a lawsuit*.”[200]

199 *See* Def.'s Answering Br. at 37 (acknowledging that “Plaintiffs claim that their purposes ‘are not limited to bringing a derivative lawsuit’ ” (citing Pls.' Opening Br. at 46)).

200 *Id.* (emphasis added).

A review of Plaintiffs' testimony and a close examination of Gilead's citations reveal that Gilead's position is unsupported and its citations are misleading. As an initial matter, although Gilead makes this point as to “Plaintiffs” as a whole, Gilead does not cite to any deposition testimony from one of the five Plaintiffs—Hollywood.[201] Nor could they. Hollywood's 30(b)(6) representative Williams testified that he had not predetermined what would happen after the investigation.[202] Williams, a retired police officer, expressly likened a Section 220 inspection to a police investigation, and stated that “[t]his is simply an investigation. If it turns out that there is no [wrongdoing], then it will be the end of it.”[203] Gilead can only avoid inspection if it defeats all five Plaintiffs' proper purposes. By failing to show that Hollywood had predetermined what to do with the fruits of its investigation, Gilead's argument falls short from the get-go.

201 *See id.* at 36–43.

202 *See* Williams Dep. Tr. at 58:1–10 (“Well, as I understand it, it's similar to a police investigation, if you will. If there is some wrongdoing that's being alleged, there's an investigation that follows. That investigation may turn out to be completely prudent. Any and all the action taken was in the best interests of the company. And as I stated before, if there's nothing there, then we move on. If it turns out that there's wrongdoing, then the matter would be brought back to the board for any other consideration.”).

203 *Id.* 52:1–3; *see also id.* at 51:10–17 ("Q. And when you say 'the action,' what do you mean by that? A. The books and records investigation involving Gilead. Q. Has Hollywood considered bringing a derivative lawsuit related to the allegations in the Section 220 demand letter? A. No.").

Gilead's other citations amount to misrepresentations of the record. For the position that it is "obvious" from "Plaintiffs' deposition testimony" that Plaintiffs' "only true purpose" was to pursue derivative claims, Gilead offers the following:

- Gilead cites to the portion of Collins's testimony where Collins directly denies any plans to file a derivative claim.[204] The examining attorney asked: "Do you intend to file a derivative action against Gilead?" Collins responded: "I don't have any plans to do that at the moment."[205] The attorney continued: "Are you aware of any other Gilead stockholders who are contemplating bringing a derivative action against Gilead?" He responded: "No, I'm not."[206]

- Gilead cites to the portion of Pettry's testimony where she directly denies that her purpose is limited to pursuing a derivative claim.[207] The examining attorney asked: "Now, at the time you entered into this engagement agreement [with counsel], did you intend to file derivative litigation relating to Gilead?" Pettry answered: "It was a matter of *first finding out*. I mean, obviously, although it's *potentially* a shareholder derivative matter, clearly there was first to do inspection demand to get information in order to determine *whether* it's appropriate to file derivative, shareholder litigation."[208]

***21** • Gilead cites to the portion of Ramirez's deposition transcript where Ramirez uses equivocal language when referring to a future derivative lawsuit.[209] Counsel for the defendants identified each category of documents requested in Ramirez's demand and asked: "[F]or what purpose do you need this information?"[210] In response to the first few such questions, Ramirez vaguely indicated that he believed that the information would strengthen his "case."[211] In response to the last such question, Ramirez went further to say that he believed the information would strengthen the allegations for the purpose of a potential lawsuit, but he used conditional language, stating: "*if* there is a case to be brought."[212] The reference to a "case to be brought" called for a follow-up question, which counsel eventually asked: "What specific case are you talking about."[213] Ramirez responded by claiming privilege, but again using conditional language: "I think any of the discussions about any potential case, *if there is to be one*, were between my counsel and I. So I don't know if I can properly answer that for you."[214] The examining attorney let the questioning end there.[215]

- Gilead cites to the portions of Friedt's testimony where Friedt suggests that she will rely on her counsel in determining the end-uses of her investigation.[216] The lead-off question in this series, which the examiner insisted required a "yes or no" response, was: "[H]ave you informed Gilead that you may file a derivative action against it?"[217] To this question, Friedt responded "[t]hrough counsel, yes," and then said "I left it up to my counsel to inform Gilead."[218] The examiner had not previously asked whether Friedt had considered filing a derivative claim, and thus the question assumed aspects of the very fact that Gilead seeks to prove—Friedt's intent to pursue derivative claims. Moreover, on its face, this examiner's question only asks whether Friedt "*may*" file a derivative action, and not that she has predetermined that a derivative claim is the only end-use she intended to pursue. Friedt later clarified, in other pages specifically relied on by Gilead, that she intended to leave it to her counsel to determine whether to pursue derivative claims, implicitly denying any then-present intention of pursuing derivative claims.[219]

204 Def.'s Answering Br. at 37 (citing Collins Dep. Tr. at 103–05).

205 Collins Dep. Tr. at 104:19–23.

206 *Id.* at 105:1–4.

207 Def.'s Answering Br. at 37 (citing Pettry Dep. Tr. at 64–65).

208 Pettry Dep. Tr. at 64:23–65:8 (emphasis added).

209 Def.'s Answering Br. at 37 (citing Ramirez Dep. Tr. at 102–12).

210 Ramirez Dep. Tr. at 107:21–22, 108:19–20, 110:1–2.

211 *See id.* at 108:3–5 ("I think they could help strengthen our case against the allegations."); *id.* at 109:15–17 ("As I had previously stated, I believe they could shed some light and strengthen our case."); *id.* at 110:15–17 ("I would again say adding merit and strength to the allegations that were present ... for all the points as like a collective.").

212 *Id.* at 111:18–21 (emphasis added) ("[A]s previously stated, these conversations could add merit and strength to our allegations, if there is to be a case brought.").

213 *Id.* at 112:14–15.

214 *Id.* at 112:16–20 (emphasis added).

215 *See id.*

216 Def.'s Answering Br. at 37 (citing Friedt Dep. Tr. at 54–56).

217 Friedt Dep. Tr. at 54:1–5.

218 *Id.* at 54:9–15.

219 *Id.* at 81:4–9 ("Q. At the time you entered into this engagement agreement, did you intend to file a derivative action relating to Gilead ... ? A.... I would leave that up to my counsel.").

This deposition testimony does not support, and portions directly contradict, Gilead's contention that Plaintiffs' "only true purpose" is to pursue a derivative lawsuit.

Plaintiffs' retention agreements with counsel similarly fail to demonstrate that Plaintiffs' sole purpose was to pursue a derivative suit. Gilead argues that "the retention agreements make clear that counsel will not be paid until Plaintiffs achieve a financial settlement or judgment—an implausible scenario absent the prosecution of derivative claims."[220] Once again, Gilead fails to make this point as to all Plaintiffs—only four of the five Plaintiffs executed retention agreements with counsel.[221] Collins represented that he did not have a retention agreement with counsel.[222]

220 Def.'s Opening Br. at 37 (citing JX-79 at 2 (Friedt Retention Agreement); JX-80 at 2 (Pettry Retention Agreement); JX-87 at 1–2 (Ramirez Retention Agreement); JX-122 at 2 (Hollywood Retention Agreement)).

221 *See* JX-79 (Friedt Retention Agreement); JX-80 (Pettry Retention Agreement); JX-87 (Ramirez Retention Agreement); JX-122 (Hollywood Retention Agreement).

222 Collins Dep. Tr. at 45:19–24.

***22** It is true that plaintiffs' attorneys commonly take matters on contingency and receive compensation only as a consequence of the prosecution and settlement of derivative claims. This common arrangement is, again, a benign aspect of Delaware's solution to the collective action problem that stockholders face. Moreover, the fact that retention agreements with counsel provide that counsel only gets paid in the event of plenary litigation does not prevent Plaintiffs from using "the fruits of their investigation for other ends."[223] It is logical that the agreements would address litigation because "[t]he plaintiffs would need their counsel to conduct litigation," but not to pursue alternative courses of action.[224] The retention agreements standing alone, therefore, do not undermine Plaintiffs' proper purposes.

223 *See* AmerisourceBergen, 2020 WL 132752 at *14.

224 *Id.*

To sum up the defects in Gilead's so-called "standing" arguments as a whole: They are not actually about standing to bring a Section 220 action. They speak to the viability of a derivative claim, which is largely beyond the scope of Section 220 proceedings. Even the authorities on which Gilead relies limit the application of Gilead's arguments to situations where pursuing a derivative claim is the plaintiff's sole purpose. Section 220 plaintiffs generally need not specify the end-uses of their investigation at the outset of their investigation, and Plaintiffs here have stated multiple potential end-uses. Gilead's arguments to the contrary based on Plaintiffs' deposition testimony fail to address all Plaintiffs and are misleading. Plaintiffs' retention agreements with their counsel do not support Gilead's point.

Gilead's arguments fail for other reasons as well. Gilead argues that Plaintiffs lack standing to seek inspection because Plaintiffs did not own shares at the time of the possible wrongdoing.[225] Yet, in *Saito*, the Delaware Supreme Court found that "the date on which a stockholder first acquired the corporation's stock does not control the scope of records available under § 220."[226] As the court explained, a stockholder can seek inspection of records pre-dating their stock ownership "[i]f activities that occurred before the purchase date are 'reasonably related' to the stockholder's interest as a stockholder."[227] A document can reasonably relate to a stockholder's current interests if it provides background and context to the current or ongoing wrong the stockholder seeks to investigate.[228] In this case, any records sought that arguably pre-date Plaintiffs' ownership of Gilead stock are "reasonably related" to Plaintiffs' current interest as stockholders, and concern post-purchase date wrongs that have their roots in earlier events.

225 *See* Def.'s Answering Br. at 36 (citing *Graulich*, 2011 WL 1843813, at *5 ("If plaintiff would not have standing to bring suit, plaintiff does not have a proper purpose to investigate wrongdoing because its stated purpose is not reasonably related to its role as a stockholder.")); *W. Coast Mgmt.*, 914 A.2d at 641 ("If a books and records demand is to investigate wrongdoing and the plaintiff's sole purpose is to pursue a derivative suit, the plaintiff must have standing to pursue the underlying suit[.]")).

226 *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 117 (Del. 2002).

227 *Id.*

228 *UICI*, 2005 WL 1377432, at *2 ("A document that contributes to the investigation of a continuing wrong or provides background and context to a current, actionable wrong may be relevant and, indeed, necessary to a shareholder's proper purpose regardless of whether the events revealed in the documents are themselves actionable.").

In any event, Gilead's timing-of-ownership argument does not apply to the on-going False Claim Acts investigations, as the antitrust abuses, mass torts, and patent violations are all alleged to be continuing.[229]

229 *See* JX-82 at ¶ 2; JX-98 at 3, 69–75; JX-244 at ¶¶ 155, 163.

***23** There is also a non-frivolous argument that Gilead waived its statute of limitations and Section 102(b)(7) defenses by failing to identify them in its interrogatory responses, despite this court ordering discovery into Gilead's defenses.[230] Gilead responds that it was not required to raise these defenses in its answer or otherwise because they are not defenses to a books and records action but, rather, to the plenary lawsuit.[231] This decision need not reach this argument given the multiple other defects in Gilead's position. But it bears noting that Gilead's position only underscores that Gilead's "standing" arguments speak to the viability of a potential derivative claim and not Plaintiffs' entitlement to inspection under Section 220.

230 *See* JX-164; JX-191; JX-206; JX-210; *see also IQ Hldgs., Inc. v. Am. Com. Lines Inc.*, 2012 WL 3877790, *1 (Del. Ch. Aug. 30, 2012) ("The underlying purpose of discovery in general is to reduce the element of surprise at trial ....").

231 *See* Def.'s Answering Br. at 40 n.23 ("The statute of limitations is not an affirmative defense in a books and records action.").

C. Scope of Production

Once a Section 220 plaintiff establishes a proper purpose, the court must determine the scope of inspection. A stockholder with a proper purpose "bears the burden of proving that each category of books and records is essential to accomplishment of the stockholder's articulated purpose for the inspection."[232]

232 *Palantir*, 203 A.3d at 751 (quoting *Thomas & Betts*, 681 A.2d at 1035).

The Delaware Supreme Court recently articulated this burden as follows:

> Books and records satisfy this standard "if they address the 'crux of the shareholder's purpose' and if that information 'is unavailable from another source.' " That determination is "fact specific and will necessarily depend on the context in which the shareholder's inspection demand arises." Keeping in mind that § 220 inspections are not tantamount to "comprehensive discovery," the Court of Chancery must tailor its order for inspection to cover only those books and records that are "essential and sufficient to the stockholder's stated purpose." In other words, the court must give the

petitioner everything that is "essential," but stop at what is "sufficient." [233]

233 *Id.* at 751–52.

In this case, Plaintiffs seek inspection of formal board materials, including board minutes, presentations, reports, agendas, and preparation materials, dating back to 2004 and concerning the topics of the Demands. Plaintiffs additionally seek five specific categories of documents.

Gilead's response is three-fold. Gilead first argues that inspection should be limited to formal board materials. Gilead next makes arguments as to each category of additional documents. Gilead finally argues that each Plaintiff should be limited to inspecting only the documents specifically sought in their respective Demands.

1. Formal Board Materials

Gilead agrees that, upon a finding that Plaintiffs have stated proper purposes, the production of the formal board materials is appropriate. [234] Gilead has collected and reviewed approximately 1,600 centrally-stored formal board materials from December 1, 2004 to February 25, 2020, and identified over 400 of them as potentially related to the topics sought in the Demands. [235] Because Plaintiffs have stated proper purposes, Plaintiffs are entitled to inspect this category of documents. These documents should have been produced in response to the Demands without resort to litigation.

234 Def.'s Answering Br. at 47–50.

235 JX-210 at 21–23.

2. Categories of Additional Documents

Gilead argues that the court should limit inspection to formal board materials based on what Gilead describes as the "default rule that only formal board materials are necessary and essential in a Section 220 proceeding." [236] There is no such default rule.

236 Def.'s Answering Br. at 54.

***24** Gilead relies primarily on Vice Chancellor Laster's decision in *AmerisourceBergen*. [237] There, the Vice Chancellor classified corporate books and records into three categories: "Formal Board Materials," [238] "Informal Board Materials," [239] and "Officer-Level Materials." [240] The Vice Chancellor explained that "[t]he starting point (and often the ending point) for an adequate inspection will be board-level documents." [241] The premise for that observation is that companies can and should provide these documents voluntarily without forcing stockholders to litigate over them. Gilead misses this point and invokes the *AmerisourceBergen* taxonomy for a contrary purpose—to broaden the already extensive disputes among the parties.

237 *See id.*

238 *AmerisourceBergen*, 2020 WL 132752 at *24 (defining "Formal Board Materials" as "board-level documents that formally evidence the directors' deliberations and decisions and comprise the materials that the directors formally received and considered") (collecting cases limiting the scope of production to Formal Board Material); *see also* *Woods v. Sahara Enters.*, 2020 WL 4200131, at *11 (Del. Ch. July 22, 2020) (same).

239 *AmerisourceBergen*, 2020 WL 132752 at *25 (defining "Informal Board Materials" as "generally include[ing] communications between directors and the corporation's officers and senior employees, such as information distributed to the directors outside of formal channels, in between formal meetings, or in connection with other types of board gatherings" and sometimes including "emails and other types of communication sent among the directors themselves, even if the directors used non-corporate accounts").

240 *Id.* (defining "Officer Level Materials" as "communications and materials that were only shared among or reviewed by officers and employees").

241 *Id.* at *24.

Formal board materials need not be an end point, particularly where the wrongdoing appears vast. As the Vice Chancellor further explained in *AmerisourceBergen*, "[i]f the plaintiff makes a proper showing, an inspection may extend to informal materials," [242] and "wide-ranging mismanagement or waste" might require a "more wide-ranging inspection."[243] In this case, Gilead's efforts to draw the line at formal board materials fall short because Plaintiffs have shown a need for additional categories of documents by demonstrating a credible basis to suspect wide-ranging misconduct and wrongdoing.

242 *Id.* at *25.

243 *Id.* at *24 (first quoting *Freund v. Lucent Techs., Inc.*, 2003 WL 139766, at *5 (Del. Ch. Jan. 9, 2003); then citing *Skoglund v. Ormand Indus.*, 372 A.2d 204, 211 (Del. Ch. 1976)).

In addition to formal board materials, Plaintiffs seek the following categories of documents: (a) the agreements with other companies at issue in the antitrust litigation; (b) policies and procedures concerning the topics covered in the Demands; (c) senior management materials; (d) communications between Gilead and the government; and (e) director questionnaires.

a. Anticompetitive Agreements

Plaintiffs seek to inspect the agreements between Gilead and its competitors at issue in the antitrust litigation.[244] Plaintiffs suspect that these agreements violated antitrust laws or otherwise perpetuate unlawful anticompetitive activity.[245] They are core to the wrongdoing Plaintiffs seek to investigate.[246] They are therefore necessary and essential to Plaintiffs' proper purposes. They are unlikely to be available from another source. Accordingly, Plaintiffs are entitled to inspect this category of documents.[247] Because of the centrality of these agreements to Plaintiffs' purposes, Gilead should have produced them without resorting to litigation.

244 Pls.' Opening Br. at 56–57.

245 *Id.*

246 *See, e.g.*, *AmerisourceBergen*, 2020 WL 132752, at *28 (ordering inspection of settlement agreements with the DEA to identify the scope of the company's compliance obligations and determine whether the Board willfully disregarded them).

247 The parties dispute the significance of *AmerisourceBergen* on this category of documents. In that case, the court ordered inspection of documents related to the defendant's participation in trade associations where the plaintiffs suspected that the defendant violated the law by collaborating with trade associations. *See id.* Plaintiffs argue that this outcome weighs in favor of production of the antitrust agreements in this action. Pls.' Opening Br. at 57 n.191. Gilead responds that the Court limited production in *AmerisourceBergen* to formal board materials, and argues that this court should "follow *AmerisourceBergen* and not order the production of the underlying antitrust agreements." Def.'s Answering Br. at 53. Defendant misconstrues *AmerisourceBergen*, where the Court found that "[t]he record is inadequate to determine whether the plaintiffs can inspect any other materials because AmerisourceBergen refused to provide any discovery into what types of books and records exist, how they are maintained, and who has them." *See* 2020 WL 132752, at *1. The court expressly granted the plaintiffs the ability to seek further discovery to determine what books and records exist. *See id.* at *29. Here, Plaintiffs obtained that discovery, so there is no need for bifurcation.

***25** In holding that Plaintiffs are entitled to inspect the allegedly anticompetitive agreements, the court does not distinguish between the Gilead/Japan Tobacco agreement and those still at issue in the *Staley* Action. The complete set of agreements is necessary to understanding the pattern of behavior that the Demands seek to investigate.

b. Policies and Procedures

Plaintiffs seek to inspect Gilead's policies and procedures concerning Gilead's compliance with antitrust regulations and patent law.[248] These requests seek discrete categories of information, which are easy to produce, and where inspection is routinely granted.[249] Gilead argues that the formal board materials from the relevant time period are sufficient to understand whether Board and management decisions were made in compliance with Gilead's policies and procedures.[250] But the formal board materials may not reflect what, if any, policies and procedures were in place during that time period. These documents are therefore necessary and essential to Plaintiffs' proper purposes. They are unlikely to be available from another source. Accordingly, Plaintiffs are entitled to inspect this category of documents. This is another category of documents that Gilead should have produced without resorting to litigation.

248 Pls.' Opening Br. at 57.

249 *See, e.g.*, *AmerisourceBergen*, 2020 WL 132752, at *27 (ordering production of the Amerisourcebergen's written policies regarding its anti-diversion and compliance program); *In re Facebook, Inc. Section 220 Litig. (Facebook 220)*, 2019 WL 2320842, at *18 (Del. Ch. May 30, 2019) (ordering the production of Facebook's formally adopted policies and procedures regarding data privacy and access to user data, including those promulgated following the entry of the Consent Decree); *UnitedHealth*, 2018 WL 1110849, at *10 (ordering the production of UnitedHealth's policies and procedures regarding Medicare billing); *Lucent*, 2003 WL 139766, at *6 (ordering production of policies and procedures concerning accounting compliance, including policies for (i) preparing revenue "targets" or preparing and disclosing "financial guidance" or projections; and (ii) recognizing revenue, on sales to its distributors).

250 Def.'s Answering Br. at 53–54.

c. Senior Management Materials

Plaintiffs seek to inspect two categories of officer-level documents that they refer to as "Senior Management Materials" to determine "whether and to what extent mismanagement occurred and what information was transmitted to Gilead's directors and officers." [251]

251 Pls.' Opening Br. at 60–62.

This court will permit inspection of officer-level documents under certain circumstances. As the Delaware Supreme Court described in *Saito* when affirming inspection of officer-level documents, "generally, the source of the documents in a corporation's possession should not control a stockholder's right to inspection under § 220." [252] Although inspection of officer-level documents can be appropriate, in general, "the Court of Chancery should not order emails to be produced when other materials (*e.g.*, traditional board-level materials, such as minutes) would accomplish the petitioner's proper purpose, but if non-email books and records are insufficient, then the court should order emails to be produced." [253] The burden lies on Plaintiffs to establish a reasonable basis to suspect that other materials are likely to be insufficient to accomplish the stockholder's proper purpose.

252 *Saito*, 806 A.2d at 118; *accord. Wal-Mart Stores, Inc.*, 95 A.3d at 1273; *see also Woods*, 2020 WL 4200131, at *11; *Mudrick Cap. Mgmt., L.P. v. Globalstar, Inc.*, 2018 WL 3625680, at *9 (Del. Ch. July 30, 2018).

253 *Palantir*, 203 A.3d at 752–53.

***26** First, Plaintiffs seek approximately thirty sets of materials emailed to senior management members prior to their bi-monthly "Leadership Team Meetings" and ad hoc meetings. [254] Plaintiffs observe that Gilead stores the materials circulated in connection with the bi-monthly meetings in a centralized location. [255] Plaintiffs contend that these materials are likely to include information about the government investigations, the antitrust lawsuits, and Gilead's decision to sue the U.S. government. [256] These thirty sets are necessary and essential to Plaintiffs' ability to investigate whether and to what extent wrongdoing occurred and what information was transmitted to Gilead's directors and officers. [257] They are also unlikely to be available from another source. Accordingly, Plaintiffs are entitled to inspect this category of documents.

254 Trial Tr. at 87:7–21; JX-210 at 26, 39.

255 *See* Pls.' Opening Br. at 62 & n.204; *see also* JX-210 at 40 ("From June 2019 to present, documents may be accessed via OneDrive and projected for shared viewing.").

256 Pls.' Opening Br. at 60–62.

257 *Cf. Facebook 220*, 2019 WL 2320842, at *18 (ordering the production of "electronic communications, if coming from, directed to or copied to a member of the Board, concerning"

the plaintiffs' allegations in that case, "to be collected from the following [senior management] custodians: Erskine B. Bowles, Sheryl Sandberg, Alex Stamos, and Mark Zuckerberg").

Second, Plaintiffs request electronically stored information—previously gathered and produced in connection with the congressional investigation, the *Staley* Action, and a 2016 subpoena—from the files of two former inside directors John Milligan and John Martin. [258] Plaintiffs say that Milligan and Martin were highly influential Board members and thus their documents are critical because any wrongdoing will likely involve what these Board members knew. [259] As to this one category, Plaintiffs' efforts fall short. A director's status as a management member or highly influential Board member can sometimes provide a basis for inspecting that director's emails, typically where the director played a key role in the suspected wrongdoing. [260] The mere fact that a director holds a management position or is influential seldom makes their documents necessary and essential to investigating wrongdoing. [261] In this case, Plaintiffs offer no additional justification for seeking to inspect these documents. Plaintiffs have therefore failed to demonstrate that these emails are necessary and essential to their stated purposes and are not entitled to inspect this category of documents.

258 Pls.' Opening Br. at 61–62; *see also* JX-210 at 27 n.4 (alleging that Milligan and Martin, as former executives, were "custodians in certain Matters by virtue of their roles as Senior Officers).

259 Pls.' Opening Br. at 61–62.

260 *See, e.g.*, *Yahoo!*, 132 A.3d at 791–793 (permitting inspection of CEO's "email and other electronic documents" because she "was the principal corporate actor in the hiring process").

261 *Cf. Kaufman v. CA, Inc. (Kaufman II)*, 905 A.2d 749, 755 (Del. Ch. 2006) (holding that the plaintiff "conflate[d] the usefulness or responsiveness of further discovery ... with the proper standard of necessity under Section 220" and "[t]hat a document would be potentially discoverable under Rule 34 does not make it necessary and essential under Section 220").

d. Gilead's Communications with the Government

Plaintiffs seek to inspect high-level communications between Gilead and government investigators that state the basis for the ongoing government investigations. [262] This court regularly orders companies to produce communications related to government investigations and litigation in Section 220 cases where those investigations supply or support a credible basis for wrongdoing. [263]

262 Pls.' Opening Br. at 58–60.

263 *See, e.g.*, *Facebook 220*, 2019 WL 2320842, at *18 (ordering production of documents and communications related to "investigations conducted by the FTC, DOJ, SEC, FBI and ICO regarding Facebook's data privacy practices"); *China MediaExpress*, 2012 WL 28818, at *6 (ordering production of any materials provided to the United States Patent Office or any patent office in any other country, including the People's Republic of China); *Lucent*, 2003 WL 139766, at *5 (ordering production of "[o]rders and other communications with the SEC concerning its investigation"); *Carapico*, 791 A.2d at 792 (ordering production of "reports presented to or minutes of meetings of the Exchange Board of Governors (or any committees or subgroups thereof) relating to (a) the SEC inquiry, (b) the decision to authorize the settlement of the SEC inquiry, or (c) the impact of the terms of the SEC Order on the business of the Exchange or any of its subsidiaries"); *see also* *AmerisourceBergen*, 2020 WL 132752, at *25 ("In an appropriate case, an inspection may extend further to encompass communications and materials that were only shared among or reviewed by officers and employees ....").

***27** Just as Gilead's policies and procedures are necessary and essential to reveal the degree of Gilead's compliance with internal rules, these documents are necessary and essential to reveal the degree of Gilead's compliance with positive law and government regulations. Considering that the ongoing government investigations supported Plaintiffs' credible basis for inspection, these documents are necessary and essential to assess whether wrongdoing occurred. These communications might also inform whether the Company has taken any steps to address the possible wrongdoing. Ongoing government investigations might threaten Gilead's ability to secure future government funding, which would present a serious problem for Gilead's business.

These documents are therefore necessary and essential to Plaintiffs' proper purposes. They are also unlikely to be available from another source. Accordingly, Plaintiffs are entitled to inspect this category of documents.

e. Director Questionnaires

Plaintiffs seek to inspect the directors' and officers' questionnaires for each Board member.[264] This court regularly orders companies to produce director questionnaires where a plaintiff has demonstrated a credible basis to suspect possible wrongdoing.[265]

264 Pls.' Opening Br. at 56.

265 *See, e.g.*, *Facebook 220*, 2019 WL 2320842, at *18 (ordering defendant to produce director questionnaires); *UnitedHealth*, 2018 WL 1110849, at *9 (same); *Lavin*, 2017 WL 6728702, at *14 (same). Often, a stockholder will assert the desire to investigate director independence as a separate purpose for seeking books and records. *See, e.g.*, *Facebook 220*, 2019 WL 2320842, at *1 (one of the plaintiffs' stated purposes was to investigate the independence and disinterest of the board); *UnitedHealth*, 2018 WL 1110849, at *1 (Del. Ch. Feb. 28, 2018) (same); *Lavin*, 2017 WL 6728702, at *1 (Del. Ch. Dec. 29, 2017) (same). In this case, Plaintiffs desire to investigating director independence is a component of investigating the corporate wrongdoing at issue.

Because that the Demands investigate alleged violations of positive law and government regulations, understanding the directors' motives and potential conflicts is paramount. Further, the burden on Gilead in producing these documents is minimal. Gilead stores these documents in a central location,[266] so they are easy to locate and produce. They are unlikely to be available from another source. Accordingly, Plaintiffs are entitled to inspect this category of documents.

266 JX-210 at 24 n.2.

3. Plaintiff-Specific Restrictions on Inspection

Gilead seeks to limit the scope of each Plaintiffs' inspections to the documents requested in their respective Demands.[267] Gilead argues that if a Plaintiff elected not to request a certain category of documents in its Demand, then it conceded that such category of information is nonessential to its stated purpose. Gilead contends that Plaintiffs may not by piggyback on other stockholders' separate Demands.[268]

267 *See* Def.'s Answering Br. at 45–46.

268 *Id.* at 46 (first citing *Paraflon Invs., Ltd. v. Linkable Networks, Inc.*, 2020 WL 1655947, at *6 (Del. Ch. Apr. 3, 2020) (refusing to order production of documents not requested in demand); then citing *Fuchs Fam. Tr. v. Parker Drilling Co.*, 2015 WL 1036106, at *4, *7 (Del. Ch. Mar. 4, 2015) (rejecting a Section 220 plaintiff's late-stage attempts to expands its inspection)).

As a general rule, a stockholder's inspection rights are limited by the scope of the demand letter, and a Section 220 plaintiff will be foreclosed from recasting the scope of its demand at the eleventh hour.[269] The conventional wisdom underlying this rule is that it is difficult and inefficient for companies to consider the merits of an evolving request. Preventing Section 220 plaintiffs from revising the scope of their demands during litigation promotes the policy of protecting corporations from the burden and additional costs created by these inefficiencies.[270]

269 *See, e.g.*, *Fuchs*, 2015 WL 1036106, at *4 (rejecting a Section 220 plaintiff's efforts to expand the scope of requested documents through a supplemental demand sent on the eve of trial); *Quantum Tech. P'rs IV, L.P. v. Ploom, Inc.*, 2014 WL 2156622, at *14 n.118 (Del. Ch. May 14, 2014) ("I note, however, that if Quantum later seeks to inspect information that is not within the categories of information sought in this action, Quantum would need to make a new demand and, if necessary, file a new action."); *Highland Select*

Equity Fund, L.P. v. Motient Corp., 906 A.2d 156, 167 (Del. Ch. 2006), and *aff'd sub nom. Highland Equity Fund, L.P. v. Motient Corp.*, 922 A.2d 415 (Del. 2007) ("None of these revisions adequately address the court's concern as to the breadth of the original demand sued upon or the scope of relief Highland Select continues to seek.").

270 *Paraflon*, 2020 WL 1655947, at *6 ("Striking the proper balance between a stockholders' inspection rights and the right of a company's board to manage the corporation without undue interference from stockholders is a core principle in our Section 220 jurisprudence. Limiting inspection to what is specified in a demand letter is a key way of maintaining that balance. A corporate board is entitled to be informed of exactly what the stockholder is demanding to inspect so it can make the call, before litigation, whether to allow inspection or litigate the demand. Holding that inspection will not be ordered unless a request is presented in the stockholder's inspection demand preserves this balance and prevents a demand letter from turning into an iterative, ongoing request for production.").

***28** This general rule serves to promote litigant and judicial efficiency and is not strictly applied when those purposes are not furthered. For example, Section 220 plaintiffs often lack information about what type of corporate records exist when making their demands. This informational asymmetry can force Section 220 plaintiffs to make broad requests. Tailored discovery in a Section 220 action can allow Section 220 plaintiffs to refine their requests with greater precision and drop requests for non-existent information. The iterative process that occurs through Section 220 discovery thus helps to eliminate pointless hypothetical disputes and promote judicial and litigant efficiencies, all good things this court strives to encourage. [271]

271 *See, e.g., ATR-Kim Eng Fin. Corp. v. Araneta*, 2006 WL 3783520, at *2 (Del. Ch. Dec. 21, 2006); *Loppert v. WindsorTech, Inc.*, 865 A.2d, 1282, 1290–91 (Del. Ch. 2004); *see also* Dkt. 65, Oral Arg. Re Def.'s Mot. for Protective Order and the Ct.'s Ruling at 9–10, 57–58.

To that end, sometimes this court will ask Section 220 plaintiffs to revise their requests to streamline disputes. In *Facebook*, for example, the court required the defendant to respond to a demand as "refined by the parties' several and meet and confer sessions." [272] The "refined" demand was "the version of the Demand that [the defendants] addressed in their pre-trial brief and at trial." [273] The court held: "The scope of documents requested in that version, therefore, has been properly joined for decision." [274]

272 *In re Facebook 220*, 2019 WL 2320842, at *18.

273 *Id.*

274 *Id.*

The general rule does not promote efficiency when applied to coordinated Section 220 actions like this case. Often, corporate actions will draw demands for inspection from multiple plaintiffs. In such cases, Section 220 plaintiffs may agree to coordinate their efforts, or sometimes the court or the defendants will ask the Section 220 plaintiffs to do so. A coordinated approach is almost always desirable because it allows the court to resolve, and the defendant to litigate, and a single Section 220 action rather than multiple actions. A coordinated approach also reduces the likelihood of inconsistent determinations on similar issues.

In this case, it was Gilead that asked Plaintiffs to coordinate their litigation efforts, and Plaintiffs agreed. [275] As part of their coordinated process, Plaintiffs worked together to narrow their over sixty overlapping documents requests to a streamlined list.

275 *See supra* note 85 and accompanying text.

In this context, limiting Plaintiffs to the documents they demanded before coordination would make no sense. There is no prejudice to Gilead in producing all categories of information deemed necessary and essential to all Plaintiffs. In fact, it would be easier for Gilead to create and track one production set rather than five. Gilead's approach would force the court to conduct four separate scope analyses, defeating some of the judicial efficiencies gained by coordination. It would also risk inconsistent rulings on whether categories of documents were necessary and essential as to certain stockholder plaintiffs but not to others who seek to investigate the same wrongdoing. In sum, strict application of the general rule in this case would defeat the rule's purpose of promote litigant and judicial efficiency.

For this reason, Gilead's final argument seems yet another indication that Gilead's real goal in this litigation is not to protect its interests but, rather, to make the process of investigating wrongdoing as difficult as possible for its stockholders.

D. Conditions on Inspection

This decision does not address whether it is appropriate to enter conditions on inspection. In its pretrial brief, Gilead asked that inspection be subject to four specific conditions.[276] In its post-trial brief, Gilead suggests that the parties should meet and confer regarding the conditions.[277] Plaintiffs appear to agree that a meet and confer is warranted.[278] The parties shall confer on whether conditions are appropriate and report to the court within twenty days of issuance of this decision.

276 Dkt. 85, Def. Gilead Sciences, Inc.'s Pre-Trial Br. at 56–57 (requesting that inspection be subject to a mutually-agreeable form of confidentiality order, a Delaware forum selection provision applicable to any future litigated that uses the fruits of Plaintiffs' inspection, an incorporation condition like that entered in *Yahoo!*, and Gilead's ability to assert that certain documents are privileged or nonresponsive).

277 Def.'s Answering Br. at 60.

278 *See* Pls.' Opening Br. at 62–63.

E. Plaintiffs Are Granted Leave to Move for Their Fees and Expenses.

***29** Delaware courts follow the American Rule that "each party is generally expected to pay its own attorneys' fees regardless of the outcome of the litigation."[279] Even under the American Rule, however, this court retains the ability to shift fees for bad faith conduct "to deter abusive litigation and protect the integrity of the judicial process."[280] In assessing "bad faith," this court can consider both litigation-related conduct and the party's pre-litigation conduct.[281] Although there is "no single, comprehensive definition of 'bad faith' that will justify a fee-shifting award,"[282] this court commonly employs the "glaring egregiousness" standard.[283] "The bad faith exception is applied in 'extraordinary circumstances,' "[284] and it "is not lightly invoked,"[285] but this court has shifted fees in Section 220 actions where a party's conduct rose to the level of bad faith.[286]

279 *Shawe v. Elting*, 157 A.3d 142, 149 (Del. 2017) (citing *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005)).

280 *Montgomery Cellular*, 880 A.2d at 227 (internal quotation marks omitted); *see also Martin v. Harbor Diversified, Inc.*, 2020 WL 568971, at *1 (Del. Ch. Feb. 5, 2020) ("Shifting fees for bad faith is not, properly speaking, an exception to the American Rule on fees; it is a method for reducing and appropriately allocating the costs of vexatious behavior sufficiently serious that justice requires such mitigation.").

281 *Compare In re SS & C Tech., Inc. S'holders Litig.*, 948 A.2d 1140, 1149–52 (Del. Ch. 2008) (applying the bad faith exception to the American Rule and shifting fees because plaintiffs' counsel brought a motion to withdraw on notice in bad faith and made a series of misstatements in filings "that tended to misrepresent or downplay the facts"), *with Hardy v. Hardy*, 2014 WL 3736331, at *17 (Del. Ch. July 29, 2014) (applying the bad faith exception to the American Rule to pre-litigation conduct and holding that the exception can apply "where the pre-litigation conduct of the losing party was so egregious as to justify an award of attorneys' fees" (quoting *Est. of E. Murton DuPont Carpenter v. Dinneen*, 2008 WL 2950764 (Del. Ch. Mar. 26, 2008))).

282 *Montgomery Cellular*, 880 A.2d at 227.

283 *See, e.g.*, *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 879 (Del. 2015) (affirming this court's determination under the "glaring egregiousness" standard to shift fees); *Isr. Disc. Bank of N.Y. v. First State Depository Co.*, 2013 WL 2326875, at *28–29 (Del. Ch. May 29, 2013) (applying the "glaring egregiousness" standard in assessing potential fee shifting); *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 47–48 (Del. Ch. 2010) (same); *In re Charles Wm. Smith Tr.*, 1999 WL 596274, at *2–4 (Del. Ch. July 23, 1999) (same).

284 *E.g.*, *Shawe*, 157 A.3d at 150–51; *Montgomery Cellular*, 880 A.2d at 227; *accord. Dover Hist. Soc.*, 902 A.2d at 1092; *Henry v. Phixios Hldgs., Inc.*, 2017 WL 2928034, at *14 (Del. Ch. July 10, 2017) (Montgomery-Reeves, V.C.).

285 *Ravenswood Inv. Co. v. Winmill & Co.*, 2014 WL 2445776, at *4 (Del. Ch. May 30, 2014) (quoting *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005)).

286 *See, e.g.*, *Carlson v. Hallinan*, 925 A.2d 506, 545–46 (Del. Ch. 2006); *McGowan v. Empress Ent., Inc.*, 791 A.2d 1, 3–8 (Del. Ch. 2000); *Technicorp Int'l II, Inc. v. Johnston*, 2000 WL 713750, at *44 (Del. Ch. May 31, 2000).

Delaware courts have urged stockholders to use the "tools at hand" and pursue Section 220 inspections before filing derivative lawsuits for decades,[287] and this court has seen a rise in Section 220 enforcement actions in recent years.[288] The regrettable reaction by defendant corporations has been massive resistance. As one academic article commented, "defendants have turned books and records litigation into a surrogate proceeding to litigate the possible merits of the suit where they place obstacles in the plaintiffs' way to obstruct them from employing it as a quick and easy pre-filing discovery tool."[289] These obstacles increase the investment required from stockholder plaintiffs and their counsel when pursuing Section 220 inspections.

287 *See supra* note 169.

288 *See* Edward B. Micheletti, et al., *Recent Trends in Books-and-Records Litigation*, 38 Del. Law. 18, 18 (2020) ("[T]he frequency of stockholder demands to inspect corporate books and records has increased ...."); Cox et al., *supra* note 6 at 2123, 2146–47 (comparing the number of Section 220 actions filed from 1981 to 1994 with those filed from 2004 to 2018 and finding a thirteen-fold increase).

289 Cox et al., *supra* note 6 at 2150.

***30** It seems that defendants like Gilead think that there are no real downsides to overly aggressive defense campaigns at the Section 220 phase. Although aggressively defending a Section 220 action will result in higher defense costs during that phase, the approach can undermine follow-on derivative claims if successful, thereby lowering net costs for defendants. Even if the approach is unsuccessful in thwarting inspection, the work product created in building legal defenses to follow-on derivative claims can be repurposed in the context of the derivative suit. And the risk of reputational harm to defendants resulting from a decision detailing possible corporate wrongdoing rendered under the plaintiff-friendly Section 220 standard appears to lack the deterrent effect one might expect it to have.

Scholars have recommended fee shifting as one means of recalibrating the risks of Section 220 litigation.[290] This proposition finds support in prior decisions of this court and the Model Business Corporation Act.[291]

290 *See id.* at 2151 ("Delaware should give serious consideration to awarding plaintiffs their attorneys' fees in cases where the defendants make untoward efforts to delay the resolution of these summary cases."); Randall Thomas, *Improving Shareholder Monitoring of Corporate Management by Expanding Statutory Access to Information*, 38 Ariz. L. Rev. 331, 335 (1996) (arguing that for Section 220 to facilitate effective stockholder monitoring, it must be significantly streamlined, including shifting attorneys' fees to deter frivolous refusals to produce information).

291 *See supra* note 286; Model Business Corporation Act § 16.04(c) ("If the court orders inspection and copying of the records demanded, it shall also order the corporation to pay the shareholder's costs (including reasonable counsel fees) incurred to obtain the order unless the corporation proves that it refused inspection in good faith because it had a reasonable basis for doubt about the right of the shareholder to inspect the records demanded.").

Fee shifting may be appropriate here. Gilead exemplified the trend of overly aggressive litigation strategies by blocking legitimate discovery, misrepresenting the record, and taking positions for no apparent purpose other than obstructing the exercise of Plaintiffs' statutory rights. Gilead's pre-litigation failure to provide any Plaintiff with even a single document despite the ample evidence of a credible basis and the obvious responsiveness of certain categories of documents amplifies the court's concerns.

For these reasons, Plaintiffs are granted leave to move for fee-shifting.

III. CONCLUSION

For the foregoing reasons, judgment is entered in favor of Plaintiffs. The parties shall confer regarding conditions on inspection and concerning a form of order memorializing the scope of Gilead's production. Plaintiffs may seek leave to move for fee-shifting.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

LENDUS, LLC, Plaintiff,
v.
John GOEDE and John Schrenkel, Defendants.

C.A. No. 2018-0233-SG
|
Date Submitted: December 4, 2018
|
Date Decided: December 10, 2018

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MEMORANDUM OPINION

GLASSCOCK, Vice Chancellor

***1** It is a rare case, fortunately, where this Court must become involved in adjudicating meaningful motions for sanctions based on lawyer misconduct. To quote the wise words of Vice Chancellor Laster, counsel should "think twice, three times, four times, perhaps even more" before seeking sanctions. [1] That is not to say, however, that this Court does not take seriously its responsibility to oversee the conduct of attorneys practicing before it. While most inappropriate conduct by attorneys is the province of disciplinary counsel, in the rare case where the conduct of counsel endangers the administration of justice toward those litigating here, this Court must act. This, I think, is one such case.

1 *Katzman v. Comprehensive Care Corp.*, C.A. No. 5892-VCL, at 13:9–12 (Del. Ch. Dec. 28, 2010) (Laster, V.C.) (TRANSCRIPT).

It is worth pointing out that Court rules and the Delaware Rules of Professional Conduct constitute the limits of behavior, and are not practice guidelines. The norms of civility and candor expected of Delaware lawyers are not only a part of the heritage of practice cherished by our bar, but are essential to the administration of justice. In other words, Delaware practitioners, whether indigenous or *pro hac vice*, should respect these norms because they are good and right; when they do not, the courts must enforce them because they are indispensable to our ability to perform the core functions of a justice system.

Judges are lawyers. We understand the pressures and frustrations of practice. It is no pleasure to criticize the practice of others, none of our own eyes being timber-free. Nonetheless, when gamesmanship and incivility become a drag on justice, we must act.

Below, I discuss cross-motions for sanctions. Only the Plaintiff's motions are substantial. The Defendants are represented by counsel licensed to practice in the state of Ohio. Their attorney, David K. Stein, appears here as a courtesy extended to him to practice *pro hac vice* at the recommendation of, and with the assistance of, Delaware counsel. His behavior has fallen short of that expected of counsel practicing before the Bar of the Supreme Court of the State of Delaware. Two fundamental principles are thus put in tension: the right of litigants, consistent with the rules limiting practice in Delaware, to have the attorney of their choosing; and the principles of justice alluded to above. Here, I find, the latter must control. Some of the alleged misconduct involves collateral litigation in other jurisdictions; that, I address by reference to the disciplinary counsel of the appropriate jurisdiction. With respect to misconduct in this litigation, I find it appropriate to grant Mr. Stein's motion to withdraw his admission *pro hac vice*, and to refer the matter to disciplinary counsel for its review.

I. BACKGROUND

A. The Parties and Relevant Non-Parties

Plaintiff LendUS, LLC is a mortgage lender, servicer, and seller of residential mortgages that is licensed to operate in forty states.[2] It is incorporated in Delaware and has a principal place of business in Alamo, California.[3]

2 Docket Item [hereinafter, "D.I."] 1, ¶ 12.

3 *Id.* ¶ 7.

***2** Defendant John Goede is a former LendUS employee.[4] He is also the founder of American Eagle Mortgage Co., LLC.[5] He came to work for LendUS as part of LendUS's merger with American Eagle Mortgage's parent company in 2017.[6] Thereafter, he was an officer within LendUS, and was partly responsible for overseeing all of the American Eagle division's operations and personnel.[7]

4 *Id.* ¶ 18.

5 *Id.* ¶ 13.

6 *Id.* ¶¶ 14–18.

7 *Id.* ¶ 21.

Defendant John Schrenkel is a former LendUS employee.[8] He was a senior executive at American Eagle, and he joined LendUS as part of LendUS's merger with American Eagle's parent company in 2017.[9] Thereafter, he was an officer within LendUS and, along with Defendant Goede, was responsible for overseeing all of the American Eagle division's operations and personnel.[10]

8 *Id.* ¶ 12.

9 *Id.* ¶¶ 13–18.

10 *Id.* ¶ 21.

Non-party David K. Stein is an attorney who is licensed to practice in Ohio, Florida, the United States District Court for the Northern and Southern Districts of Ohio and the Eastern District of Michigan, and the United States Court of Appeals for the Sixth Circuit.[11] Mr. Stein is admitted to practice *pro hac vice* in this case. Mr. Stein does not represent the Defendants solely for purposes of this action; per the Plaintiff, he was also involved in facilitating the events at issue in this litigation, the Defendants' departure from LendUS and their subsequent employment with Supreme Lending.[12] As part of this case, LendUS sought to depose Mr. Stein about his knowledge of LendUS employees leaving to work for Supreme Lending. Because Mr. Stein is an attorney in this matter, and his involvement as a witness would bear on his ability to continue in his role as counsel, I granted the Defendants' Motion for a Protective Order on November 15, 2018.[13] I reasoned that the Defendants' ability to choose their counsel outweighed LendUS's need to depose Mr. Stein, in light of the fact that the information Mr. Stein possessed could be obtained elsewhere.

11 Certification of David K. Stein, Esq. in Support of Mot. for his Admission *Pro Hac Vice* ¶ 8.

12 *See* D.I. 86; D.I. 114; D.I. 138.

13 *See* Nov. 15, 2018 Oral Argument Tr.

Non-party Bricker & Eckler LLP is a law firm in Ohio, of which Mr. Stein is a Partner.[14]

14 *See* D.I. 48.

B. Relevant Facts

1. The Underlying Litigation

LendUS filed this action on March 30, 2018.[15] Its Complaint brought three counts: breach of contract, breach of fiduciary duty, and tortious interference with contract.[16] Because this is a fledgling suit and there is relatively little record evidence, and because the underlying litigation is only marginally relevant to the current sanctions motions, I will merely summarize the relevant facts and allegations of this action, as laid out in the Complaint.

15 *See* D.I. 1.

16 *Id.* ¶¶ 35–53.

LendUS alleges that while the Defendants were employed with LendUS, they were responsible for managing and overseeing approximately three hundred employees within LendUS's American Eagle division.[17] In 2017, LendUS investigated financial irregularities within American Eagle and concluded that the irregularities were likely the result of intentional misconduct.[18] LendUS ultimately confronted the Defendants about the irregularities in early 2018.[19] LendUS submits that at around the time of the confrontation, the Defendants began meeting with another mortgage lender, Supreme Lending, "to explore the possibility of Supreme Lending acquiring most if not all of the people and assets of the [American Eagle] division."[20]

17 *Id.* ¶ 21.

18 *Id.* ¶ 23.

19 *Id.* ¶ 24.

20 *Id.* ¶ 27.

***3** The Complaint further alleges that the Defendants decided to join Supreme Lending, and thereafter, they set out on a campaign to recruit American Eagle division employees to move to Supreme Lending, in violation of certain contractual covenants.[21] LendUS caught wind of the Defendants' purported behavior.[22] It terminated Goede and Schrenkel for cause on March 30, 2018, the same day that it filed the Complaint.[23]

21 *Id.* ¶ 28.

22 *Id.* ¶ 32.

23 *Id.* ¶ 34.

As the suit progressed, the parties engaged in prolific motion practice. A significant point of disagreement was whether, under the relevant contractual terms, Delaware or Florida had jurisdiction over the litigation. On October 30, 2018, a Federal District Court in Florida decided that the case should proceed in Delaware.[24] Significant to the issues here is that the proceedings in this matter are bifurcated; predicate issues, relating to Count II of Plaintiff's Complaint, have proceeded on an expedited track, and that phase of the litigation is scheduled for trial on January 28, 2019 through February 1, 2019.[25] The extent to which discovery was also to proceed on a bifurcated basis is relevant to some of the issues involved in the sanctions motions, described below.

24 *See* D.I. 130, Ex. A.

25 *See* May 31, 2018 Oral Argument Tr.

2. LendUS's First Motion for Sanctions

LendUS first filed a Motion for Sanctions on October 15, 2018. That Motion alleges that David K. Stein, while representing the Defendants in this matter, engaged in improper conduct in regard to David Berry, a LendUS employee. Specifically, LendUS claims that Mr. Stein, on behalf of the Defendants, filed a separate indemnification action against Mr. Berry in Ohio.[26] LendUS claims that this Ohio action was "entirely baseless" and was "used only as a vehicle to obtain *ex parte* discovery related to this litigation."[27] Per the recitations in LendUS's Motion, the Defendants sought to depose Mr. Berry, and told him that if he appeared for the deposition, the case against him would be dismissed.[28] Mr. Berry was deposed, without an attorney, by the Defendants' counsel, Mr. Stein.[29] The Defendants did not notify LendUS that Mr. Berry was to be deposed.[30] Afterward, the Ohio action was voluntarily dismissed without prejudice.[31]

26 D.I. 115, ¶ 14.

27 *Id.* ¶ 16.

28 *Id.*

29 *Id.*

30 *Id.*

31 *Id.* ¶ 17.

In a second deposition—this time as part of the present litigation and with LendUS's counsel present—Mr. Berry stated that in his first deposition, the same attorney (Mr. Stein) had previously asked him some of the same questions; that is, in the first deposition, Mr. Stein had asked Mr. Berry questions relating to the LendUS litigation.[32] LendUS contends that this line of questioning sought disclosure of privileged information in violation of the Delaware Rules of Professional Conduct.[33] Among other things, LendUS requests the Court to sanction the Defendants and Mr. Stein, to prohibit the use of Mr. Berry's deposition, to prohibit Mr. Stein from contacting any current or former LendUS employees, to take steps to identify all improper conduct by Defense counsel, and to award LendUS reasonable fees and expenses associated with its Motion.[34]

32 *Id.* ¶¶ 19–22.

33 *Id.* ¶¶ 23–33.

34 *Id.* ¶ 36.

In their Opposition to the Motion, the Defendants assert that the allegations in the Ohio litigation were meritorious. [35] They also assert that neither Mr. Stein nor the Defendants violated the Delaware Rules of Professional Conduct because Mr. Berry did not have the right to speak for LendUS; thus, his deposition was not an improper *ex parte* deposition. [36]

35 *See generally* D.I. 125.

36 *See generally id.*

3. The Defendants' First Motion to Compel and for Sanctions

***4** Shortly after LendUS filed its first Motion for Sanctions, the Defendants filed a Motion to Compel and for Sanctions on October 19, 2018. It, too, related to the Berry Depositions. The Defendants' Motion alleges that "anytime [sic] Defendants' counsel sought to explore Berry's knowledge of the facts underlying the allegations in the Complaint, Plaintiff's counsel inappropriately shut down questioning." [37] The Defendants argue that the Plaintiff's counsel attempted to improperly use attorney-client privilege to prevent discovery of relevant facts. [38] The Defendants seek an order compelling LendUS to produce Mr. Berry for deposition, requiring Mr. Berry to testify on the topics that he had previously been instructed not to discuss, and awarding the Defendants their fees associated with the motion. [39]

37 D.I. 120, ¶ 14.

38 *Id.* ¶¶ 17–24.

39 *See generally id.*

4. LendUS's Second Motion for Sanctions

LendUS filed a second Motion for Sanctions on November 8, 2018. In that Motion, LendUS alleges that on September 7, 2018, Mr. Stein filed suit in Florida against another LendUS employee, Rachel Brillhart May, seeking over $150,000 in damages for her purported failure to repay a loan. [40] According to LendUS, an intermediary told Ms. May that if she immediately quit her position with LendUS, the suit would be dismissed. [41] LendUS also alleges that Mr. Stein has continued to improperly contact current and former LendUS employees about the present litigation, without disclosing that contact to LendUS. [42]

40 D.I. 135, Ex. A; D.I. 135, ¶ 2.

41 D.I. 135, ¶ 2.

42 *Id.* ¶ 4.

In its second Motion for Sanctions, LendUS requests that Mr. Stein be disqualified from further involvement in this litigation. [43]

43 *Id.* ¶ 21.

In its Opposition, the Defendants assert that this Court has no authority to make determinations regarding the May lawsuit, because it is not relevant to, nor does it interfere with, the present litigation. [44] They also argue that LendUS's statements regarding Mr. Stein's communications with LendUS employees are false and misleading, and that sanctions are inappropriate. [45]

44 *See generally* D.I. 165.

45 *See id.*

5. The Perel Deposition

On November 14, 2018, LendUS's counsel sent a letter to "inform the Court of recent unacceptable conduct by Defendants' *pro hac vice* counsel, David K. Stein," concerning a deposition taken the previous day. [46] On November 13, 2018, the Defendants had deposed Michael Perel, a LendUS employee, regarding events relevant to this lawsuit. LendUS's letter highlighted several instances of Mr. Stein's unprofessional conduct that occurred during the Perel Deposition. [47] LendUS transmitted to the Court a copy of the deposition transcript, as well as a video recording.

46 D.I. 146, at 1.

47 *See generally id.*

It is worth pointing out what apparently led to Mr. Stein's frustration at the deposition. As described above, this matter has been bifurcated, with issues arising from a single count of the Complaint proceeding on an expedited schedule. Accordingly, Mr. Caponi, representing the Plaintiff, instructed the witness not to testify regarding issues outside the scope of the portion of the action that had been expedited. Mr. Stein believed all matters relevant to the litigation, writ large, were fair game. This was a good faith dispute, which should have been resolved by counsel or, failing that, through referral to the Court. Unfortunately, Mr. Stein took another approach.

Upon simultaneously reviewing the deposition transcript and the video, it is clear to me that Mr. Stein took a hostile tone toward the Plaintiff's attorney, Steven L. Caponi, regarding Mr. Caponi's objections. [48] Mr. Stein repeatedly interrupted Mr. Caponi, and after one such interruption, he said to Mr. Caponi, "I really have seen enough and heard enough from you." [49] Mr. Stein questioned whether Mr. Caponi is, in fact, admitted to practice in Delaware [50] and whether he understands Delaware law. [51] Mr. Stein also referred to Mr. Caponi as "Egregious Steve" [52] and the "sovereign of Delaware" [53] throughout the deposition. Furthermore, Mr. Stein remarked, "Mr. Caponi, you don't get to create the rules. This is my deposition. I'm paying the court reporter. You don't create the rules." [54]

48 *See* D.I. 146, Ex. A, Perel, Dep., at 46:14–16 ("Okay. So is that an objection? Because I don't recall even hearing the word objection"), 49:10–24 (regarding speaking objections, "I don't know how they do it here in Delaware, but that's certainly not how it's done in the 49 other states"), 50:11–13 ("Is there an order to that effect? Can you pull out the order and show me?").

49 *Id.* at 50:16–17.

50 *Id.* at 174:1–2.

51 *Id.* at 62:6–15.

52 *Id.* at 51:12.

53 *Id.* at 171:22, 175:22–24.

54 *Id.* at 254:18–21.

***5** Mr. Stein badgered and belittled Mr. Caponi in a manner that was neither relevant nor productive to the present lawsuit. For instance, after a break, Mr. Stein inquired, on the record, whether Mr. Caponi had washed his hands after using the restroom. [55] He also said to the deponent, Mr. Perel, that he was "talking [with] little words so that [Mr. Caponi] can understand." [56]

55 *Id.* at 67:5–16.

56 *Id.* at175:13–15.

This written recitation does not adequately convey the sarcasm and hostility that Mr. Stein expressed toward opposing counsel and the deponent. Beyond inappropriate words, Mr. Stein's unprofessionalism manifested through physical acts. The record reflects that Mr. Stein raised his hand and made yapping gestures toward Mr. Caponi while Mr. Caponi was speaking. [57] Mr. Caponi also relates that Mr. Stein "leaned across the table and [bared] his teeth" in an aggressive and exaggerated grimace while Mr. Caponi was speaking. [58]

57 *Id.* at 54:16–22.

58 D.I. 146, at 3.

Mr. Stein similarly harassed the deponent, Mr. Perel. Like his treatment of Mr. Caponi, Mr. Stein often interrupted Mr. Perel during the deposition. [59] Mr. Stein tenaciously inquired about Mr. Perel's personal life, extending beyond what was relevant to the lawsuit. This included inquiring about the reasons that Mr. Perel's marriage ended in divorce, [60] as well as prolonged questioning on Mr. Perel's use of alcohol and drugs, despite Mr. Perel's repeated answers that he does not drink. For instance, Mr. Stein questioned:

> Stein: The question is do you know whether there was litigation prior to [the Defendants'] termination?
>
> Perel: I don't know.
>
> Stein: You don't know?
>
> Perel: Or recall.
>
> Stein: Are you under the influence of any drugs or alcohol sitting here today?
>
> Perel: No. Why?
>
> Stein: Well, I'm asking the questions. So your answer is no. Is there anything that would harm or hinder your memory being able to answer truthfully here today?
>
> Perel: I only speak the truth, so no.

Stein: Do you have a physical condition that prevents you from having the power of recall as to events that might have happened in 2018?

Perel: I have no issue with my memory if that's what you're asking me.

Stein: And you're not under the influence of any alcohol sitting here today?

Perel: No, I don't drink alcohol. I have [a medical issue].

Stein: When did you stop drinking alcohol?

Perel: I have never—I don't drink alcohol.

Stein: Never?

Perel: Yes. I have [a medical issue] ... and I avoid alcohol at all costs.

Stein: Okay. Was that always the case while you were employed by RPM or LendUS?

Perel: Yes, that's always the case.

Stein: And you're not under the influence of any medication that would prevent your memory from working here today, are you?

Perel: No.... [61]

59 *See, e.g.*, *id.* at 288:16–17, 289:8–19.

60 D.I. 146, Ex. A, Perel Dep., at 74:22–23, 75:20–22.

61 *Id.* at 69:3–70:15. Again, I note that words alone cannot adequately transmit Mr. Stein's sarcastic tone.

Furthermore, on multiple occasions, Mr. Stein questioned Mr. Perel's truthfulness. In addition to the aforementioned questions about whether Mr. Perel was under the influence of any drugs or alcohol during the deposition, and his sarcastic inquiry into Mr. Perel's mental and physical capacity, Mr. Stein accused Mr. Perel of "making things up" [62] and lying under oath. In the last several minutes of the deposition, Mr. Stein's questioning went as follows:

***6** Stein: Daily conversations about the company folding up, where were those conversations taking place?

Perel: Daily conversations ... with other American Eagle employees.

Mr. Stein: Who are those other employees? Let's get that very clear right now because you certainly seem to suggest something different than five minutes ago.

Perel: I'm not.

Caponi: Is there a question?

Stein: Yes. Who are the other employees that you had these conversations with?

Caponi: Before the witness answers, Mr. Stein, I ask you to lower the tone of your voice. I don't know if you[ ] notice it, but you're yelling and it's intimidating to the witness.

Stein: I'm not trying to intimidate any witness. I get upset when people are dishonest, especially when they're under oath and giving testimony in a case.

Perel: No one is being dishonest.

Caponi: Excuse me, Mr. Perel. Don't answer that question. Don't speak. Again, Mr.... Again, Sean [Brennecke] –

Stein: It's Stein, S-T-E-I-N.

Caponi: Sean, I just had your co-counsel insult a witness by calling him dishonest under oath when he's been answering these questions. That is completely inappropriate and he's been yelling at this witness for the last few minutes. And I've tried not to inflame Mr. Stein anymore [sic] by objecting. But I'm not going to tolerate it any further. He's either going to curb himself or again I'm going to take this witness and go. So I don't know if you need a break, Mr. Stein, to calm down, but we're not going to be subjected, this witness is not going [to be] subjected – I get paid to take abuse from people like you. This witness does not and I'm not going to tolerate it.

Stein: Well, I don't get paid to hear testimony that's made up. I want to know who the daily conversations were about.

Caponi: We're done with this deposition. [63]

62 *Id.* at 289:6–7.

63 *Id.* at 294:11–296:20.

At one point in the deposition, according to LendUS's counsel, after a contentious back-and-forth regarding Mr. Caponi's objections, Mr. Stein called Mr. Caponi and Mr. Perel "idiots." This comment was made off the stenographic record; [64] however, it is audible on the videotaped deposition recording. [65] Later in his deposition, Mr. Perel testified that earlier, he had heard Mr. Stein call himself and Mr. Caponi "idiots." [66]

64 *See id.* at 215:20–21.

65 Mr. Stein uttered "idiots" at approximately 4:15:18 pm. Perel Video Dep., Video C, at 1:23:34.

66 D.I. 146, Ex. A, Perel Dep., at 287:1–17.

For much of the deposition, the Defendants' Delaware counsel was not present. Mr. Caponi first asked Mr. Stein to adjust his behavior, and when Mr. Stein did not, Mr. Caponi asked the Defendants' Delaware counsel to attend the rest of the deposition as a check on Mr. Stein. Mr. Stein's unprofessional antics continued, and, as evidenced in the earlier excerpt, Mr. Caponi ultimately ended the deposition. He notified the Court by letter the next morning. [67]

67 *See generally* D.I. 146.

In response to Mr. Caponi's November 14, 2018 letter setting out the facts recited above, the Defendants' Delaware counsel submitted a letter on November 15, 2018. Counsel stated that they were still reviewing the Perel Deposition transcript. [68] Counsel for Mr. Stein and his law firm, however, submitted a letter on November 15, 2018 that asserted, on behalf of Mr. Stein, that at the Perel Deposition, Mr. Stein had "comported himself in a manner expected of lawyers practicing in this Court," and that Mr. Caponi's "repeated[ ] fail[ure] to comply with established deposition rules provoke[ed] unnecessary consternation ...." [69] Importantly, that letter claims that "[n]owhere in the Deposition record can Mr. Stein be seen or heard to have uttered the word 'idiot' in the direction of Plaintiff's counsel or the deponent," [70] despite the representation to the contrary in the Plaintiff's November 14 letter. [71] It also claims that "the only record support for this contention was 'developed' by Plaintiff's counsel ...." [72]

68 D.I. 151, at 2.

69 D.I. 157, at 1–2.

70 *Id.* at 5.

71 At Oral Argument on December 4, 2018, Mr. Stein's counsel orally withdrew this representation.

72 D.I. 157, at 5.

6. The Defendants' Second Motion to Compel and for Sanctions

***7** After the Perel Deposition, on November 21, 2018, the Defendants filed a second Motion to Compel and for Sanctions. Similar to their first Motion to Compel and for Sanctions, which sought to compel LendUS to produce Mr. Berry for further deposition, the second Motion requests that LendUS produce Mr. Perel for further deposition. [73] The Defendants submit that this is necessary because, contrary to Chancery Rule 26(b)(1), which contemplates broad discovery, Mr. Caponi improperly instructed Mr. Perel not to answer questions during his first deposition. [74] The Defendants also seek attorneys' fees in connection with the Motion. [75]

73 *See generally* D.I. 166.

74 *Id.* ¶ 18.

75 *See id.*

7. Pending *Pro Hac Vice* Motions

As oral argument on the sanctions motions approached, the Defendants moved to withdraw Mr. Stein's *pro hac vice* admission, "to avoid further distraction from the merits of the case." [76] They also moved to admit Anne Marie Sferra, another Partner at Bricker & Eckler, *pro hac vice*. LendUS promptly opposed both motions. It opposed Mr. Stein's withdrawal until after oral argument on the sanctions motions, since the motions implicate Mr. Stein's *pro hac vice* status. [77] It opposed Ms. Sferra's admission as premature, given that the pending motions for sanctions against Mr. Stein also run to Bricker & Eckler, and expressed concern that Ms. Sferra's admission would be an opportunity for Mr. Stein to exercise "dead hand control" over the case. [78]

76 D.I. 183, at 1.

77 D.I. 185, at 1.

78 *See* D.I. 186.

C. Procedural Posture

LendUS initiated this action on March 30, 2018, along with a Motion for Expedited Proceedings. The Defendants filed a Motion to Dismiss on August 8, 2018; thereafter, the parties engaged in prolific motion practice, some of which is discussed above.[79] The Motion to Dismiss was mooted in part by an October 30, 2018 decision from the United States District Court for the Middle District of Florida that found that Delaware has jurisdiction,[80] and I denied what remained of the Motion to Dismiss in a November 15, 2018 bench decision. Also on November 15, I granted the Defendants' Motion for a Protective Order to prevent the deposition of Mr. Stein, as discussed above.

79 For the purposes of this opinion, I need not engage in a tedious recitation of these motions, many of which relate to discovery. I instead discuss the case history only to the extent that it is relevant to the present dispute.

80 *See* D.I. 130, Ex. A.

The outstanding motions currently pending are: (1) LendUS's October 15, 2018 Motion for Sanctions; (2) LendUS's November 8, 2018 Motion for Further Sanctions; (3) the Defendants' October 19, 2018 Motion to Compel and for Sanctions; (4) the Defendants' November 21, 2018 Motion to Compel and for Sanctions; (5) the Defendants' November 30, 2018 Motion to Withdraw the Admission *Pro Hac Vice* of David K. Stein, Esquire; and (6) the Defendants' November 30, 2018 Motion for Admission *Pro Hac Vice* of Anne Marie Sferra, Esquire. The first phase of trial is scheduled for January 28, 2019 through February 1, 2019. I heard oral argument on the outstanding sanctions and *pro hac vice* motions on December 4, 2018.[81] This Memorandum Opinion addresses those motions.

81 On December 4, 2018, I also heard oral argument on LendUS's Motion to Compel, which I granted from the bench.

II. ANALYSIS

A. Motions for Sanctions Against the Defendants and their Counsel

The Delaware Bench and Bar guards jealously its reputation for civility, collegiality, and candor. This is not simply a matter of parochial pride, nor fusty pretentiousness or fulsome self-regard. It rests on a sincere belief that the end toward which we as judges and lawyers work—a truthful exposure of the facts in pursuit of justice—is best served by our tradition of respect and civility accompanied by vigorous, not vinegarish, advocacy. The edifice that supports a civil and robust pursuit of truth is stable but not self-maintaining: as with a three-legged stool, withdrawal of support by any of the litigants or by the Court can cause it to topple. Accordingly, here, counsel "should not reflect any ill feelings that clients may have toward their adversaries in their dealings with the Court and other counsel."[82] Likewise, despite any personal feelings of an attorney himself toward opposing clients or counsel, we expect professional behavior in pursuit of professional duties. Delaware case law makes clear that our courts will not condone, "accept or permit the use of profanity, acrimony, derisive gibes, or sarcasm with respect to any communication related to any matter, proceeding, writing, meeting, etc. ..."[83]

82 *395 Assoc., LLC v. New Castle Cty.*, 2005 WL 3194566, at *4 (Del. Super. Ct. Nov. 28, 2005) (quotation omitted).

83 *Crowhorn v. Nationwide Mut. Ins. Co.*, 2012 WL 1274052, at *5 (Del. Super. Ct. May 6, 2002).

***8** When practicing in Delaware and in this Court, an attorney has obligations to the Court under both the Delaware Lawyers' Rules of Professional Conduct and the Principles of Professionalism for Delaware Lawyers.[84] The Delaware Rules of Professional Conduct provide that a lawyer shall not knowingly "make a false statement of fact or law to a tribunal ...."[85] Those rules also prohibit a lawyer from engaging in *ex parte* communication.[86] More broadly, the Principles of Professionalism for Delaware Lawyers state that "[a] lawyer should develop and maintain the qualities of integrity, compassion, learning, *civility*, diligence, and public service."[87] They define professional civility as "conduct that shows respect ... for all people encountered in practice," which includes "emotional self-control [and] the absence of scorn and superiority in words or demeanor."[88]

84 Ct. Ch. R. 170(c)(ii).

85 Del. R. Prof. Conduct 3.3(a).

86 Del. R. Prof. Conduct 4.3.

87 Principles of Professionalism for Delaware Lawyers, Principle A (emphasis added).

88 *Id.*, Principle A(4).

These obligations bind Delaware lawyers, and they apply with equal force to lawyers who are permitted to practice in this state under a *pro hac vice* admission. [89] That admission, fundamentally, is a privilege, as is its analog to Delaware lawyers admitted to practice for specific litigation in sister jurisdictions. When an attorney who is admitted *pro hac vice* engages in conduct that is repugnant to this Court's ideals of civility and candor, revocation of that attorney's *pro hac vice* admission is an appropriate sanction. [90]

89 *See* Ct. Ch. R. 170(c)(ii).

90 *See State of Del. v. Mumford*, 731 A.2d 831, 835–36 (Del. Super. Ct. 1999) (revoking *pro hac vice* admission due to an attorney's failure to control his client's behavior); *State of Del. v. Grossberg*, 705 A.2d 608, 613 (Del. Super. Ct. 1997) (revoking *pro hac vice* admission because an attorney made inaccurate representations to the court and violated other Rules of Professional Conduct).

Proceedings resulting in sanctions are, and should be, rare in this Court. When they do arise, it is most common for an opposing party to move for sanctions; however, it is worth noting that the Court may raise the issue of sanctions *sua sponte*. [91] The Court may also revoke a *pro hac vice* admission *sua sponte* if it determines that continued admission is "inappropriate or inadvisable." [92] Nevertheless, because of the potential for abuse, a party seeking sanctions in the form of disqualification faces a heavy burden: the party must show, by clear and convincing evidence, that the behavior of the attorney in question "is so extreme that it calls into question the fairness or efficiency of the administration of justice." [93] The right of a litigant to choose her counsel is fundamental, and must not be abrogated absent compelling reason. In other words, I must exercise my discretion in considering LendUS's request to revoke Mr. Stein's admission with great care.

91 *See, e.g.*, *In the Matter of Ramunno*, 625 A.2d 248, 249 (Del. 1993) (court raised sanctions *sua sponte*); *395 Assoc., LLC v. New Castle Cty.*, 2005 WL 3194566, at *1 (Del. Super. Ct. Nov. 28, 2005) (same).

92 Ct. Ch. R. 170(e).

93 *Manning v. Vellardita*, 2012 WL 1072233, at *2 (Del. Ch. Mar. 28, 2012) (quoting *Dunlap v. State Farm Fire & Cas. Co. Disqualification of Counsel*, 2008 WL 2415043, at *1 (Del. May 6, 2008)); *see also Crowhorn v. Nationwide Mut. Ins. Co.*, 2012 WL 1274052, at *4 (Del. Super. Ct. May 6, 2002).

Here, the deposition transcript and video recording, discussed at length above, speak for themselves. Mr. Stein may have labeled his opposing counsel "Egregious Steve," but it was Mr. Stein's actions that were, in fact, egregious. Mr. Stein harassed opposing counsel and the deponent, using sarcasm and accusations of perjury, and rude gestures and grimaces, in an unprofessional manner. It is clear to me that Mr. Stein intended his behavior to intimidate and discomfort the deponent. In other words, his behavior appears not only to be rude, but tactically so.

***9** I note that, from time to time, otherwise professional and diligent advocates may suffer a momentary loss of composure, which is regrettable, but understandable during a contentious legal proceeding. These temporary lapses are unfortunate, but do not warrant motion practice—particularly where, as is the norm in Delaware, the attorney later apologizes to the other parties involved. Mr. Stein's behavior in this case, in contrast, occurred *repeatedly* over an hours-long deposition. Rather than a momentary lapse of judgment, it indicates a systematic intent to intimidate the witness and to hector opposing counsel.

Equally disturbing was Mr. Stein's initial lack of candor to the Court. The Movant alleged that Mr. Stein, during the deposition, called opposing counsel and the deponent "idiots," which is clearly inappropriate conduct. This reference does not appear in the deposition transcript, presumably because it was delivered *sotto voce*, in a stage whisper that escaped the court reporter as the reporter was reading back a question. In response to this accusation, Mr. Stein's counsel wrote a letter to the Court on November 15, in which Mr. Stein not only denied that he had called the witness and his counsel idiots, but suggested that opposing counsel had "developed" [94] the record, presumably to reflect unprofessional behavior on behalf of Mr. Stein, and stated that "the video recording ... *will discredit this contention as another out-of-context, embellishment* [sic]." [95] Obviously, whether Mr. Stein called counsel and the witness "idiots" is a matter known to Mr. Stein. Just as obviously, the implication that LendUS's counsel had invented Mr. Stein's use of the term "idiots" in order to obtain a favorable result from this Court is a serious accusation of misconduct. However, the videotape was to the contrary; Mr. Stein's utterance of the word "idiots" is clearly audible to me, and I find that it was meant to be heard by the participants. [96] I find this lack of candor particularly egregious, because it is an untruth used as both shield and sword: to insulate Mr. Stein from the fruits of his unprofessional conduct, but also—worse—to traduce opposing counsel. This, from an officer of the court, cannot stand. I find Mr. Stein's continued admission *pro hac vice* to be both inappropriate and inadvisable.

94 *See* D.I. 157, at 5.

95 *Id.* at 4 (emphasis added).

96 Mr. Stein called Mr. Caponi and the deponent "idiots" at approximately 4:15:18 p.m. Perel Video Dep., Video C, at 1:23:34.

I say this notwithstanding the fact that Mr. Stein, at argument on these motions and at the request of his counsel, forthrightly appeared and apologized for his behavior in the Perel Deposition. [97] He did not attempt to deny or diminish the conduct about which the Movant complained. He explained that he had allowed his frustration to get the better of him, and acted in a way that, he avers, was not only inappropriate, but utterly uncharacteristic of his career as a lawyer. I accept this assertion, and it is unfortunate that he allowed himself to act in an unprofessional manner that was not representative of what he acknowledges is his responsibility as an attorney. A single incident cannot capture the tenor of an entire career. However, my interests in justice, both specific and systematic, convince me that Mr. Stein's admission *pro hac vice* must end.

97 *See* Dec. 4, 2018 Oral Argument Tr.

I turn, then, to the appropriate sanction. Because of Mr. Stein's conduct, as laid out above, I find it appropriate to award LendUS its reasonable attorneys' fees incurred in prosecuting its Motion for Sanctions in connection with the Perel Deposition, as well as its fees incurred in attending the deposition, to be paid by Mr. Stein and his firm, and not by their clients. The remaining question is whether to grant Mr. Stein's Motion to Withdraw, or to revoke his admission, pursuant to Rule 170(e). Counsel for LendUS asks that I revoke, suggesting that *pro hac vice* reporting requirements are such that revocation will serve a punitive function on Mr. Stein going forward. I address the question cognizant of the fact that, in any event, the pursuit of justice *in this matter* will not be impeded by granting Mr. Stein's Motion, in light of his absence from this case.

***10** I find it appropriate to grant Mr. Stein's Motion to Withdraw, and to refer the matter to the Delaware Office of Disciplinary Counsel. Disciplinary Counsel may then consider the Perel Deposition misconduct, the circumstances of the November 15 letter, and, to the extent it finds appropriate, the additional allegations of misconduct addressed below, together with exculpatory factors (if any). So informed, it can determine whether further action is required.

In addition to the misconduct related to the Perel Deposition, LendUS makes other allegations as well. As laid out in the Background section of this Memorandum Opinion, LendUS's counsel represents to the Court that Mr. Stein has abused legal process in Ohio and Florida by bringing actions, *not* to obtain the relief sought in those complaints, but to seek an advantage on behalf of his clients in this suit, or for their business generally. I direct Mr. Stein to disclose to LendUS, within ten days of this decision, each *ex parte* contact he has made with LendUS's employees, either in the context of the Florida or Ohio litigations or otherwise during the pendency of this case. As for sanctions, however, I note that the facts regarding these other matters are not developed in the record before me. At oral argument, Delaware counsel for the Defendants indicated that they had undertaken an appropriate inquiry as to whether these foreign actions implied improper behavior regarding *this Delaware action*, and concluded in the negative. I find that no sanctions are warranted, in this jurisdiction and based on the record before me, for Mr. Stein's conduct in the Florida and Ohio actions. Nonetheless, the allegations of abuse of process are serious, if unproven. Accordingly, I refer these matters to the Ohio Supreme Court's Office of Disciplinary Counsel and the Florida Supreme Court's Department of Lawyer Regulation. To be clear, the alleged misconduct relating to the Ohio and Florida actions does not form any basis for my decision here.

I note that I previously granted the Defendants' Motion for a Protective Order to prevent the deposition of Mr. Stein. Mr. Stein represented the Defendants at the time of the alleged wrongful competition and breach of fiduciary duty. LendUS insists that he facilitated the Defendants' malfeasance, and is accordingly an appropriate fact witness in this matter. As such, LendUS sought to depose him. I found, however, that Mr. Stein should not be deposed, in order to honor the Defendants' choice of counsel and because LendUS had not shown that the information Mr. Stein possessed could not be acquired elsewhere. Now, however, because Mr. Stein is no longer trial counsel in this litigation, LendUS may find it appropriate to revisit the issue of deposing Mr. Stein.

Pending is the Defendants' Motion for Admission *Pro Hac Vice* of Anne Marie Sferra, Esquire. Along with Mr. Stein, Ms. Sferra is a Partner at Bricker & Eckler LLP. LendUS objects to Ms. Sferra's admission, citing concern that it will be a sham admission that will allow Mr. Stein to control the litigation. [98] I, however, have another concern. If Mr. Stein becomes a fact witness in this matter, his firm's representation of the Defendants may be problematic. Rather than address this issue in a potentially advisory fashion, I defer decision on the Motion pending LendUS's decision whether it will again seek to depose Mr. Stein—a decision it should make promptly, at which point I will allow the parties to supplement their arguments. I note that my decision to defer action on the Motion for Admission *Pro Hac Vice* arises solely from the concern addressed above; it is not reflective of Ms. Sferra's qualifications or her fitness to practice in Delaware, nor those of her firm.

98 D.I. 186.

B. Motions to Compel and for Sanctions Against LendUS and its Counsel

***11** As discussed above, the Defendants have filed two Motions to Compel and for Sanctions. The Defendants' Motions seek, respectively, to compel deposition testimony of Mr. Berry and Mr. Perel, in response to Mr. Caponi's instructions to the witnesses not to answer and his decision to truncate deposition testimony. In light of the facts laid out above, sanctions are not appropriate. I commend to Delaware counsel the issue of whether further discovery is needed from Mr. Berry and Mr. Perel, which I expect they will be able to resolve in good faith.

III. CONCLUSION

For the forgoing reasons, the Plaintiff's Motions for Sanctions are granted in part, and the Defendants' Motions for Sanctions are denied. The Defendants' Motion to Withdraw the Admission *Pro Hac Vice* of David K. Stein, Esquire is granted. I defer consideration of the Defendants' Motion for Admission *Pro Hac Vice* of Anne Marie Sferra, Esquire, as well as the Defendants' Motions to Compel. The Parties should submit an appropriate Order.

All Citations

Not Reported in Atl. Rptr., 2018 WL 6498674

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765 A.2d 930
Supreme Court of Delaware.

In the Matter of a Member of the Bar of the Supreme Court of Delaware, K. Kay SHEARIN, Respondent.

No. 178, 2000.
|
Submitted: Dec. 5, 2000.
|
Decided: Dec. 22, 2000.

Synopsis
Attorney sought review of report issued by Board on Professional Responsibility finding that attorney violated several rules of professional conduct and recommending a three-year suspension. The Supreme Court held that attorney violated professional conduct rules by filing lawsuit which violated court order and which contained "shamefully frivolous" claims against judge.

Affirmed as to finding of violations; jurisdiction retained.

***931** Disciplinary Proceeding Upon Final Report of the Board on Professional Responsibility of the Supreme Court. Affirmed.

Attorneys and Law Firms

Joseph M. Bernstein, Wilmington, Delaware, for respondent.

Mary Susan Much, Office of Disciplinary Counsel, Wilmington, Delaware.

Before: WALSH, HOLLAND and BERGER, Justices.

Opinion

PER CURIAM:

This case comes before the Court pursuant to Rule 9(e) of the Rules of the Board on Professional Responsibility. The Respondent, K. Kay Shearin, a member of the Delaware Bar, seeks review of a report ***932** issued by the Board on Professional Responsibility ("Report"). In the Report, the Board found that Shearin had violated several rules of the Delaware Lawyers' Rules of Professional Conduct ("DLRPC") and recommended that Shearin be suspended for a period of three years pursuant to Board Rule 8(a)(2).

Shearin filed a timely objection to the Board's Report and its recommendation. Shearin has raised three issues on appeal. First, she contends that the Office of Disciplinary Counsel failed to establish that she violated the DLRPC as alleged in the Petition for Discipline ("Petition"). Second, she argues that the Board's findings of fact are not supported by substantial evidence. Third, she submits that the sanction of a three-year suspension recommended by the Board should be rejected in favor of a reprimand.

We have concluded that the violations found by the Board are supported by competent admissible evidence. Nevertheless, we have concluded that the sanction recommended by the Board needs to be addressed further by the parties before a final determination is made by this Court.

STATEMENT OF FACTS [1]

1 The facts are taken almost verbatim from Shearin's Opening Brief.

Events Leading to Disciplinary Charges

On September 1, 1998, the Office of Disciplinary Counsel ("ODC") filed a Petition for Discipline against Shearin. The Petition alleged six violations of the DLRPC by Shearin. The events which led to the ODC's charges against Shearin arose from Shearin's role in litigation, which commenced in 1991, concerning the ownership and governance of certain church properties located in Wilmington, Delaware and elsewhere. The parties involved in that litigation were the Mother African Union First Colored Methodist Protestant Church ("Mother Congregation"), the Conference of African Union First Colored Methodist Protestant Church ("AUMP Church"), and its President Prelate, Delbert L. Jackson ("Bishop Jackson").[2] Shearin was the attorney for the Conference and Bishop Jackson in that litigation.

2 See *Mother African Union First Colored Methodist Protestant Church v. The Conference of African Union First Colored Methodist Protestant Church,* Del.Ch., 1992 WL 83518, 1992 Del.Ch., LEXIS 89 (April 22, 1992).

That litigation resulted in the entry of a final judgment ("Final Judgment") on February 24, 1993 which denied the claims of Shearin's clients, the AUMP Church and Bishop

Jackson, and upheld the claims of the plaintiff, the Mother Congregation and its members. The Court of Chancery held that the church properties in question belonged to the Mother Congregation, its Trustees and its members. The Court of Chancery issued a final injunction restraining the AUMP Church from interfering with the use and enjoyment of the properties by the Mother Congregation and its members and also invalidated a deed that purported to transfer the church properties from the Mother Congregation to the AUMP Church. The Court of Chancery's Order also imposed sanctions on Shearin under Chancery Court Rule 11 and ordered her to pay $459.00 to the plaintiffs' attorneys.

On July 13, 1995, the Court of Chancery entered an Order finding Shearin in civil contempt of court for violating the terms of the Final Judgment. The Court of Chancery transmitted its Memorandum Opinion and Order to the ODC for it to "consider appropriate disciplinary measures against Ms. Shearin, whose pattern of behavior in this case raises serious questions as to her willingness to abide by the standards of conduct expected of attorneys who practice before this Court." On September 22, 1995, the Court of Chancery entered an Order finding Shearin in civil contempt for conduct that the Court ***933** found to be in violation of the Court's July 13, 1995 Order. The Court's Order also directed that a copy of the Order be transmitted to ODC "to take such disciplinary action against [Shearin] as it deems appropriate." These two referrals to ODC led to the initiation of three separate disciplinary proceedings against Shearin, which resulted in the imposition of a one-year suspension from the practice of law. [3]

3 *See In re Shearin,* Del.Supr., 721 A.2d 157 (1998) (per curiam), *cert. denied,* 526 U.S. 1122, 119 S.Ct. 1776 (1999) ("*Shearin I* ").

The pending ODC Petition arose from a lawsuit filed by Shearin, *pro se,* and Bishop Jackson on February 26, 1997 in the U.S. District Court for the District of Columbia (the "Shearin Lawsuit"). The claims asserted in the Shearin Lawsuit were brought under the federal civil rights laws, 42 U.S.C. §§ 1983 and 1985 and sought monetary damages as well as injunctive relief. The named defendants included individual trustees of the Mother Congregation, attorneys who had represented the Mother Congregation, several Superior Court Judges, two Vice–Chancellors, most current and former Justices of the Delaware Supreme Court, some U.S. District Court judges and judges of the Third Circuit Court of Appeals, one attorney employed by the ODC, and a United States Senator.

In the complaint, Bishop Jackson alleged that defendant Jarman had conspired with other named defendants to "break up the AUMP Church" and to "take its church buildings and land away from it." Bishop Jackson also alleged that various named defendants had engaged in a conspiracy to deprive Jackson and the AUMP Church members of church properties (hereinafter "Jackson Claims").

In claims that were unrelated to Bishop Jackson's claims concerning the church and its properties, Shearin alleged that one defendant, then a United States District Court Judge: unlawfully refused to authorize payments to Shearin for services she had rendered as a court-appointed attorney under the Criminal Justice Act, 18 U.S.C. § 3006A; had induced other federal judges in the District of Delaware to do the same; had caused Shearin's name to be removed from the panel of attorneys who were eligible for CJA appointments in Delaware; and had unlawfully induced other Delaware District Court judges to dismiss all the cases in which Shearin was involved as an attorney for the plaintiff. Shearin alleged that the judge in the Court of Chancery proceedings "suffered a progressive mental disability" which caused him to "exhibit mood swings and injudicious conduct, including hostility to litigants and court personnel." Shearin also alleged that the same jurist "had induced other Delaware judges to ratify his rulings in the AUMP church cases, even when those rulings were contrary to the evidence before the courts and to the controlling law." Lastly, Shearin alleged that several of the named defendants had "defamed" Shearin in various publications and legal proceedings.

In a Memorandum Opinion and Order dated January 27, 1998, all of the claims set forth in the Shearin Lawsuit were dismissed for lack of subject matter jurisdiction under the *Rooker–Feldman* doctrine. [4] In dismissing the claims concerning the AUMP Church and its properties, the federal trial judge in the District of Columbia stated:

4 "Under the *Rooker–Feldman* doctrine, lower federal courts cannot entertain constitutional claims that have been previously adjudicated in state court or that are inextricably intertwined with such a state adjudication." *Gulla v. North Strabane Township,* 3rd Cir., 146 F.3d 168 (1998); *see District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206

(1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923).

> A review of the relief sought by plaintiffs demonstrates that in effect plaintiffs seek the same relief they were unable to obtain in the prior lawsuits ... the court concludes that the plaintiffs ***934** underlying constitutional claims are "inextricably intertwined" with the previous state court judgments. This case presents allegations already entertained and decided in various state court actions ... The relief plaintiffs seek is precisely what the *Rooker–Feldman* doctrine bars. Accordingly, this court lack subject matter jurisdiction over such claims ...

The court also dismissed Shearin's claims against the defendant, Delaware District Court Judge stating:

> They are, for the reasons already stated, without merit and shamefully frivolous. Indeed the record in this case suggests that bringing these claims represents a pattern and course of conduct worthy of consideration for action by the State of Delaware Bar Disciplinary Counsel.

Board Proceedings

The Petition filed by ODC alleged six separate violations of the DLRPC by Shearin. All of the alleged violations arose from the "filing of the Shearin suit in Federal District Court." A hearing before the Board was held on December 19, 1999. Shearin appeared *pro se.*

This hearing had been originally scheduled for June 16, 1999. It was continued until September 22, 1999 to give Shearin time to obtain an attorney. The September 22, 1999 hearing was again continued when questions about the Board's composition were raised by Shearin and subpoenas were outstanding.

Prior to the December 19 hearing before the Board, at Shearin's request, the Board had issued subpoenas to a former ODC attorney, a Vice–Chancellor and the Federal District Court Judge in the District of Columbia who had dismissed Shearin's claims. ODC moved to quash the subpoenas. The Board granted ODC's motion and ruled that "the testimony and documents [that Shearin] seeks to introduce at the hearing are irrelevant to the proceedings before the Board." At the outset of the hearing, Shearin also moved to disqualify one of the Board members. That motion was denied by the Board.

When the Board hearing began, ODC requested that all the allegations set forth in the Petition for Discipline filed on September 1, 1998 be "deemed admitted." Board Rule 9(d) states that Respondent had twenty days after service of the petition to file an answer and to serve it on the ODC or charges shall be deemed admitted. Service was made on Shearin on September 2, 1998. No answer was filed within the twenty-day period.

A previous Chair of the Board had extended the time for Shearin to answer the Petition until December 22, 1998. Shearin failed to file an answer on the extended date, stating it was done to preserve her "right to counsel" argument. Although the Board concluded that Shearin's "right to counsel" argument had no merit, it denied ODC's request to deem that Shearin had admitted the allegations in its Petition by failing to file an answer.

This Court understands the Board's desire to accommodate the Respondent in this case since she appeared *pro se.* In the future, however, the Board's procedural rules should be enforced. Rule 9(d)(2) provides "in the event the respondent fails to answer within the prescribed time, all of the allegations and charges in the petition shall be deemed admitted, such that the sole remaining issue to be determined by the Board shall be the appropriate disciplinary action."

Board Hearing

At the Board hearing, the attorney for ODC did not present any witnesses to support the allegations in the Petition. Rather, ODC introduced certain documents into evidence and argued that those documents established the alleged violations. The documents were the Petition for Discipline with four exhibits and thirteen ODC exhibits in bound form as follows:

> ***935** ODC EXHIBIT 1—Verified Complaint, *Jackson, et al. v. Jarman, et al.,* Civil Action No. 97cv0429(RMU).

> ODC EXHIBIT 2—Memorandum Opinion of the Court of Chancery of the State of Delaware in and for New Castle County, *Mother African Union First Colored Methodist*

Protestant Church v. The Conference of African Union first Colored Methodist Protestant Church, Del.Ch., C.A. No. 12055, 1992 WL 83518, (V.C.Jacobs), dated April 22, 1992 (Mem.Op.)

ODC EXHIBIT 3—Superseding Final Order and Judgment, C.A. No. 12055, (V.C. Jacobs) dated February 24, 1993 based on Memo Op. 4/22/92.

ODC EXHIBIT 4—Memorandum Opinion and Order Voiding Deed, Adjudication Contempt, and Imposing Sanctions (C.A. No. 12055), and Order dismissing C.A. 1674, 1995 WL 420003 (V.C.Jacobs), dated July 13, 1995.

ODC EXHIBIT 5—Contempt Order, C.A. No. 12055 (V.C. Jacobs), dated September 2, 1995.

ODC EXHIBIT 6—Order of Dismissal, C.A. No. 95C–07–230 (Judge DelPesco), dated September 25, 1995.

ODC EXHIBIT 7—Copy of Docket Sheet of United States District Court for the District of Columbia for C.A. No. 97–CV–429.

ODC EXHIBIT 8—Memorandum Opinion and Order of the United States District Court for the District of Columbia and Order Granting Defendant's Motions to Dismiss, Civil Action No. 97CV0429 (RMU)—filed January 27, 1998.

ODC Exhibit 10—Order of the United States Court of Appeals for the District of Columbia Circuit, No. 98–5077—filed July 15, 1998 affirming District Court Order.

ODC Exhibit 11—Memorandum Opinion and Amended Order in the Court of Chancery of the State of Delaware in and for New Castle County: C.A. No. 12055, 1998 WL 892642 (V.C.Jacobs) dated December 11, 1998 and December 21, 1998.

ODC EXHIBIT 12—Order, C.A. No. 12055, (V.C. Jacobs) dated May 11, 1999.

ODC EXHIBIT 13—May 17, 1999 letter from ODC to H. Edward Maull, Esquire with the attached exhibit "D" pertaining to the issue of deemed admissions (12/9/98 letter from prior Chair of the Board On Professional Responsibility, Steven J. Rothschild, Esquire).

Shearin objected to the admission of these documents into evidence. Over this objection, the Board admitted all of the exhibits presented by the ODC as matters of public record and of which judicial notice could be taken. Shearin testified as a witness on her own behalf. The Board also permitted Shearin to respond *pro se* to the legal arguments made by ODC.

Alleged Violations

ODC alleged in its Petition that Shearin had violated six separate provisions of the DLRPC:

1. "The Respondent's filing of the patently frivolous Shearin Suit and the Shearin Appeal, which contained a series of groundless and utterly fantastic claims and allegations, was a violation of Rule 3.1 of the Delaware Lawyers' Rules of Professional Conduct (the "DLRPC"), which generally states that a lawyer shall not engage in frivolous litigation."

2. "The Respondent's filing of the patently frivolous Shearin Suit and the Shearin Appeal, which were actions taken contrary to the plain and express provisions of the Final Order, was a violation of Rule 3.4(c) of the DLRPC, which states that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal."

3. "The Respondent's filing of the patently frivolous Shearin Suit and the Shearin Appeal, which contained numerous and ***936** plainly baseless accusations against members of the Delaware and federal judiciary, and which directly violated orders of the Chancery Court, was a violation of Rule 3.5(c) of the DLRPC, which states that a lawyer shall not engage in conduct which is disruptive, discourteous, or degrading to a tribunal."

4. "The Respondent's filing of the patently frivolous Shearin Suit and the Shearin Appeal, which did little more than harass, delay, and unnecessarily burden dozens of named defendants, was a violation of Rule 4.4 of the DLRPC, which states that a lawyer shall not use means that have no substantial purpose other than to delay or burden a third person."

5. "The Respondent's filing of the patently frivolous Shearin Suit and the Shearin Appeal, which contained numerous and baseless personal attacks on the integrity of various members of the Delaware federal judiciary, was a violation of Rule 8.2 of the DLRPC, which states generally that a lawyer shall not

make statements about the character or integrity of a member of the judiciary with reckless disregard for the truth or falsity of such statements."

6. "The Respondent's filing of the patently frivolous Shearin Suit and the Shearin Appeal, as well as her prosecution of such actions over many months, caused two federal courts, many judicial defendants, and many other members of the legal system to waste time and resources on matters that were in fact lacking in the slightest legal merit, and therefore was a violation of Rule 8.4(d) of the DLRPC, which states that a lawyer shall not engage in conduct that is prejudicial to the administration of justice."

In its Report, the Board found that four allegations of misconduct in violation of Rules 3.1, 3.4(c), 8.2 and 8.4(d) had been established and that two allegations of violations of Rules 3.5(c) and 4.4 had not been established. The sanction recommended by the Board was a three-year suspension from the practice of law.

THE BOARD'S EVIDENTIARY RULINGS ARE CORRECT

The evidence presented by ODC consisted of the documentary exhibits identified earlier in this opinion. We have concluded that those exhibits were admissible pursuant to Delaware Rules of Evidence 201 and 803(8). Delaware Rule of Evidence 201 provides for judicial notice of adjudicative facts that are not subject to reasonable dispute because those facts are capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned. Delaware Rule of Evidence 803(8) is a well-recognized exception to the Hearsay Rule for public records or reports.

SHEARIN VIOLATED RULE 3.1

Rule 3.1 of the DLRPC provides that "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, when the lawyer knows or it is obvious that there is no non-frivolous basis for doing so; however, this does not preclude a lawyer from making a good faith argument for an extension, modification or reversal of existing law." In its Petition, ODC alleged that Shearin violated Rule 3.1 because the Shearin lawsuit and the subsequent appeal "were frivolous in nature and contained groundless and utterly fantastic claims and allegations."

In response to this allegation, Shearin argued that Rule 3.1 did not apply because she was not acting as the attorney for Bishop Jackson and also because she was a *pro se* litigant with respect to the "Shearin Claims." Shearin did admit, however, that she was the one who had drafted the Complaint:

> I drafted it and then showed it to the Bishop and he made some comments. I mean, we did it together. But I drafted the main part of it because I had most of the documents with the names and addresses and everything. I did put the legal language in and everything, but he also had some input in it. It wasn't that ***937** I did it and he just signed it. I want you to understand we both did it, but I did the main part of the writing.

The record reflects that the Complaint was signed by Shearin and Delbert Jackson.

The Board rejected Shearin's argument and concluded that her role in the Shearin Lawsuit was governed by the provisions of Rule 3.1. The Board concluded that Shearin's conduct was in violation of Rule 3.1 on the basis of the District Court's Memorandum Opinion which dismissed the Shearin Lawsuit. In taking that action, the Federal judge found that "Ms. Shearin is both a plaintiff in the present action as well as counsel for plaintiffs."

The record reflects that Shearin exercised her right to appeal the Federal District Court's judgment. That judgment was affirmed by the Circuit Court of Appeals. Shearin's petition for a writ of certiorari was denied by the United States Supreme Court. Accordingly, the judgment entered against Shearin became final and was a proper basis for the Board's determination that Shearin violated Rule 3.1.

SHEARIN VIOLATED RULE 3.4(c)

Rule 3.4(c) provides that a "lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." The Board found that Shearin knowingly disobeyed the Chancery Court order, which expressly enjoined her, and her client, from interfering with the quiet title, operation, use, enjoyment and governance of the church properties and from holding themselves out as having any ownership interest in those properties.

The Board reviewed the content of the Shearin Suit and found that by seeking monetary relief from the Mother Congregation, Shearin was, in essence, again questioning the Mother Congregation's absolute right to title of the church properties which had been granted by the courts of the State of Delaware. The Board also found that by seeking punitive damages for the value of injury to her reputation and loss of business, as well as her legal expenses and counsel fees since the origination of the Mother Congregation litigation in 1991, Shearin was again putting into question the right of the Mother Congregation to maintain title to the properties.

Shearin argues that, because she was not acting in a representative capacity, she cannot be found to have violated Rule 3.4(c). According to Shearin, the Chancery Court order dealt exclusively with title to the church properties, which would fall under the "Jackson Claim." The record supports the Board's determination that the Shearin Suit, in seeking monetary damages from the Mother Congregation for properties taken from the AUMP Church since 1991, interfered with the rights of the Mother Congregation to enjoy quiet title to its properties. The Board's conclusion that Shearin violated Rule 3.4(c) is affirmed.

SHEARIN VIOLATED RULE 8.2

Rule 8.2 provides that "a lawyer shall not make a statement that the lawyer knows to be false, or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge ..." Shearin contends that the Board placed a burden of proof on her to prove that her allegations against the Delaware Federal District Court Judge and the Vice Chancellor were true. According to Shearin, the Board presumed that the allegations were false and put the burden on Shearin to prove otherwise:

> Respondent presented no objective evidence to support the statements about [the Delaware Federal District Court Judge]. Respondent further demonstrated a reckless disregard for the truth of her statements in characterizing the mental health of the Vice–Chancellor. Her statements had no objective basis in fact. It does not appear from ***938** Respondent's testimony that she is medically qualified to make allegations as to mental health nor was any medical evidence presented ...

Shearin submits that the Board relieved ODC of its duty to present evidence in support of its allegations.

Shearin's arguments disregard the documentary exhibits admitted into evidence before the Board that reflect her allegations were dismissed as "frivolous" by a Federal District Court in the forum of her choice, the District of Columbia, and affirmed on appeal. Those final judicial determinations constituted sufficient credible evidence to carry ODC's burden of establishing the alleged violation of Rule 8.2 in the Petition. The burden then shifted to Shearin.

Alternatively, Shearin argues that she has a constitutional right to make these remarks concerning members of the judiciary. She cites *Standing Committee on Discipline v. Yagman,* [5] in which the Ninth Circuit held that a lawyer's First Amendment rights to freedom of speech were constitutionally guaranteed and he was shielded from disciplinary sanctions for that speech. The decision in *Yagman* is inconsistent with the holdings of this Court on the issue of constitutionally protected speech as applied to lawyers.

5 9th Cir., 55 F.3d 1430, 1438 (1995).

Based upon the United States Supreme Court's decision in *Gentile,* this Court has held that there are ethical obligations imposed upon a Delaware lawyer, which qualify the lawyer's constitutional right to freedom of speech. [6] Accordingly, members of the Delaware Bar are subject to disciplinary sanctions for speech consisting of intemperate and reckless personal attacks on the integrity of judicial officers. [7] This Court's holdings are supported by the Seventh Circuit Court of Appeals decision in *Palmisano,* [8] which declined to follow the Ninth Circuit's holding in *Yagman.* [9]

6 *Gentile v. Nevada Bar,* 501 U.S. 1030, 1065, 1076, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991). *See also Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

7 *See In re Guy,* Del.Supr., 756 A.2d 875, 877–79 (2000) (per curiam) (affirming the Board's conclusion that Guy had violated rule 8.2, in the course of representing a criminal defendant, based upon his written assertions in a letter to a Superior Court Judge that the Judge acted with racial bias against him) (citing *Gentile v. State Bar of Nevada,* 501 U.S. 1030, 1081–82, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) (O'Connor, J., concurring) ("Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech.")); *In re Guy,* Del.Supr., No. 138, 1995, Holland, J., 670 A.2d 1338 (Sept. 13, 1995) (ORDER), *cert denied,* 516 U.S. 1115, 116 S.Ct. 917 (1996) (affirming the Board's conclusion that Guy had violated rules 3.5(c) and 8.2 by directing a letter to the Chief Justice, which contained personal attacks against him); *Shearin I,* 721 A.2d at 162 (Shearin violated Rule 3.5(c) for filing a reply brief which contained personal attacks against the trial judge and allegations that he was bribed by the opposing party to the litigation.).

8 *In re Palmisano,* 7th Cir., 70 F.3d 483 (1995). *See also,* Randy J. Holland, *Attorney's Media Contacts: Some Ethical Considerations,* Fed.Law., Feb. 1996, at 26.

9 *Standing Committee on Discipline v. Yagman,* 9th Cir., 55 F.3d 1430, 1438 (1995).

In *Palmisano,* the Seventh Circuit held that there must be some factual basis for the lawyer's accusations of judicial dishonesty before the First Amendment protections for such speech can apply. [10] This record reflects *no* factual basis for the Shearin assertions involving a Vice Chancellor's mental capacity and a former Delaware District Court Judge's conspiracy with other judges against her. The Board's conclusion that Shearin violated Rule 8.2 is affirmed.

10 *Id.* at 487.

SHEARIN VIOLATED RULE 8.4(d)

Rule 8.4(d) provides that is "professional misconduct for a lawyer to ... engage in ***939** conduct that is prejudicial to the administration of justice." The ODC Petition alleged that "The Respondent's filing of the patently frivolous Shearin Suit, and the Shearin Appeal, as well as her prosecution of such actions over many months, caused two federal courts, many judicial defendants, and many other members of the legal system to waste time and resources on matters that were in fact lacking in the slightest legal merit ..."

The Board found that filing the Shearin Suit was an abuse of process and prejudicial to the administration of justice. The Petition alleged, *inter alia,* that the Shearin Suit required the Federal District Court to review 200 pleadings and amendments on charges which had already been finally determined by the courts of the State of Delaware. The filing of the Shearin Suit was also in disregard of the Delaware Chancery Court order, insofar as it placed the title to the Mother Congregation's property in question. Violations of court orders constitute conduct prejudicial to the administration of justice. [11] The Board's conclusion that Shearin violated Rule 8.4(d) is supported by the record.

11 *See In re Tos,* Del.Supr., 576 A.2d 607 (1990).

APPROPRIATE SANCTION

The exclusive authority to impose sanctions for attorney misconduct is vested in this Court. [12] The guidelines for the imposition of sanctions are well-established. They are not designed to be either punitive or penal. [13] The relevant factors to consider in determining an appropriate sanction are: (1) the nature of the duty violated; (2) the lawyer's mental state; (3) the actual/potential injury caused by the misconduct; and (4) the existence of aggravating and mitigating circumstances. [14]

12 *Shearin I,* 721 A.2d at 165.

13 *Id.* at 166.

14 *In re Mekler,* Del.Supr., 669 A.2d 655, 668 (1995). The Court has also looked for guidance to the *ABA Standards for Imposing Lawyer Sanctions. Shearin I,* 721 A.2d at 165–166.

Shearin's attorney properly points out that "although the Petition alleged violations of separate provisions of the DLRPC, all of the allegations which the Board found to have been established arose from a common nucleus of facts —the substantive content of the Shearin Lawsuit that was filed in U.S. District Court for the District of Columbia, which was ultimately dismissed." He argues that a public reprimand is the most appropriate sanction because Shearin did not knowingly violate the Delaware Lawyers Rules of Professional Responsibility. Shearin's representation by her attorney in this appeal has been exemplary.

The second guideline for imposing sanctions is the lawyer's state of mind. Although ODC argues that a three-year suspension is the appropriate sanction, ODC's Answering Brief acknowledges Shearin's "statements to the Board clearly reflect that she does not recognize the wrongfulness of her conduct." This Court has concluded that it would be helpful, in deciding upon an appropriate sanction, to have a professional assessment of Shearin's mental state.

CONCLUSION

The Board's judgment that Shearin violated four provisions in the Delaware Lawyers Rule of Professional Responsibility is affirmed. The Court will retain jurisdiction to decide upon an appropriate sanction.

All Citations

765 A.2d 930

Pagination
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Majority Opinion > Concurring Opinion > Dissenting Opinion >

SUPREME COURT OF OHIO

COLUMBUS BAR ASSOCIATION v. BAHAN.

No. 2021-0224

June 15, 2021, Submitted

April 14, 2022, Decided

THIS SLIP OPINION IS SUBJECT TO FORMAL REVISION BEFORE IT IS PUBLISHED IN AN ADVANCE SHEET OF THE OHIO OFFICIAL REPORTS.

ON CERTIFIED REPORT by the Board of Professional Conduct of the Supreme Court, No. 2019-065.

Attorneys—Misconduct—Violations of the Rules of Professional Conduct—Violation of the Rules for the Government of the Bar—Conditionally stayed six-month suspension.

Briscoe Law Offices and Collen H. Briscoe; Dinsmore & Shohl, L.L.P., and Nita Hanson; and Kent R. Markus, Bar Counsel, and Thomas E. Zani, Deputy Bar Counsel, for relator.

The Steinhelfer Firm, L.L.C., and Tim Steinhelfer, for respondent.

O'CONNOR, C.J. FISCHER, DONNELLY, STEWART, and BRUNNER, JJ., concur. KENNEDY, J., concurs in part and dissents in part, with an opinion joined by DEWINE, J., except for paragraphs 85 and 86. DEWINE, J., concurs in judgment only, with an opinion joined by KENNEDY, J.

O'CONNOR

O'Connor, C.J.

P1 Respondent, Natalie J. Bahan, of West Mansfield, Ohio, Attorney Registration No. 0079304, was admitted to the practice of law in Ohio in 2005. On February 12, 2020, we publicly reprimanded her for violating Prof.Cond.R. 7.3(a) (a lawyer shall not, by in-person, live-telephone, or real-time electronic contact, solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain). *Columbus Bar Assn. v. Bahan*, 159 Ohio St.3d 479 , 2020-Ohio-434 , 152 N.E.3d 189 (" *Bahan I* ").

P2 In a four-count complaint filed in December 2019, relator, Columbus Bar Association, charged Bahan with four counts of professional misconduct arising from (1) her loud, profane, and alcohol-fueled outburst that she had directed at a former judge during a presentation at the 2018 Logan County Bar Association holiday event (Count One), (2) seven other incidents related to her alleged alcohol use (Count Two), (3) failing to diligently represent a client (Count Three), and (4) failing to cooperate in a disciplinary investigation and allowing her attorney registration to lapse (Count Four).

P3 A three-member panel of the Board of Professional Conduct conducted a hearing and heard testimony from Bahan and 14 other witnesses. At the conclusion of the evidence, relator withdrew Count Three. After the hearing, the panel unanimously accepted that withdrawal and also dismissed the charges alleged in Count Four.

P4 The panel issued a report finding that Bahan's alcohol-related conduct violated two rules governing the ethical conduct of lawyers, unanimously dismissed two alleged charges (one from Count One and one from Count Two), alleging violations of Prof.Cond.R. 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law), and recommended that we impose a conditionally stayed, six-month suspension for Bahan's misconduct. The board adopted the panel's findings of fact, conclusions of law, and recommended sanction.

P5 Bahan raises five objections to the board's findings and recommended sanction. Her primary argument is that her conduct at the bar association's holiday event is constitutionally **[*2]** protected speech that may not be sanctioned under Gov.Bar R. IV(2).

P6 With one exception, we overrule Bahan's objections and adopt the board's findings of misconduct. We also adopt the board's recommendation that Bahan be suspended for six months with the entire suspension stayed on the condition that she engage in no further misconduct—with the additional condition that she submit to a substance-use assessment conducted by the Ohio Lawyers Assistance Program ("OLAP") and comply with all recommendations arising from that assessment.

Bahan's Alcohol-Related Misconduct

Count One: Failure to maintain a respectful attitude toward the courts

P7 Bahan and her husband attended the annual Logan County Bar Association holiday event on December 8, 2018. During the event, the bar association presented a "mock award" to William Goslee, who at that time was a judge on the Logan County Court of Common Pleas. Bahan, who had consumed alcohol at the event and appeared to be intoxicated, loudly and rudely interrupted the presentation of the award and called Judge Goslee a "piece of shit," an "asshole," and a "motherfucker."

P8 The board found that Bahan was displeased with Judge Goslee because he was involved with filing the grievance that had resulted in relator's decision to file the disciplinary complaint against her in *Bahan I*, 159 Ohio St.3d 479 , 2020-Ohio-434 , 152 N.E.3d 189 . At the time of the bar event, *Bahan I* was pending before the board, and the hearing was scheduled for two days after the bar event.

P9 The board found that Bahan's "loud, profane, and drunken conduct," which was directed at Judge Goslee, violated Gov.Bar R. IV(2) (requiring a lawyer to maintain a respectful attitude toward the courts).

Count Two: Conduct prejudicial to the administration of justice

P10 In its complaint, relator alleged that over a nine-year period, Bahan had engaged in seven additional incidents of improper conduct while under the influence of alcohol and that her conduct violated Prof.Cond.R. 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice). The board found that Bahan's conduct in three of those incidents violated Prof.Cond.R. 8.4(d) .

P11 In the first incident, while attending a charity benefit with her husband in May 2019, Bahan called the Logan County Sheriff's Office to report that "William Branan" had stolen her vehicle. Approximately ten minutes into that call, a male got on the phone and informed the dispatcher that "William Branan" was Bahan's husband, that Bahan was mad at him, and that there was no car theft in progress.

P12 During Bahan's disciplinary hearing, Deputy Miriam Reames testified that she responded to Bahan's call. Reames was unable to locate Bahan at the charity benefit, so she went to Bahan's home along with another deputy. There, Bahan told Reames that she and her husband had had a verbal disagreement, that he had gone outside, and that she thought he had left her at the party. At some point after Bahan called the sheriff's office, Bahan's husband took her home. Reames concluded that Bahan was intoxicated because her eyes were glassy and bloodshot **[*3]** and there was an odor of alcohol coming from her person and breath.

P13 The second incident involved a phone call that Bahan made to the sheriff's office in February 2017 to report that her teenaged son had stolen her iPad. While Bahan was speaking to a sheriff's deputy, her husband called 9-1-1 to report that she was "heavily intoxicated and causing problems." Sheriff's deputies arrived at Bahan's residence and learned that her son had left the home with the iPad. The deputies noticed that Bahan was loud and unsteady on her feet. She was also slurring her speech and had bloodshot and glassy eyes and a strong odor of alcohol on her breath. They concluded that she was intoxicated. Bahan yelled profanities at the deputies as they helped her husband leave the home. The deputies admonished her to calm down and repeatedly told her to remain in her home.

P14 No charges were ever brought against Bahan's son, but Bahan was cited for disorderly conduct—though that charge was later dismissed. The board found that Bahan engaged in conduct prejudicial to the administration of justice and that she abused the legal system by reporting these two trivial incidents to law-enforcement authorities.

P15 The third incident occurred while Bahan was serving as a guardian ad litem ("GAL") in 2010. Bahan had attempted to make a surprise visit to the home of her ward's mother, but the mother was not at home. Bahan and her husband went to eat dinner at a nearby restaurant, where she drank one glass of wine with her meal before returning to the mother's home to complete the visit. The board found that by drinking alcohol before a home visit while serving as a GAL, Bahan engaged in conduct that was prejudicial to the administration of justice.

Bahan's Objections to the Board's Findings

P16 Bahan raises four objections to the board's findings of fact, misconduct, and evidentiary rulings. For the following reasons, we overrule all but her third objection.

Gov.Bar R. IV(2) is constitutional as applied to Bahan's conduct in this case

P17 In her first objection, Bahan contends that her conduct at the Logan County Bar Association event may not support a finding of a violation of Gov.Bar R. IV(2), because that conduct consisted of political speech that is protected under the First Amendment to the United States Constitution and Article I, Section 11 of the Ohio Constitution , and was not directed "toward the courts." Specifically, Bahan contends that her speech at the event was political in nature because she intended to express her disapproval of Judge Goslee's courtroom conduct that purportedly led the bar association to present him with a mock award that evening. Relator, in contrast, argues that this matter is not about the freedom of speech, but rather "the uncontrolled, self-indulgent, drunken behavior of a member of the bar." For the following reasons, we find that Bahan's objection is without merit.

Factual background

P18 At its 2018 holiday event, at which approximately 50 to 70 people attended, the Logan County Bar Association offered bar members and their spouses **[*4]** an opportunity to socialize over dinner, drinks (including alcohol), and some dancing. The event also included an awards ceremony.

P19 According to Bahan and other witnesses, she was not intoxicated when she arrived at the event, but she began to drink wine soon thereafter. Bahan testified that she had about three glasses of wine, because that is her "public limit." She did not believe that she was intoxicated, but she also did not believe that it was a good idea for her to drive herself home. Judge Charles Chamberlain testified that Bahan "was a little unsteady on her feet." Although her conduct suggests otherwise, Bahan denied that alcohol played any role in her conduct at the event.

P20 Witnesses testified that they did not notice anything unusual about Bahan's behavior until after dinner. Natasha Kennedy, a magistrate with the Logan County Family Court, testified that as the evening progressed, she observed some tension between Bahan and Judge Goslee.

P21 After dinner had been served, Judge Goslee was presented with a mock award that he described as "a bit of a roast." As he gave remarks after accepting the award, Bahan started calling him foul names under her breath and her voice got progressively louder. As the people around her told her to be quiet, she stood up and loudly interrupted Judge Goslee, calling him a "piece of shit," an "asshole," and a "motherfucker."

P22 Bahan's comments were loud enough for the entire room to hear. Kennedy and Miranda Warren, an attorney who was seated five to ten feet away from Bahan, testified that the other attendees appeared to be shocked by Bahan's conduct. Warren stated that she could see Judge Goslee and believed that he heard Bahan's outburst, though she, Kennedy, and another attorney all testified that Judge Goslee did not react.

The First Amendment and the regulation of attorney conduct

P23 As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Chicago Police Dept. v. Mosley*, 408 U.S. 92 , 95 , 92 S.Ct. 2286 , 33 L.Ed.2d 212 (1972). That said, "the First and Fourteenth Amendments have never been thought to give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses." *Cohen v. California*, 403 U.S. 15 , 19 , 91 S.Ct. 1780 , 29 L.Ed.2d 284 (1971).

P24 "It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed." *Gentile v. Nevada State Bar*, 501 U.S. 1030 , 1071 , 111 S.Ct. 2720 , 115 L.Ed.2d 888 (1991). And "[e]ven outside the courtroom, * * * lawyers in pending cases [a]re subject to ethical restrictions on speech to which an ordinary citizen would not be." *Id.*

P25 The United States Supreme Court has also recognized that "[e]ven in an area far from the courtroom and the pendency of a case, our decisions dealing with a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, have not suggested that lawyers are protected by the First Amendment to the same extent as those engaged in other businesses." *Id.* at 1073 , citing **[*5]** *Bates v. Arizona State Bar*, 433 U.S. 350 , 97 S.Ct. 2691 , 53 L.Ed.2d 810 (1977), *Peel v. Attorney Registration and Disciplinary Comm. of Illinois*, 496 U.S. 91 , 110 S.Ct. 2281 , 110 L.Ed.2d 83 (1990), and *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 , 98 S.Ct. 1912 , 56 L.Ed.2d 444 (1978). "In each of these cases, [the court] engaged in a balancing process, weighting the State's interest in the regulation of a specialized profession against a lawyer's First Amendment interest in the kind of speech that was at issue." *Gentile* at 1073 .

P26 Perhaps more importantly, the Supreme Court has recognized an attorney's duty to maintain a respectful attitude toward the courts.

> [T]he obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not to merely be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers.
>
> This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally and for their judicial acts.

Bradley v. Fisher, 80 U.S. 335 , 355 , 20 L.Ed. 646 (1871).

P27 In an effort to preserve the honor, integrity, and dignity of the legal profession and Ohio courts, this court has adopted Gov.Bar R. IV(2) to regulate attorney conduct toward the courts. That rule provides: "It is the duty of the lawyer to maintain a respectful attitude toward the courts, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance." While recognizing that judges and justices are entitled to receive the support of lawyers against unjust criticism and clamor, the rule declares that a lawyer has the right and duty to submit a grievance to proper authorities, "[w]henever there is proper ground for serious complaint of a judicial officer." *Id.* Indeed, it emphasizes that "[t]hese charges should be encouraged and the person making them should be protected." *Id.*

P28 The requirements of Gov.Bar R. IV(2) are consistent with an Ohio lawyer's oath to conduct herself "with dignity and civility and show respect toward judges, court staff, clients, fellow professionals, and all other persons" in her capacity as an attorney and an officer of the court. Gov.Bar R. I(9)(A). Those requirements are also consistent with Section 5 of the preamble to the Ohio Rules of Professional Conduct , which provides that "[a] lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials," and underscores that "[a]lthough a lawyer, as a citizen has a right to criticize such officials, the lawyer should do so with restraint and avoid intemperate statements that tend to lessen public confidence in the legal system."

P29 Significantly, none of these regulations prohibit a lawyer from speaking on any subject matter. Instead, they require a lawyer to conduct herself with the dignity and respect that is commensurate with her role as an officer of the court to encourage civility and to preserve public confidence in the legal system.

Analysis of Bahan's objection[*6]

P30 Bahan contends that Gov.Bar R. IV(2) should not be broadly interpreted so as to proscribe the use of offensive language to criticize a judge. Citing *Disciplinary Counsel v. Gardner*, 99 Ohio St.3d 416 , 2003-Ohio-4048 , 793 N.E.2d 425 , Bahan asserts that attorneys may still "freely exercise free speech rights and make statements supported by a reasonable factual basis, even if the attorney turns out to be mistaken." But Bahan was not charged under the rule that prohibits an attorney from knowingly making a false accusation against a judge. She was charged under a rule that requires a lawyer to maintain a respectful attitude toward the courts.

P31 Here, Bahan's conduct is not objectionable simply because she publicly criticized Judge Goslee and it remains unclear how directing profane insults toward a judge is "political speech." Bahan argues that she intended to express her disapproval of Judge Goslee's courtroom conduct that purportedly led the bar association to present him with a mock award that evening. But Bahan did not associate her vulgarities with any other facts or context. Instead, on its face, Bahan's conduct—offensive name-calling, which was apparently induced by alcohol and directed toward a sitting judge while he was being publicly recognized at a bar-association function—erodes the civility, dignity, and respect for the rule of law contrary to an attorney's duty described in Gov.Bar R. IV(2).

P32 Bahan argues that her speech is not sanctionable under the First Amendment standard set forth in *Berry v. Schmitt*, 688 F.3d 290 (6th Cir.2012). But the Sixth Circuit in *Berry* expressly stated: "We also take no position on the constitutionality of sanctioning a lawyer's profanity or threats directed against the courts, or other examples of a lawyer's unmitigated expression of disrespect for the law, even outside the courtoom." *Id.* at 305 . Bahan's conduct is more fitting of this description than to being categorized as political speech. Thus, *Berry* is not applicable to the facts of this case.

P33 Unlike the opinion concurring in judgment only, we fail to see how finding misconduct in this case will have a chilling effect on "legitimate [attorney] criticism of the judiciary." Opinion concurring in judgment only, ¶ 106. Surely, we are not asked to determine whether Bahan's choice expletives to describe Judge Goslee are "legitimate criticism" or even whether they are knowingly false. The opinion concurring in judgment only also suggests that a finding of misconduct here sends a message that attorneys should not get "anywhere close to the line of saying something about the judiciary that someone might consider disrespectful." *Id.* at ¶ 107. We do not agree that the facts of this case are "close to the line" or otherwise warrant such a concern.

P34 By accepting the privilege of practicing law, an attorney accepts certain conditions and duties as an officer of the court. *Cleveland Metro. Bar Assn. v. Morton*, ___ Ohio St.3d ___, 2021-Ohio-4095 , ___ N.E.3d ___, ¶ 38 (O'Connor, C.J., concurring). And while the First Amendment may be invoked as a defense for permissible criticism, *see, e.g., In re Sawyer*, 360 U.S. 622 , 79 S.Ct. 1376 , 3 L.Ed.2d 1473 (1959), *Gardner*, 99 Ohio St.3d 416 , 2003-Ohio-4048 , 793 N.E.2d 425 , that is not the situation here. **[*7]** We therefore overrule Bahan's first objection and adopt the board's finding that her conduct at the December 2018 Logan County Bar Association event violated Gov.Bar R. IV(2).

P35 The opinion concurring in part and dissenting in part asserts that Gov.Bar R. IV(2) "is not a stand-alone, independent ground on which to discipline Bahan." Opinion concurring in part and dissenting in part, ¶ 66. It also asserts that because Gov.Bar R. IV(2) is not one of the Rules of Professional Conduct, it "cannot serve as an underlying basis for an allegation of misconduct." *Id.* at ¶ 77. But those claims are without basis.

P36 Indeed, this court has publicly reprimanded an attorney based solely on his violations of the Rules of the Government of the Bar. *See, e.g., Cincinnati Bar Assn. v. Brand*, 164 Ohio St.3d 542 , 2021-Ohio-2122 , 173 N.E.3d 1211 . In *Brand* , a *unanimous* decision issued last year, this court adopted the board's findings of misconduct based on Jack Irwin Brand's violations of Gov.Bar R. V(23)(C) (requiring a lawyer seeking to enter into an employment, contractual, or consulting relationship with a disqualified or suspended attorney to register that relationship with the Office of Disciplinary Counsel), Gov.Bar R. V(23)(D) (requiring the lawyer entering into an employment, contractual, or consulting relationship with a disqualified or suspended attorney to receive written acknowledgment of that relationship from the Office of Disciplinary Counsel before the relationship commences), and Gov.Bar R. V(23)(F) (requiring an attorney to provide advance written notice to a client that a disqualified or suspended attorney will perform work or provide services on the client's case). To be clear, this court found no accompanying violation of a Rule of Professional Conduct. And that decision was not an anomaly. *See, e.g., Columbus Bar Assn. v. Dugan*, 113 Ohio St.3d 370 , 2007-Ohio-2077 , 865 N.E.2d 895 , ¶ 3 (publicly reprimanding an attorney for violating Gov.Bar R. V(8)(G)(1) (requiring a lawyer who employs a lawyer with a suspended license to register the employment with the Office of Disciplinary Counsel) and, for separate conduct, violating former disciplinary rules); *Cleveland Bar Assn. v. Allanson*, 72 Ohio St.3d 228 , 1995 Ohio 309 , 648 N.E.2d 1340 (1995) (publicly reprimanding an attorney for violating former Gov.Bar R. V(5)(A), which is now Gov.Bar R. V(4)(G) (requiring a lawyer to cooperate with a disciplinary investigation) and Gov.Bar R. VI(1)(A) (requiring an attorney to comply with regulations for biennial registration and payment of fees)).

P37 In addition, this court has disciplined attorneys for violating the same rule at issue here, Gov.Bar R. IV(2). *See Disciplinary Counsel v. Proctor*, 131 Ohio St.3d 215 , 2012-Ohio-684 , 963 N.E.2d 806 , ¶ 5, 8 ;

Disciplinary Counsel v. Frost, 122 Ohio St.3d 219 , 2009-Ohio-2870 , 909 N.E.2d 1271 , ¶ 5 ; *Disciplinary Counsel v. Watterson*, 114 Ohio St.3d 159 , 2007-Ohio-3615 , 870 N.E.2d 1153 , ¶ 29 . Although the attorneys in those cases also violated various former disciplinary rules, we did not make a distinction between the two sets of rules or otherwise disregard the violation of Gov.Bar R. IV(2), as the opinion concurring in part and dissenting in part suggests that we must do here.

P38 The opinion concurring in part and dissenting in part asserts that because Gov.Bar R. IV(1) places attorneys on notice that they must comply with the Rules of Professional Conduct, but does not expressly **[*8]** state that attorneys must also comply with the Rules for the Government of the Bar, this court does not have the authority to sanction an attorney for violating the Rules for the Government of the Bar. But Gov.Bar R. IV(1) does not contain any such limitation. Nor does it contain language stating that the Rules of Professional Conduct are the *exclusive* parameters on an attorney's conduct. The Rules for the Government of the Bar delineate things like the requirements for an attorney's admission to the bar, attorney registration, and continuing legal education. *See* Gov.Bar R. I, VI, and X. But if we were to accept the statements in the separate opinion as true, the Rules for the Government of the Bar would be unenforceable unless a parallel Rule of Professional Conduct existed. And that interpretation is not supported by either set of rules or this court's precedent.

P39 If the separate opinions intend to suggest that the Rules for the Government of the Bar are not clear regarding an attorney's risk of being sanctioned for his or her failure to comply with those rules, then there is a process by which this court may amend those rules. However, not even Bahan argues that she may not be sanctioned for violating one of the Rules for the Government of the Bar. Instead, Bahan argues that her conduct did not constitute a violation of Gov.Bar R. IV(2). Thus, our analysis here remains within that scope, and we rely on this court's significant body of precedent in which it affirmed findings of misconduct based on a violation of the Rules for the Government of the Bar.

The record supports two of the board's three findings that Bahan engaged in conduct that was prejudicial to the administration of justice

P40 In her second and third objections, Bahan contends that the evidence does not support the board's finding that the incidents of alcohol-related conduct in Count Two were prejudicial to the administration of justice. Specifically, Bahan contends that (1) she appropriately called the sheriff's office to report the alleged theft of her car and iPad and (2) relator's evidence was insufficient to support a finding that drinking a single glass of wine with dinner before conducting a visit to her ward's home was prejudicial to the administration of justice.

P41 Bahan maintains that she had a right to report a crime or an emergency and that her May 2019 and February 2017 calls to the Logan County Sheriff's Office did just that. To support that claim, she asserts (1) that the deputy who responded to the call pertaining to the theft of her iPad testified that she "did the right thing" by contacting law enforcement, and (2) that another officer, who testified about responding to the call that Bahan had made regarding the alleged theft of her vehicle, "likewise saw no problem with [her] contact with law enforcement." Bahan argues that both officers expressed their preference to receive calls like Bahan's sooner rather than later when they involve situations that could lead to domestic violence.

P42 All told, law-enforcement officers spent more than an hour **[*9]** responding to Bahan's claim that her vehicle had been stolen. And Bahan's initial report to law enforcement in no way suggested that the alleged theft involved a domestic dispute or a threat of domestic violence.

P43 Regarding the alleged iPad theft, the deputy's audio recording of the incident suggests that Bahan's son was authorized to use the device for schoolwork, but that Bahan attempted to take it away from him that night. Her son retreated to his room before leaving the home for the night.

P44 The deputies who responded to the scene never investigated Bahan's allegations that her son had stolen her iPad because her husband had also called 9-1-1 to report—and the deputies' observations confirmed—that Bahan was heavily intoxicated and was the one who had been causing problems at the home. Bahan's retrospective suggestion that her drunken call may have been intended to forestall the potential for domestic violence from which her son had retreated is not persuasive. Nor does the absence of criminal charges for her drunken and questionable reports absolve her of her misuse of law-enforcement resources. We therefore overrule Bahan's second objection and find that her two reports to law enforcement were prejudicial to the administration of justice in violation of Prof.Cond.R. 8.4(d) .

P45 However, we sustain Bahan's third objection challenging the board's findings regarding her conduct as a GAL more than 10 years ago. Although Bahan admitted to having consumed a glass of wine before conducting a surprise visit at the home of her ward's mother, she also testified that after that visit, she and the judge who had appointed her to the case discussed the matter. Ultimately, Bahan completed her representation in that case and thereafter submitted a bill and received payment. And she stated that the judge continued to appoint her as a GAL in other cases. The judge, however, testified that he believed that Bahan had withdrawn from the case at his suggestion.

P46 In the absence of any clear and convincing evidence tending to show that Bahan's judgment was impaired that night or that her alcohol consumption somehow prejudiced the rights of the ward's mother, we reject the board's findings that her conduct in that case was prejudicial to the administration of justice. We therefore sustain Bahan's third objection.

P47 Having overruled Bahan's first and second objections, we agree with the board's findings that her conduct violated Gov.Bar R. IV(2) and Prof.Cond.R. 8.4(d) .

Bahan has failed to prove that the panel's evidentiary rulings prejudiced her case

P48 Bahan's fourth objection relates to the panel's evidentiary rulings at her disciplinary hearing. On October 21, 2020, relator filed a motion in limine seeking to exclude the testimony of Bahan's witnesses who were not disclosed to relator until October 20, 2020—one week before the disciplinary hearing. In response, Bahan argued that the panel chair had vacated every deadline for the disclosure of witnesses except for the order directing the parties to file their final witness **[*10]** lists, hearing exhibits, and stipulations by October 20, 2020. At the beginning of the disciplinary hearing, the panel chair issued an interlocutory order that Bahan's newly disclosed witnesses would be permitted to testify about Bahan's character, reputation, and professionalism and their observations regarding her alcohol use, but that they would not be permitted to testify about any of the contested matters in the case. Bahan objects to that ruling and argues that the panel's limitation of her witnesses' testimony violated her right to due process.

P49 The record shows that the panel chair vacated two scheduling orders in Bahan's disciplinary case—one requiring the parties to disclose their witness lists on or before March 18, 2020, and the other requiring that disclosure was to be made no later than June 5. Both orders were vacated *after* the disclosure-of-witness-list deadlines had passed. The order vacating the June 5 deadline plainly contemplated that the parties had already exchanged their initial witness lists as it stated that "[t]he parties shall file *final* witness lists, hearing exhibits, and stipulations on or before October 20, 2020." (Emphasis added.) But Bahan did not submit a witness list of any kind until October 20, 2020.

P50 Although the panel's scheduling orders could have been more carefully drafted, Bahan's first two deadlines for disclosing witnesses had passed well before the orders vacating those deadlines. In addition, Evid.R. 103(A)(2) —which is made applicable to disciplinary proceedings by Gov.Bar R. V(27)(A)—provides that an error may not be predicated on a ruling which excludes evidence unless the ruling affects a party's substantial right *and* the party made the substance of the evidence known to the court.

P51 Here, the panel chair agreed to keep an open mind regarding the extent of the testimony that he would allow from Bahan's witnesses and stated that Bahan could proffer any testimony that she believed to have been wrongly excluded. But Bahan made only one proffer of evidence to counter testimony that she had smelled strongly of alcohol while representing a criminal defendant at trial—and it was unrelated to any of the misconduct that had been found by the board. Because Bahan failed to proffer the excluded evidence or otherwise demonstrate how the panel's evidentiary ruling prejudiced her case, we overrule her fourth objection.

Recommended Sanction

P52 When imposing sanctions for attorney misconduct, we consider all relevant factors, including the ethical duties that the lawyer violated, the aggravating and mitigating factors listed in Gov.Bar R. V(13), and the sanctions imposed in similar cases.

P53 The board found that four aggravating factors are present in this case, namely that Bahan (1) has prior discipline, (2) engaged in a pattern of misconduct, (3) committed multiple offenses, and (4) refused to acknowledge the wrongful nature of her conduct. *See* Gov.Bar R. V(13)(B)(1), (3), (4), and (7). As mitigating factors, the board found that Bahan acted without a dishonest or selfish motive and that **[*11]** she exhibited a cooperative attitude toward the disciplinary proceedings. *See* Gov.Bar R. V(13)(C)(2) and (4). The board declined to accord any mitigating effect to the testimony of Mark O'Connor (a former judge in the Logan County Court of Common Pleas) and Wade Thomas Minahan (a former magistrate in the Logan County Court of Common Pleas), upon finding that those witnesses testified to Bahan's *competence* as an attorney and not to her character or reputation as contemplated by Gov.Bar R. V(13)(C)(5).

P54 Although Bahan has been evaluated by OLAP twice in the past, it is not clear from the record that she has submitted to a comprehensive substance-use assessment conducted by a qualified chemical-dependency professional in conjunction with the alcohol-related incidents in this case.

P55 The board considered the sanctions we have imposed for comparable misconduct in multiple cases. There are several cases in which we disciplined an attorney (or a judge) for multiple ethical violations, including violations of Gov.Bar R. IV(2), for making unfounded allegations against judges and other public officials. For example, in *Gardner*, 99 Ohio St.3d 416 , 2003-Ohio-4048 , 793 N.E.2d 425 , we imposed a six-month suspension on an attorney who, in a motion for reconsideration, accused an appellate-court panel of being dishonest, ignoring well-established law, and distorting the truth when the appellate court ruled against his client. And in *Disciplinary Counsel v. Ferreri*, 85 Ohio St.3d 649 , 1999-Ohio-330 , 710 N.E.2d 1107 (1999), we imposed an 18-month suspension, with 12 months conditionally stayed, on a judge who had made false and unfounded statements to the media about judges and other public officials. Ferreri stated that (1) an appellate-court panel had issued a politically motivated decision, (2) a judge had engaged in a conspiracy to cover up the mistreatment of juveniles by detention-center staff, and (3) another judge or those under his direct supervision had lied to the federal government about the success of a juvenile boot-camp program.

P56 The board also considered the sanctions that we imposed on attorneys who engaged in alcohol-related misconduct. For example, in *Disciplinary Counsel v. Mitchell*, 158 Ohio St.3d 356 , 2019-Ohio-5218 , 142 N.E.3d 669 , we imposed a one-year conditionally stayed suspension on an attorney who was convicted of driving while intoxicated and fleeing the scene of an accident involving injuries to the driver and passenger of the other vehicle. In *Lorain Cty. Bar Assn. v. Lewis*, 152 Ohio St.3d 614 , 2018-Ohio-2024 , 99 N.E.3d 404 , we imposed a two-year suspension, with six months conditionally stayed, on an attorney who had left the scene of a motor-vehicle accident after a night of drinking and who was later convicted of obstructing official business for submitting a false witness statement to police. And in *Disciplinary Counsel v. Scurry*, 115 Ohio St.3d 201 , 2007-Ohio-4796 , 874 N.E.2d 521 , we imposed a two-year conditionally stayed suspension on an attorney who, while intoxicated, met with clients and attempted to manage his professional affairs.

P57 The board found that Bahan's profane and alcohol-fueled outburst against Judge Goslee was not nearly as egregious as the allegations that had been made against the attorney in *Gardner* . The board further noted **[*12]** that Bahan's outburst at a private, bar-association event was also not as egregious as what had occurred in *Fererri*—i.e., that judge made some negative statements that were published by the media. Moreover, the board found that none of Bahan's misconduct adversely affected her clients or resulted in a criminal conviction, rendering her conduct substantially less egregious than the attorneys in *Mitchell* and *Lewis* —both of whom left the scene of alcohol-related motor-vehicle accidents. Balancing these facts with the aggravating and mitigating factors present in this case, the board determined that Bahan's misconduct warranted a lesser sanction than the fully stayed one-year suspension that we imposed in *Mitchell* . The board therefore recommends that we impose a six-month suspension, with the entire suspension stayed on the condition that Bahan engage in no further misconduct and pay the cost of these proceedings.

Bahan's Objection to the Recommended Sanction

P58 Bahan objects to the board's recommended sanction and argues that a public reprimand is the appropriate sanction for her misconduct. In support of that sanction, she cites three cases in which we publicly reprimanded attorneys for misconduct that she believes to be more analogous to her own: *Erie-Huron Cty. Bar Assn. v. Bailey*, 161 Ohio St.3d 146 , 2020-Ohio-3701 , 161 N.E.3d 590 (publicly reprimanding an attorney who knowingly or recklessly made false statements on Facebook concerning the integrity of the judge who had jailed his father for direct contempt of court), *Disciplinary Counsel v. Grimes*, 66 Ohio St.3d 607 , 1993-Ohio-125 , 614 N.E.2d 740 (1993) (publicly reprimanding an attorney for making inappropriate and disrespectful statements about a judge to a newspaper reporter and for making inappropriate statements during a hearing), and *Columbus Bar Assn. v. Riebel*, 69 Ohio St.2d 290 , 432 N.E.2d 165 (1982) (publicly reprimanding an attorney who directed verbal and written obscenities at an adverse party in a divorce proceeding). But none of those attorneys had a record of prior discipline, and Bahan does.

P59 Next, Bahan asserts that the board erred by drawing a false distinction between evidence of "character" and evidence of "competence," and it therefore failed to credit her with the good-character-or-reputation mitigation factor, *see* Gov.Bar R. V(13)(C)(5), based on the favorable testimony that former judge O'Connor and former magistrate Minahan gave regarding her competence as an attorney. Bahan cites two cases in which we afforded some mitigating effect to evidence of the respondents' competence and/or professionalism as opposed to their character or reputation. *See Disciplinary Counsel v. Adelstein*, 160 Ohio St.3d 511 , 2020-Ohio-3000 , 159 N.E.3d 1126 , ¶ 16 (attributing some mitigating effect to client letters attesting to the respondent's competence and capability as an attorney); *Dayton Bar Assn. v. Rogers*, 116 Ohio St.3d 99 , 2007-Ohio-5544 , 876 N.E.2d 923 , ¶ 17 (attributing some mitigating effect to client letters attesting to the respondent's competence and professionalism). But here, Bahan presented evidence from two judicial officers who had been retired for at least four years before the date of her disciplinary hearing and well before the misconduct in this **[*13]** case even occurred. And Judge O'Connor observed Bahan's courtroom performance after his retirement only once, in a case in which he served as a visiting judge. For these reasons, we find that evidence of Bahan's competence is of limited probative value and afford it no mitigating weight.

P60 Lastly, Bahan argues that she is entitled to a reduction in board costs that is commensurate with the overall results of this proceeding. She notes one case in which we reduced the amount of the costs that a respondent was liable to pay after 9 of the 17 alleged rule violations were dismissed. *See Akron Bar Assn. v. Shenise*, 143 Ohio St.3d 134 , 2015-Ohio-1548 , 34 N.E.3d 910 , ¶ 26 (reducing the respondent's liability for costs from $9,571.08 to $4,000). In this case, however, relator withdrew one count from the complaint without presenting any evidence of the violations alleged therein and the panel dismissed a second count following the hearing. Bahan was found to have committed one of the two alleged rule violations charged in each of the two remaining counts. While the costs incurred in connection with this proceeding may be on the higher side of normal for the number of violations that we have found, we do not find that they are so out of line as to warrant a reduction.

P61 Having considered Bahan's misconduct, the relevant aggravating and mitigating factors, and the sanctions imposed for comparable misconduct, we agree that a six-month conditionally stayed suspension is the appropriate sanction in this case. Given that Bahan's alcohol use played a significant role in the misconduct at issue, and that Bahan has not submitted to a substance-use assessment conducted by a qualified chemical-dependency professional since that misconduct occurred, a condition of the stay shall include a requirement that she submit to an OLAP substance-use assessment.

Conclusion

P62 Accordingly, Natalie J. Bahan is suspended from the practice of law in Ohio for six months, with the entire suspension stayed on the conditions that she engage in no further misconduct, submit to a substance-use assessment conducted by OLAP, and comply with all the recommendations arising from that assessment. If Bahan fails to comply with any condition of the stay, it will be lifted and she will serve the full six-month suspension. Costs are taxed to Bahan.

Judgment accordingly.

Fischer, Donnelly, Stewart, and Brunner, JJ., concur.

Kennedy, J., concurs in part and dissents in part, with an opinion joined by Dewine, J., except for paragraphs 85 and 86.

Dewine, J., concurs in judgment only, with an opinion joined by Kennedy, J.

DEWINE; KENNEDY (In Part)

Dewine, J., concurring in judgment only.

P87 Today, the majority holds that an attorney may be punished under the Rules for the Government of the Bar of Ohio for speech that fails "to maintain a respectful attitude toward the courts." Majority opinion, ¶ 26. In doing so, it exceeds the limits of our disciplinary authority. Our rules allow us to punish only attorney speech about a judge that the lawyer knows to be false or that is made with reckless disregard as to its truth or falsity. Prof.Cond.R. 8.2(a) . What's **[*14]** more, in holding that an attorney's speech may be punished simply because it is disrespectful of the judiciary, the majority makes mincemeat of First Amendment protections. The unfortunate result will almost certainly be to chill other attorneys from engaging in legitimate criticism of the judiciary.

We lack the authority to discipline an attorney for speech that is critical of the judiciary under the Rules for the Government of the Bar

P88 I have no quarrel with the majority's decision to discipline Natalie Bahan for violating Prof.Cond.R. 8.4(d) (prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice) by making unnecessary calls to law enforcement while she was intoxicated. And based on these violations, I concur with the majority as to the sanction it imposes. But I take issue with the majority's decision to discipline Bahan for violating Gov.Bar R. IV(2) (requiring a lawyer to maintain a respectful attitude toward the courts) for making demeaning statements about a common-pleas judge at a bar association's holiday party.

P89 As the opinion concurring in part and dissenting in part points out, Gov.Bar R. IV(2) does not provide this court with the authority to discipline an attorney for engaging in speech that is critical of the judiciary. The Rules for the Government of the Bar make clear that it is the Rules of Professional Conduct that prescribe the standards under which an attorney may be disciplined. Gov.Bar R. IV(1) provides that "[t]he willful breach of the Rules [of Professional Conduct] shall be punished by reprimand, suspension, disbarment, or probation."

P90 Thus, when it comes to disciplining attorney speech that is critical of the judiciary, we must look to the standards set forth in the Rules of Professional Conduct. Prof.Cond.R. 8.2(a) explicitly defines what an attorney may not say about a judge: "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer." The majority errs by ignoring the professional-conduct rule that defines the standards under which speech critical of the judiciary may be sanctioned and instead opts to impose discipline under Gov.Bar R. IV(2)'s amorphous "respectful attitude towards the courts" language.

Using Gov.Bar R. IV(2) as a basis to discipline attorney speech is inconsistent with the First Amendment

P91 Not only is there no basis for this court to discipline an attorney for an independent violation of Gov.Bar R. IV(2), but in doing so, the majority eviscerates the protections on speech afforded by the Ohio and United States Constitutions. The majority punishes Bahan for violating Gov.Bar R. IV(2)'s admonition that "[i]t is the duty of the lawyer to maintain a respectful attitude toward the courts." Attorney criticism of courts, however, is expressly regulated by Prof.Cond.R. 8.2(a) , which provides that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity **[*15]** concerning the qualifications or integrity of a judicial officer." This professional-conduct rule was carefully calibrated so as not to abridge First Amendment freedoms by adopting the actual-malice standard from *New York Times Co. v. Sullivan*, 376 U.S. 254 , 279-280 , 84 S.Ct. 710 , 11 L.Ed.2d 686 (1964) (statement is made with actual malice when it is made "with knowledge that it was false or with reckless disregard of whether it was false or not"). In saying that an attorney's speech may now be punished simply because it fails to "maintain a respectful attitude toward the courts," majority opinion at ¶ 26, the majority substitutes an amorphous standard for the one that was developed to conform with United States Supreme Court precedent. It thus allows for the punishment of speech beyond that proscribed by Prof.Cond.R. 8.2(a) —speech that is entitled to protection under the Ohio and United States Constitutions.

P92 Just recently, the same majority that writes today stretched the meaning of Prof.Cond.R. 8.2(a) well beyond its terms when it held that an attorney's criticism of the judiciary may be punished even though the attorney's statements have not been shown to be false. *See Cleveland Metro. Bar Assn. v. Morton*, ___ Ohio St.3d ___, 2021-Ohio-4095 , ___ N.E.3d ___. What it does in this case is even more troubling. Today, it renders Prof.Cond.R. 8.2(a) 's actual-malice standard largely beside the point. In essence, the majority says *if we think your speech is disrespectful, we can punish you even if your speech doesn't violate Prof.Cond.R. 8.2(a)* .

P93 Never mind that this holding flies in the face of controlling precent from the United States Supreme Court. District Attorney Jim Garrison certainly did not have a "respectful attitude toward the courts" when he held a press conference criticizing a group of local judges for "inefficiency [and] laziness" and suggested that the judges' conduct might be explained by "racketeer influences on [the parish's] eight vacation-minded judges." *Garrison v. Louisiana*, 379 U.S. 64 , 66 , 85 S.Ct. 209 , 13 L.Ed.2d 125 (1964). Nonetheless, the United States Supreme Court found that Garrison's speech was entitled to constitutional protection and that it could be punished only if it satisfied *Sullivan* 's actual-malice standard. *Garrison* at 78-79 .

P94 The majority simply ignores this controlling precedent. Instead, to justify its holding that attorney speech may be restricted just because it is disrespectful to a court, the majority reaches back to 1871 and suggests that what is "most important[]" is dicta from a case dealing with judicial immunity. *See* majority opinion at ¶ 26, quoting *Bradley v. Fisher*, 80 U.S. 335 , 355 , 20 L.Ed. 646 (1871). What the majority neglects to mention is that in the 151 years since *Bradley* was decided, the United States Supreme Court has never cited the *Bradley* dicta to justify a restriction on attorney speech. Not once.

P95 To the contrary, the United States Supreme Court has explained that "speech cannot be punished * * * 'to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed." *Landmark Communications, Inc. v. Virginia* ***[*16]*** , 435 U.S. 829 , 842 , 98 S.Ct. 1535 , 56 L.Ed.2d 1 (1978), quoting *Bridges v. California*, 314 U.S. 252 , 292 , 62 S.Ct. 190 , 86 L.Ed. 192 (1941) (Frankfurter, J., dissenting). Today, though, the majority holds just the opposite. Speech about judges can now be punished merely because it is disrespectful.

P96 Brazenly, the majority even cites *Cohen v. California*, 403 U.S. 15 , 19 , 91 S.Ct. 1780 , 29 L.Ed.2d 284 (1971), to support the result that it reaches today. *See* majority opinion at ¶ 23. *Cohen* , of course, is the seminal free-speech case in which the United States Supreme Court held that California authorities could not punish a man for wearing a jacket bearing the words "Fuck the Draft" in a county courthouse. "One of the prerogatives of American citizenship," the court explained, "is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Id.* at 26 , quoting *Baumgartner v. United States*, 322 U.S. 665 , 673-674 , 64 S.Ct. 1240 , 88 L.Ed. 1525 (1944). Fair to say, the *Cohen* court's conception of the First Amendment is dramatically different than the one the majority employs today.

When speech is punished because of its subject, the regulation is not content neutral

P97 A particularly troubling aspect of the majority opinion is its rejection of even the most basic principles of First Amendment jurisprudence. The majority never even acknowledges that in holding an attorney may be disciplined for out-of-courtroom speech simply because it is about a judge, it is imposing a content-based restriction on speech. "Government regulation of speech is 'content based' if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Gilbert*, 576 U.S. 155 , 163 , 135 S.Ct. 2218 , 192 L.Ed.2d 236 (2015). Here the regulation is specifically based on the "topic discussed" (the courts), and thus, is inarguably content based.

P98 It would be one thing if the majority sanctioned Bahan simply for her drunken, public outburst. Or if it said that her out-of-court conduct would be equally sanctionable whether her tirade was directed at a judge, a minister, a barber, a city councilperson, or a member of the public. In such a situation, the majority could plausibly maintain that the regulation it is enforcing is content neutral. But that's not what it holds. It holds that her conduct is sanctionable for violating Gov.Bar R. IV(2) precisely because it was directed at a judge. That's not a content-neutral regulation. And because it is not content neutral, it can pass constitutional muster only if it survives strict scrutiny. *Turner Broadcast Sys., Inc. v. Fed. Communications Comm.*, 512 U.S. 622 , 641 , 114 S.Ct. 2445 , 129 L.Ed.2d 497 (1994). The majority cannot—and doesn't even try—to make such a showing. Indeed, the very existence of Prof.Cond.R. 8.2(a) demonstrates that there are less restrictive means for the government to accomplish its legitimate interests here.

P99 Equally disquieting is the fact that the majority continues to justify its hyper-restrictive speech regulation on the need to "preserve public confidence in the legal system," majority opinion at ¶ 29; *see also Morton*, ___ Ohio St.3d ___, 2021-Ohio-4095 , ___ N.E.3d ___, at ¶ 40 (O'Connor C.J., concurring) ("the integrity of the court is an essential cog in the democratic system"). The United States Supreme Court, however, **[*17]** has flatly rejected this rationale. As the Supreme Court has explained, "injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'" *Landmark Communications, Inc.*, 435 U.S. at 841-842 , 98 S.Ct. 1535 , 56 L.Ed.2d 1 , quoting *Sullivan*, 376 U.S. at 272-273 , 84 S.Ct. 710 , 11 L.Ed.2d 686 . And "the institutional reputation of the courts is entitled to no greater weight in the constitutional scales." *Id.* at 842 . Instead, "[t]he premise of the First Amendment is that the American people are neither sheep nor fools, and hence fully capable of considering both the substance of the speech presented to them and its proximate and ultimate source." *McConnell v. Fed. Election Comm.*, 540 U.S. 93 , 258-259 , 124 S.Ct. 619 , 157 L.Ed.2d 491 (2003) (Scalia, J., concurring in part and dissenting in part).

P100 Not only is the reputation-protecting speech restriction endorsed by the majority today constitutionally infirm, the restriction is also counterproductive. As the U.S. Supreme Court has cautioned:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion.
>
> For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

(Footnote omitted.) *Bridges*, 314 U.S. at 270-271 , 62 S.Ct. 190 , 86 L.Ed. 192 .

P101 The majority's view is that the First Amendment only "may be invoked as a defense for permissible criticism." Majority opinion at ¶ 34. News flash. That's not the way the First Amendment works. The First Amendment guarantees citizens permission to criticize their government; it doesn't grant government the right to decide what criticism is permissible.

P102 None of this is to defend Bahan's conduct. By all accounts, her behavior at the holiday party was boorish, unprofessional, and embarrassing to herself and others. No doubt, regardless of any discipline that this court imposes, behavior of this sort has its own consequences. It's a fairly safe bet that Bahan's outburst did serious damage to her reputation among the lawyers and judges who were in attendance—damage that one may assume will have financial consequences to her and her practice. And there is a case to be made that independent of the communicative aspects of her drunken tirade, Bahan could have been disciplined for violating Prof.Cond.R. 8.4(h) (prohibiting a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law). But for whatever reason, the three-member panel of the Board of Professional Conduct that heard Bahan's case chose to dismiss those alleged violations, and we cannot impose discipline on any charge that a panel has unanimously dismissed. *See* Gov.Bar R. V(12)(G) (when a unanimous hearing panel finds that the evidence is insufficient to support a charge or count of misconduct, the panel may order on the record or in its report that the complaint or count be dismissed).

P103 The bottom line, though, is that it doesn't matter what one **[*18]** thinks of Bahan's conduct. Under our own rules and established First Amendment jurisprudence, the majority does not have the authority to discipline Bahan under Gov.Bar R. IV(2) for her holiday-party outburst. It should have dismissed that charge.

The chilling effect of the majority's opinion

P104 One might ask, "What's the big deal?" Bahan's behavior at the holiday party was outlandish, so why does it matter if the majority stretches the rules to discipline her?

P105 One obvious answer is that as judges, we are bound to apply the law and to follow the Ohio and United States Constitutions. We hardly engender respect for the rule of law if we ignore United States Supreme Court precedent and overlook constitutional limitations on our authority when it comes to punishing our critics.

P106 The other problem is that the majority's opinion will almost certainly have a chilling effect on legitimate attorney criticism of the judiciary. Just over four months ago, this court issued its decision in *Morton*, ___ Ohio St.3d ___, 2021-Ohio-4095 , ___ N.E.3d ___, and suspended an attorney from the practice of law for criticizing this court in a court filing even though nothing that the attorney said was shown to be untrue. Today, this court goes a step further and says that even out-of-court speech is subject to punishment when it is disrespectful of the judiciary.

P107 The majority attempts to hide from the broad rule it writes. It suggests that because Bahan used "choice expletives" to describe Judge Goslee, its opinion will not have a chilling effect on legitimate attorney speech. Majority opinion at ¶ 33. Bahan's conduct was certainly appalling. But the problem is that rule that the majority writes isn't cabined to situations like Bahan's; it applies to any criticism of the judiciary that is deemed disrespectful. The message to attorneys is clear—criticize this court or any judge at your own peril. That message may not have much impact on attorneys like Bahan, but it is likely to be heard loudly and clearly by others who are more cautious. Why risk one's livelihood by getting anywhere close to the line of saying something about the judiciary that someone might consider disrespectful?

P108 "[S]peech critical of the exercise of the State's power lies at the very center of the First Amendment ." *Gentile v. Nevada State Bar*, 501 U.S. 1030 , 1034 , 111 S.Ct. 2720 , 115 L.Ed.2d 888 (1991). Our nation's conception of free speech is premised on the idea that citizens will serve as a check on public officials, including judges. Indeed, "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern." *Landmark Communications, Inc.*, 435 U.S. at 839 , 98 S.Ct. 1535 , 56 L.Ed.2d 1 . But in establishing a rule that makes "disrespectful" speech sanctionable, the majority removes from public debate even legitimate attorney criticism of the judiciary.

P109 As I explained in *Morton* :

> Stifling attorney criticism comes at a high cost. Attorneys, by virtue of their education, training, and experience with the judicial branch, are in the best position to "recognize, understand, and articulate problems with the judiciary" and "to comment on the judiciary and judicial qualifications." **[*19]** Tarkington, *The Truth Be Damned: The First Amendment, Attorney Speech, and Judicial Reputation*, 97 Geo.L.J. 1567, 1601 [2009]. This is precisely the information that the public needs "to make informed decisions about the judiciary, to fulfill the self-governing role, and check judicial abuses." *Id.*
>
> Today's decision will make attorneys hesitant to assert opinions critical of the court. Not just attorneys like Morton whose assertions some may consider outlandish, but also the more cautious

> and the more insightful. By chilling attorney criticism of the judiciary, we "forestall[] the public's access to the thoughts of the very class of people in daily contact with the judicial system" and "shield the judiciary" from those best situated "to advance knowledgeable criticism." [*State ex rel. Oklahoma Bar Assn. v.] Porter*, 1988 OK 114 , 766 P.2d [958,] 968 [(Okla.1988)].

(Second set of brackets added in *Morton* .) , ___ Ohio St.3d ___, 2021-Ohio-4095 , ___ N.E.3d ___, at ¶ 104-105 (DeWine, J., dissenting).

P110 Today, the majority follows up on *Morton* with yet another warning to attorneys to watch what they say when it comes to talking about judges; when it comes to speech directed at the judiciary, basic principles of free speech do not apply. This is not good for self-government.

Conclusion

P111 In holding that attorneys are now subject to discipline under Gov.Bar R. IV(2) for directing disrespectful speech at a judge, the majority cites the oath that Ohio lawyers take to conduct themselves "with dignity and civility and show respect towards judges." Majority opinion at ¶ 28. But as judges, we also take an oath. And by that oath, we promise "to support the constitution of the United States and the constitution of this state." R.C. 3.23 . Hence, I cannot join the majority in its holding that an attorney's speech is subject to discipline under Gov.Bar R. IV(2) simply because it is disrespectful to a member of the judiciary.

P112 Because I believe that Bahan's violations of Prof.Cond.R. 8.4(h) by themselves warrant the sanction imposed by the majority, I concur in its judgment. But because I believe there is no basis to sanction Bahan under Gov.Bar R. IV(2), I concur in judgment only.

Kennedy, J., concurs in the foregoing opinion.

KENNEDY (In Part)

Kennedy, J., concurring in part and dissenting in part.

P63 I agree with the majority that respondent, Natalie J. Bahan, violated Prof.Cond.R. 8.4(d) , which prohibits a lawyer from engaging in conduct that is prejudicial to the administration of justice. On two occasions, she contacted law enforcement while intoxicated to report minor incidents involving her family. I therefore concur with the majority that the appropriate sanction is a six-month suspension, with the entire suspension stayed on the conditions that Bahan engage in no further misconduct, that she complete a substance-use assessment conducted by the Ohio Lawyers Assistance Program ("OLAP"), and that she comply with all the recommendations arising from that assessment. I would also require Bahan to contact OLAP within 60 days after this court's judgment to begin the process for the substance-use assessment.

P64 I part ways with the majority's analysis regarding **[*20]** Count One, which alleges that Bahan violated Gov.Bar R. IV(2) by failing to maintain a "respectful attitude" toward the courts when she called a judge expletives during a bar-association holiday event.

P65 I agree with the opinion concurring in judgment only that the First Amendment of the United States

Constitution prohibits this court from discipling an attorney solely for exhibiting a disrespectful attitude toward the courts. The majority today has made Gov.Bar R. IV(2) a content-based regulation that prohibits lawyers from calling judges—but no one else—rude names. More alarming is that this case is just part of a recent trend in which the majority is ordering that any criticism of the judiciary be kept silent. Last year, this court disciplined an attorney for impugning the integrity of this court when that attorney asserted that one of this court's judgments had been based on political motivations. *Cleveland Metro. Bar Assn. v. Morton*, ___ Ohio St.3d ___, 2021-Ohio-4095 , ___ N.E.3d ___. Today, the majority punishes an attorney for failing to show the appropriate amount of respect toward a judge outside a courtroom. In barring attorney speech that supposedly erodes "respect for the rule of law," majority opinion, ¶ 31, the majority chills an attorney's ability to express dissatisfaction in the judiciary in words (that a judge is, perhaps, "incompetent," "unreasonable," or just "wrong") or tone. Ohioans should no more countenance the majority slicing away bit by bit at their fundamental right of the freedom of expression any more than they would permit the government to enter their homes to cut away the legs of their dining-room tables.

P66 The focus of this dissent, however, will be a textual analysis of the majority's disturbing trend toward ignoring the plain language of Ohio's disciplinary rules. *See, e.g., Morton* at ¶ 47-48 (Kennedy, J., dissenting). Although Gov.Bar R. IV(2) states that "[i]t is the duty of the lawyer to maintain a respectful attitude toward the courts," Gov.Bar R. IV(1) states that lawyers are obligated to comply with the Ohio Rules of Professional Conduct and that "[t]he willful breach of the Rules shall be punished by reprimand, suspension, disbarment, or probation as provided in Gov.Bar R. V." When these provisions are read together, the unmistakable conclusion of their meaning is that Gov.Bar R. IV(2) is not a standalone, independent ground on which to discipline Bahan because it is not one of the Rules of Professional Conduct. The fact that the parties have failed to make this argument in this case or that this court has failed to notice its inapplicability in past cases does not justify turning a blind eye to the plain language of Gov.Bar R. IV, especially when a person's freedom of speech hangs in the balance.

P67 Because Gov.Bar R. IV(1) limits attorney discipline to violations of the Rules of Professional Conduct, I would hold that Gov.Bar R. IV(2) cannot serve as an independent basis for sanctioning misconduct. Therefore, I would dismiss that count of the complaint on procedural grounds and would not reach Bahan's First-Amendment-grounds objection to that count.**[*21]**

P68 After dismissing Count One, I would sanction Bahan for violating Prof.Cond.R. 8.4(d) . While there is no case directly on point for the misconduct at issue here, we have imposed sanctions for a single violation of Prof.Cond.R. 8.4(d) based on alcohol-related misconduct. Those cases, along with the aggravating and mitigating factors in this case, demonstrate that the appropriate sanction here is a six-month suspension, with the entire suspension stayed. Therefore, I concur in the majority's sanction—a six-month suspension, fully stayed on the conditions that Bahan engage in no further misconduct, that she contact OLAP for a substance-use assessment conducted by OLAP, and that she comply with all recommendations arising from that assessment. Additionally, I would require Bahan to contact OLAP within 60 days of this opinion to begin the process for her substance-use assessment.

P69 For these reasons, I concur in part and dissent in part.

Gov.Bar R. IV

P70 Count One of the complaint charged Bahan with misconduct from two separate sources, the Rules of Professional Conduct (Prof.Cond.R. 8.4(h)) and the Rules for the Government of the Bar (Gov.Bar R. IV(2)). The allegations stemmed from an alleged loud, profane, and drunken outburst that Bahan directed at a common-pleas-court judge during the Logan County Bar Association's annual holiday party. After the hearing, the panel unanimously dismissed the alleged violation of Prof.Cond.R. 8.4(h) . The panel nevertheless proceeded to find that Bahan had violated Gov.Bar R. IV(2).

P71 The scope of the Rules of Professional Conduct provides "a framework for the ethical practice of law." Prof.Cond.R., Preamble [16] . "Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process." *Id.* at [19]. "[S]ince the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of breach of the applicable standard of conduct." *Id.* at [20]. The professional-conduct rules therefore establish the conduct that an attorney is required to abide by when engaging in the practice of law: (1) in the client-lawyer relationship, Prof.Cond.R. 1.1 through 1.18 , (2) as a counselor, Prof.Cond.R. 2.1 , 2.2 and 2.3 , (3) as an advocate, Prof.Cond.R. 3.1 through 3.9, (4) in transactions with persons other than clients, Prof.Cond.R. 4.1 through 4.4, (5) in law firms and associations, Prof.Cond.R. 5.1 through 5.7, (6) in public service, Prof.Cond.R. 6.2 and 6.5, (7) regarding information about legal services, Prof.Cond.R. 6.1 through *6.7,* and (8) for maintaining the integrity of the profession, Prof.Cond.R. 8.1 through 8.5.

P72 In comparison, the Rules for the Government of the Bar address, generally, two separate mandates. First, they establish the requirements and procedures to become licensed to practice law in Ohio. *See, e.g.*, Gov.Bar R. I (admission to the practice of law) and XII (pro hac vice admission). Second, the rules set forth the professional responsibilities that are required for attorneys to remain licensed to practice law in Ohio. *See, e.g.*, Gov.Bar R. IV (professional responsibility), VI (registration of attorneys), and X (continuing legal **[*22]** education).

P73 The specific rule at issue, Gov.Bar R. IV, has two provisions:

> Section 1. Applicability. The Ohio Rules of Professional Conduct, effective February 1, 2007, as amended, shall be binding upon all persons admitted to practice law in Ohio. The willful breach of the Rules shall be punished by reprimand, suspension, disbarment, or probation as provided in Gov.Bar R. V.
>
> Section 2. Duty of Lawyers. It is the duty of the lawyer to maintain a respectful attitude toward the courts, not for the sake of the temporary incumbent of the judicial office, but for the maintenance of its supreme importance. Judges and Justices, not being wholly free to defend themselves, are peculiarly entitled to receive the support of lawyers against unjust criticism and clamor. Whenever there is proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit a grievance to proper authorities. These charges should be encouraged and the person making them should be protected.

P74 I recognize that this court has previously disciplined attorneys for violating the Rules for the Government of the Bar in general and Gov.Bar R. IV(2) in particular. *See, e.g., Disciplinary Counsel v. Brown*, 90 Ohio St.3d 273 , 2000-Ohio-82 , 737 N.E.2d 516 (2000); *Disciplinary Counsel v. Cicero*, 78 Ohio St.3d 351 , 1997-Ohio-

207 , 678 N.E.2d 517 (1997). But in deciding those cases, the court never specifically addressed whether Gov.Bar R. IV(2) could be a stand-alone violation. As we explained long ago, "A reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon or raised at the time of the adjudication." *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129 , 107 N.E.2d 206 (1952), paragraph one of the syllabus . Therefore, prior decisions have little bearing on this issue.

P75 I also acknowledge that Bahan has not raised the issue whether Gov.Bar R. IV(2) may be a stand-alone violation. However, the failure to raise that issue does not prevent this court from reviewing it when called upon to determine whether an attorney may be sanctioned for violating Gov.Bar R. IV(2). In interpreting the Rules of Professional Conduct and the Rules for the Government of the Bar, we "have the authority and the duty to 'say what the law is.'" *In re Determination of Existence of Significantly Excessive Earnings for 2017 Under the Elec. Sec. Plan of Ohio Edison Co.*, 162 Ohio St.3d 651 , 2020-Ohio-5450 , 166 N.E.3d 1191 , ¶ 105 (Kennedy, J., concurring in judgment only in part and dissenting in part), quoting *Marbury v. Madison*, 5 U.S. 137 , 177 , 2 L.Ed. 60 (1803). Therefore, we abdicate that responsibility when we fail to apply the correct meaning of a rule just because a party has not asked us to do so. *Id.*

P76 The majority gives two responses for why an attorney may be disciplined for violating Gov.Bar R. IV(2). First, it points out that Gov.Bar R. IV(1) does not "contain language stating that the Rules of Professional Conduct are the *exclusive* parameters on an attorney's conduct." Majority opinion at ¶ 38. But Gov.Bar R. IV(1) lists the sanctions that may be imposed for attorney misconduct. And if a violation for one of the Rules for the Government of the Bar were subject of those sanctions, one would naturally **[*23]** expect Gov.Bar R. IV(1) to say so. Instead, Gov.Bar R. IV(1) singles out the professional-conduct rules, and states that a violation of the Rules of Professional Conduct is to be punished by reprimand, suspension, disbarment, or probation. Accordingly, this statement creates the common-sense inference that a violation of a different set rules (i.e., the Rules for the Government of the Bar) is not subject to those sanctions. *See* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012). To accept the majority's interpretation would mean disciplining an attorney solely by reading between the lines of Gov.Bar R. IV(1). We cannot do that. Second, the majority falls back on the position that a contrary holding would mean that the Rules for the Government of the Bar would be unenforceable unless a parallel Rule of Professional Conduct existed. Majority opinion at ¶ 38. But that is a judgment based on policy, and a policy judgment does not give this court license to read language that is not there to cure an oversight in Gov.Bar R. IV(1).

P77 The plain and unambiguous language of Gov.Bar R. IV(1) places attorneys on notice that their behavior and actions must comply with the Rules of Professional Conduct and that an intentional breach of one of those rules could result in discipline. Gov.Bar R. IV(2) is not one of the Rules of Professional Conduct, and in my view, this general statement cannot serve as an underlying basis for an allegation of misconduct.

P78 It is also important to note that Gov.Bar R. IV(2) admonishes attorneys to maintain a respectful attitude toward *the courts*. A court is "'a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law.'" *State ex rel. Cleveland Mun. Court v. Cleveland City Council*, 34 Ohio St.2d 120 , 121 , 296 N.E.2d 544 (1973), quoting *Todd v. United States*, 158 U.S. 278 , 284 , 15 S.Ct. 889 , 39 L.Ed. 982 (1895). As Gov.Bar R. IV(2) recognizes, there is a difference between a court and "the temporary incumbent of the judicial office." It is "a fundamental understanding of constitutional democracy" that "judges are not imperial." *State v. Fischer*, 128 Ohio St.3d 92 , 2010-Ohio-6238 , 942 N.E.2d 332 , ¶ 21 , *overruled on other grounds by State v. Harper*, 160 Ohio St.3d 480 , 2020-Ohio-2913 , 159 N.E.3d 248 . Nor are they "anointed priests set apart from the community and spared the criticism to which * * * other public servants are exposed." *Bridges v. California*, 314 U.S. 252 , 292 , 62 S.Ct. 190 , 86 L.Ed. 192 (1941) (Frankfurter, J., dissenting). Just like other public officials, judges are not insulated from public comment that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," *New York Times Co. v. Sullivan*, 376 U.S. 254 , 270 , 84 S.Ct. 710 , 11 L.Ed.2d 686 (1964). And here, Bahan made an expletive-laden personal attack against a sitting judge outside the courtroom setting. That setting—a bar-association holiday event—did not involve any need to maintain decorum and order *in the courtroom* to ensure the proper functioning of the court. Bahan's behavior, although classless, did not implicate, much less violate, Gov.Bar R. IV(2).

P79 To charge Bahan with misconduct for making improper statements against a member of the judiciary, then, relator would have to have alleged that Bahan violated **[*24]** Prof.Cond.R. 8.2(a) , which provides that "[a] lawyer shall not make a statement that the lawyer *knows* to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer, or candidate for election or appointment to judicial office." (Italics sic.) However, the facts of this case do not support such an allegation. Bahan made personal attacks on the judge by using expletives. Those comments did not address his qualifications or integrity but rather were expressions of opinion that do not amount to defamation under the actual-malice standard, as established in *Sullivan*, 376 U.S. 254 , 84 S.Ct. 710 , 11 L.Ed.2d 686 , that I believe is imposed by Prof.Cond.R. 8.2(a) , but which this court has not adopted. *See Morton*, ___ Ohio St.3d ___, 2021-Ohio-4095 , ___ N.E.3d ___, at ¶ 56-58 (Kennedy, J., dissenting).

P80 Because attorneys are not subject to discipline for violating Gov.Bar R. IV(2), I would dismiss Count One of the complaint. Therefore, the only remaining findings by the majority of misconduct by Bahan are the violations of Prof.Cond.R. 8.4(d) , and I agree with the majority that the evidence in this case proves that Bahan violated this rule.

The Appropriate Sanction for Violating Prof.Cond.R. 8.4(d)

P81 Turning to the appropriate sanction in this matter, the relevant aggravating factors are that Bahan (1) has prior discipline, (2) engaged in a pattern of misconduct, (3) committed multiple offenses, and (4) refused to acknowledge the wrongful nature of her conduct. *See* Gov.Bar R. V(13)(B)(1), (3), (4), and (7). The relevant mitigating factors are that Bahan (1) acted without a dishonest or selfish motive and (2) exhibited a cooperative attitude toward the disciplinary proceedings. *See* Gov.Bar R. V(13)(C)(2) and (4). I agree with the majority that the testimony of Mark O'Connor (a former judge in the Logan County Court of Common Pleas) and Wade Thomas Minahan (a former magistrate in the Logan County Court of Common Pleas) attesting to Bahan's competence is of limited probative value and should be afforded no mitigating weight.

P82 Recently, in *Cleveland Metro. Bar Assn. v. Hackerd*, 156 Ohio St.3d 545 , 2019-Ohio-1340 , 130 N.E.3d 254 , ¶ 12 , this court considered for the first time the appropriate sanction for a "stand-alone violation of Prof.Cond.R. 8.4(d) ." In *Hackerd* , the attorney continued to represent his client after being disqualified by the trial court. We noted the absence of any aggravating factors and the presence of four mitigating factors. "Hackerd ha[d] no prior disciplinary record, he acted without a dishonest or selfish motive, he offered full and free disclosure to the board and demonstrated a cooperative attitude toward the disciplinary proceedings, and he presented evidence of his good character and reputation." *Id.* at ¶ 11 , citing Gov.Bar R. V(13)(C)(1), (2), (4), and (5). On that record, this court determined that a public reprimand was the appropriate sanction for a single rule violation.

P83 Additionally, as recognized by the majority, sanctions that have been imposed on attorneys who engaged in alcohol-related misconduct should be considered. In *Disciplinary Counsel v. Mitchell*, 158 Ohio St.3d 356 , 2019-Ohio-5218 , 142 N.E.3d 669 , this court imposed a one-year conditionally stayed suspension on an attorney based on his **[*25]** convictions for driving while intoxicated and leaving the scene of an accident involving injuries to the driver and passenger of the other vehicle. In *Lorain Cty. Bar Assn. v. Lewis*, 152 Ohio St.3d 614 , 2018-Ohio-2024 , 99 N.E.3d 404 , the court imposed a two-year suspension, with six months conditionally stayed, on an attorney who after being out drinking, left the scene of a motor-vehicle accident and was later convicted of obstructing justice for submitting a false witness statement to police. And in *Disciplinary Counsel v. Scurry*, 115 Ohio St.3d 201 , 2007-Ohio-4796 , 874 N.E.2d 521 , ¶ 4 , this court imposed a two-year conditionally stayed suspension on an attorney who, among other things, "repeatedly met with clients and attempted to manage his professional affairs while intoxicated."

P84 Bahan's misconduct is significantly more egregious than the continued representation of a client after disqualification in *Hackerd* because it was a pattern of conduct. She contacted law enforcement twice and made complaints against family members to punish and embarrass that family member. Additionally, *Hackerd* is not analogous to this case, because of the aggravating factors present here. However, Bahan's misconduct does not rise to the level of the behavior sanctioned in *Mitchell, Lewis*, or *Scurry* . As recognized by the majority, Bahan's misconduct did not result in harm to any clients or a criminal conviction. Although she was intoxicated on the two occasions that she called the sheriff's office to report that family members had stolen her property, she was not representing clients or acting in the professional capacity of an attorney.

P85 Guided by our caselaw, I agree with the majority that the appropriate sanction for Bahan's misconduct is a six-month suspension, with the entire suspension stayed on the condition that Bahan engage in no further misconduct, that she complete a substance-use assessment conducted by OLAP, and that she comply with all the recommendations arising from that assessment. However, I would also require Bahan to contact OLAP within 60 days after this court's judgment to begin the process for the substance-use assessment.

P86 Therefore, I concur in part and dissent in part.

Dewine, J., concurs in the foregoing opinion, except for paragraphs 85 and 86.

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Transaction ID 62518141
Case No. 2018-0182-JTL

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE:	:
	:
INNOVARI, INC.	:
a Delaware corporation,	:
	:
Assignor,	:
	:
v	: C. A. No.
	: 2018-0182-JTL
To:	:
	:
INNOVARI (ABC), LLC,	:
	:
Assignee.	:

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Chancery Court Chambers
Leonard L. Williams Justice Center
500 North King Street
Wilmington, Delaware
Monday, March 26, 2018
11:00 a.m.

\- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor

\- - -

TELEPHONIC STATUS CONFERENCE

CHANCERY COURT REPORTERS
Leonard L. Williams Justice Center
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APPEARANCES: (Via teleconference)

ERIC LOPEZ SCHNABEL, ESQ.
Dorsey & Whitney LLP
for Assignee Innovari (ABC), LLC

JOHN D. DEMMY, ESQ.
Saul Ewing Arnstein & Lehr LLP
for American Electric Power Corporation and AEP Industries

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THE COURT: Good morning. This is Travis Laster speaking. Thank you, everybody, for getting on the phone. I see that we have Mr. Demmy and Mr. Schnabel here.

Mr. Demmy, if you could go ahead and let me know where things stand.

MR. DEMMY: Yes. Thank you, Your Honor. And thank you for letting us participate by phone. I represent American Electric Power Service Corporation and AEP Investments. We filed this motion to compel, as well as the motion to expedite, because we needed to become involved in this assignment for the benefit of creditors matter to get some information about where things stood, because we did not have a lot of information at the outset.

What I will tell Your Honor is that over the past ten days, we've had numerous productive conversations with counsel for the assignee. We have resolved some issues that we have raised. There may be an issue or two that remains.

I know that it is the assignee's desire to proceed with a sales transaction in fairly short order, which, frankly, was a reason why we felt that filing the motion on the day after the petition was filed, and also a motion to expedite, was in order, because we didn't have comfort at that time that our rights and interests were being protected, and we wanted to make sure that the rights that were provided to creditors and other parties-in-interest under the statute were being fulfilled.

So at this point in time, Your Honor, we -- I believe that we have resolved issues, and some of which were set forth in the motion to compel that we filed, but issues relating to property that AEP claims an interest in, and also with regard to requests for information. There's still an open issue about appraisal, and we've had some discussion with counsel for the assignee about that, about the appraisals, a valuation of the asset.

And potentially -- and I don't mean to sandbag Mr. Schnabel. I'm unclear in a 100 percent manner about the status of all of the communications between the parties, but I think there was also a communication about a potential representation by the assignee that the assets are not being sold to insiders.

We had initially discussed whether or not to push this -- or to request the Court, that is, to push this hearing back a few days to allow the parties' conversations to continue. But they've continued right up to the time of this hearing, so it made more sense, really, just to get on the telephone and talk these things through with the Court, and also with counsel for the assignee.

I'll have other comments, I'm sure, but with that, I turn the matter over to Mr. Schnabel for the assignee's perspective on where we stand.

THE COURT: Before you do, right now, is there anything that you're asking me to do?

MR. DEMMY: From our perspective, no. I think our conversations have been fruitful. I think we are continuing those, and I don't know that there's -- well, I'll hedge a little bit on that. It depends, perhaps, on where the assignee stands with respect to the appraisal issue, before I 100 percent commit that there's nothing we're asking you to do. But I don't know exactly where things stand on that at this point.

THE COURT: All right.

Mr. Schnabel, do you want to go ahead?

MR. SCHNABEL: Thank you, Your Honor. And I have to say that I think I need to work on my avatar, because I'm the only one without a photo on this Court Solutions call.

Your Honor, for the record, it's Eric Lopez Schnabel of Dorsey & Whitney Delaware on behalf of the assignee, Innovari (ABC), LLC.

Your Honor, Mr. Demmy is correct, we've had numerous conversations. I think they're much more up to speed in terms of what we've done as the assignee, in terms of marketing the assets, and also understand our dire situation in terms of cash. We had to terminate all of the employees shortly after, or on or about the date we filed the petition, because we simply didn't have any cash to fund payroll. And that's why we're in kind of a fast-sale process.

But we've reviewed with them the process that we've engaged in, and I think they understand that we're -- you know, we've contacted over 50 people, that we're doing a thorough process. We invited them to bid. We extended their bid deadlines so they could try to participate. They've declined to participate in the bidding, and I think that's why, if their issues with regards to the sale are resolved, we do plan or may close, even late this week, on one portion of the assets with some of the bidders who were interested and have continued with us.

In terms of the appraisals which Mr. Demmy asked about, you know, we filed our inventory list on Friday this past week. We were going to actually file it earlier, but we gave them some draft language regarding some of their issues, to resolve their issues. And that delayed the filing.

But we did file it on Friday. And we planned, pursuant to the statutory framework, to move for the retention of appraisers, to have those appraisals done, and to, you know, file the appraisals and go forward with a bond and other aspects that we're required to do. So we will comply with those things, which I think is the -- really, is their request.

But having said that, given our dire straits in terms of cash, we need to sell these assets before we lose the bidders. So those sales may occur before we will get, you know, fully into the appraisals and bond hearing. But again, since they're not bidding, we don't think there is an issue.

So I think today we're just giving you

an update. Is there -- they seem not to be pressing the motion, and that we maybe withdraw it or continue it, and eventually it would be mooted, once we file for the appraisers and file the appraisals.

But, you know, I leave it to them to speak for themselves, obviously, but I think we've complied with all their requests, and therefore, I think we're not going to have a contested litigation matter regarding their motion. That's at least our perspective.

THE COURT: Let me ask you a couple of things. This is a rather skeletal statutory regime and seems to be a fairly underdeveloped body of law, at least here in Delaware. And I haven't myself, as of yet, done digging to find out if there's going to be great vistas of jurisprudence and treatise authority and things like that if I get out outside of Delaware.

Right now I'm asking you, on the assumption that you've done more of this type of homework and you can be in a position to give me the nickel tour, what do you envision, or what do you understand to have to happen, in terms of my involvement, before you go to a sale? Let's just stop there, and then I'll have a follow-up question.

In other words, is there any type of approval that you need from me before you could go through and close on a sale?

MR. SCHNABEL: Your Honor, the answer to that question, from our perspective, is no, that we do not need any approval from the Court to do -- you know, to close a sale. And I think that's really based upon two or, I would say, three things. One is that the charge, pursuant to the assignment that created the assignee and, you know, Michael Hogan of Armanino, LLP is the manager of the assignee. He is a professional liquidator out of California and has done numerous Delaware and California and other ABCs as part of his professional work.

And, you know, again, it's an arm's length third-party assignee. We're not connected to the company in any way, other than being hired to do this, the same as Dorsey. And the assignment very clearly gave the assignee full authority to sell the assets in its sole discretion. So if you think of the corporate existence of the assignee with the assets, by its very nature, through the assignment, has full authority to do it private, without any need for Court approval. So that's one. Two, the statutory scheme doesn't require any sort of approval for sales.

I will tell the Court that there are times, for whatever reasons -- and these are not our cases that we run, but I've seen other firms file for approvals. And I think sometimes people treat ABCs as a quasi-bankruptcy type of proceeding in state court. And of course, in bankruptcy, under federal law, you do have to file a motion to sell assets outside the ordinary course of business. But we view ABCs as different, and the statutory scheme, unlike the Bankruptcy Code, doesn't require leave of court to sell assets.

I think, Your Honor, third reason, finally, is that there just isn't any case law that we've ever found that would require it. And we don't think that's surprising, given the statutory framework. And in our view, the statutory framework was created to provide a very quick and efficient private process that has some court requirements that are very limited, but it does allow someone like AEP to show up in court and say something. And we have to respond to that. And we believe we have here and that the rights are being fully protected.

So that was my long-winded answer to your question that, no, we don't believe any authority is required by Your Honor for us to close the sale.

THE COURT: All right. That's great.

Now let's take the next step, and let's take as our working principle what you've just told me. So there's no requirement for ex-ante judicial approval, and let's assume a situation where no one takes the precautionary step of voluntarily seeking and obtaining ex-ante judicial approval.

Let's go with the Schnabel framework. What is the remedy? So assume that in fact what happens -- and again, I'm not positing that you guys are going to do this -- but let's assume that in fact what happens is you run a process that is commercially unreasonable. It sounds like that's not the case, but if one were to envision a situation in which some liquidator ran a process that was commercially unreasonable, what would be the remedy of someone who believed that they were injured by that process -- so either a creditor that doesn't get picked up, because the money doesn't go deep enough into the stack, or even somebody that comes in and claims that there really was residual value left for the equity if you guys had just done your jobs appropriately. What would be the mechanism that someone would use if they believed that that was the case?

MR. SCHNABEL: Well, Your Honor, I think that we're obviously created, and the agents of the assignee are charged with duties pursuant to the assignment. And it's an LLC, and they're -- in essence, creditors are third-party beneficiaries of that LLC in that assignment. And so if there was some -- you know, being not a regular corporation, but an alternative kind of contractual corporation, the liabilities of those agents and representatives of the LLC would be covered by that document and by just general common law.

So if, for example -- I think commercially reasonable process, it would depend on the LLC, but I think you would be protected in that if it were under some ordinary negligence theory. But if you, the creditor -- and, of course we're not doing this, but if an assignee were to, you know, sell all the assets to a relative for $1, which is, you know, clearly an outrageous execution, or lack of execution, of their actual duties, you know, that would -- could not be protected, and they would have rights under common law to bring some sort of a suit, which could either be in this Court or potentially in another court of competent jurisdiction.

So the assignment doesn't necessarily -- and this is what the assignment and then a subsequent sale -- you know, without an order at the sale time, it's like a private sale outside of any court supervision or involvement where post-sale issues could be brought. But again, they'd be defined by both applicable common law and by the assignment and LLC operative documents themselves.

THE COURT: You anticipated my next question a little bit, which is assuming that those opportunities exist to challenge something that the liquidator has done. One option, you think, would be to challenge it here. Another option, you think, would be to sue in another jurisdiction. But for someone like AEP, who is already here, they conceivably could continue a challenge in this action, or would they have to file some wholly new proceeding?

MR. SCHNABEL: Your Honor, I think they would -- that's a very good question. I mean, this proceeding has limited scope. I wonder whether they could, under the rules -- and I have not seen this, so I'm kind of thinking off the top of my head, but I wonder if, under the rules, they could seek to intervene and counterclaim, in a way, rather than actually bringing a separate lawsuit in this Court. I'm just not entirely sure about the answer to that, whether they'd have to file a separate lawsuit or not.

THE COURT: All right. Then what, in your estimation, is the purpose of the appraisers and the bonding requirement? What role are those folks performing?

MR. SCHNABEL: Well, Your Honor, I think a lot of times the scheme, the statutory scheme, provides that role to, you know, ensure that the assignee is going to kind of run through its duties appropriately, the posting of the bond -- and the appraisal is to set the bond.

I think the problem you have, and it makes somewhat sense when you have a more static, illiquid and, I would say, almost nonoperating asset -- so, for example, real estate. If the primary asset that the assignee has were real estate, that's usually something that would take a little bit more time to market and a little bit more time to close. And an appraisal of real estate would give you some measure of value for the assets.

Here, however, you know, the assets are not really -- they're not hard assets. I mean, there's technology, there's IP, there's patents. It's a system with servers that's running that's -- you know, actually AEP is our largest customer, or one of our largest customers. And we -- well, not we, but the assignor and AEP had a dispute, and AEP withheld payments. And that's one reason that the whole assignment and the cash problem and this liquidation occurred.

So there was kind of this operating thing which is now not really operating, other than the servers are running, but they don't really have any employees to further develop and engage things. That's an asset that you can't really appraise. That's really an asset that has to be market tested.

So you market test it, you sell it, and the appraisals and the bond are just part of the scheme that you have to run through to, you know, close a case out. It's, in a way, you would assume that if the appraisals came back that these were worth a billion dollars and we only sold them for, you know, a million, that that would be an issue.

We don't believe there's any way that the appraisals are going to be anywhere but within the realm of what our results of our market test are going to be, because of the way we've run the market process.

And again, I think AEP is pretty satisfied with our market process, because they had an opportunity to bid, and they've declined.

THE COURT: Yeah. So --

MR. DEMMY: Your Honor --

THE COURT: Hold on. I'm talking to Mr. Schnabel right now.

It seems to me that there are potentially alternative frameworks for protecting the sale process. In other words, the two alternatives are the appraisal put bond and recovery against the bond, versus some type of action for liability against the assignee or its representatives.

So under case B, which we were talking about first, which is the idea that somebody like AEP could sue if there hadn't been a commercially reasonable process, or something like that, it seems to me that then you end up with an inadequate sale, there's a remedy, and the people get a remedy in the form of this recovery from -- assuming they could prove everything, from the liquidator.

The bond requirement, at least at first blush to me, seemed like the idea was to, as you say, establish some type of floor or establish some type of expected value. And then the idea almost seemed to be -- and the statutory language on this is very cryptic -- that if the liquidator didn't go out and clear the bond amount, or if there was other reason to think that some type of misconduct could happen, then the Court is supposed to allow somebody like AEP to "proceed against the bond," or to engage in proceedings against the bond. Which then provides a floor, or a source of recovery, because it is something where people can get money for the delta.

So, Mr. Schnabel, does that ring any bells for you, or does that make any sense for you in terms of how this whole bond thing might work?

And part of the reason I'm pushing you on this is it does seem to me like maybe, in a case where you've got the type of property that you've got here, maybe there isn't much point in doing the appraisals and the bond, and really, the better view or better approach would be some type of after-the-fact remedy, if somebody thought the sale process didn't go well.

The problem with that, what I would be worried about, is if somehow somebody like you was able to argue that the bond set the limit of the recovery, such that if there wasn't some type of bond process beforehand, or I set the bond at zero, or something like that, then somebody in the liquidator's position might be able to say -- you know, as people do on injunction bonds -- that the bond sets the limit of recovery.

So react first, if you would, to this idea that maybe these things are alternative methods of protecting the creditors. And then react to this idea of maybe, in a situation like this, if there's some type of ex-post remedy that folks like AEP could have, is there really a point in going through the front-end process?

MR. SCHNABEL: Well, Your Honor, I think the bond would -- you know, does create a limit. I think that the rights of a creditor -- and AEP may not be a creditor. They may actually be a party that owes -- well, they definitely do owe the assignee money. You know, whether they have setoffs that actually make them a creditor or not is another issue, not for today.

And if you think about it, Your Honor, and if you set the bond through a hearing and appraisals before the assets are sold, versus after the assets are sold, it's still almost the same thing. Because if the assets have already been sold, there still has to be an independent appraiser who makes an appraisal, and you get to look at those two. Versus if you do the appraisal first and then the sale of the assets, you get to look at those two reactions.

It doesn't really necessarily matter whether one comes before the other, because it's an independent view of the assets versus the market test. The rights of someone who is a creditor to -- you know, when I answered Your Honor's question earlier in terms of going -- you know, if someone stole the assets or something like that, I think those rights aren't going to be -- they exist, but I think once you've sold the assets and this Court has accepted the appraisals and set the bond, they've already seen the process. They really can't collaterally attack it after the fact.

I think during the appraisal period

and the bond-setting period, if they really had a problem with what occurred, they would be able to continue to assert their rights that the appraisals are not accurate or that, you know, the bond ought to be larger because of X, Y, or Z fact.

I mean, I don't know what those facts are, but it's not like they're not going to be able to participate in those two aspects that will happen down the road if they think that these are really billion-dollar assets and, you know, we didn't do a good job selling them and the appraisal that we got is not accurate, because here is a counter-valuation at a much higher number.

They'd be able to participate in that and have their say, notwithstanding whatever is happening right now.

THE COURT: Yeah. So I was actually taking another step. I hear what you're saying, but I was really asking the question of whether, when you're looking at this after the fact, whether there's really any utility to the appraisal and bond requirement. If you've really done an arm's length procedure and you've gotten an arm's length price, why are we bothering to get some appraiser to come in and look at comps and things like that, when you've got a market-tested outcome?

MR. SCHNABEL: Well, Your Honor, I think that's a -- it's a fair question. And I think from our perspective, the problem is that the General Assembly has said we're supposed to do this. And so even though, from a practical sense, if we put on, you know -- I mean, I don't know. Do we file for leave not to do those things and put on evidence of the market test we conducted?

And it's obviously arm's length, because, you know, Mr. Hogan has no connection with the assignor and no connection with anyone who's interested in buying it. He's not selling it to anybody associated with his firm or a relative or anything like that, obviously.

So I think it's a good, practical point, Your Honor, but, you know, I guess unless we were asked for -- sorry. If we were to ask for leave not to comply with those statutory requirements -- we've always done it, even though in some ways, you know, the purpose of them for these kind of assets might be not as great as another group of assets in a different case.

THE COURT: Yeah. I think I have had people who have put in orders that have basically said given what we've done here, we want the Court to waive the bond or the bond hearing.

Now, having talked about this with you, I suspect that one benefit of the bonding requirement is it forces your client to put up something that is a creditworthy asset against which people could theoretically levy. Because I assume -- I mean, I forgot the name of your -- oh, it's just Innovari (ABC). I assume that that entity is a special-purpose vehicle that has no other assets under the rights under the assignment agreement; yes?

MR. SCHNABEL: Yeah. Correct.

THE COURT: Yeah. So forcing your guy to put up a bond does at least serve the benefit of giving creditors, or people who might be aggrieved, something that they could proceed against, without having to argue piercing or some other way to go against whatever the name of your fellow is who is the principal liquidator. So I guess it has that value to it.

MR. SCHNABEL: And obviously, Your Honor, I think you're right. And a piercing or something like that kind of, really, extreme remedy for really outrageous conduct is not -- strange things happen, but not with sophisticated professional parties.

And so it should be more of the bond than -- because trying to show some sort of a fraud or whatever is just not there. So the remedy isn't there.

THE COURT: Part of the reason why I'm asking you all these things is these have been historically very-light-touch procedures here in Chancery, and they have basically proceeded essentially ex parte. I mean, the Court is involved, but there's nobody else showing the other side.

And I can tell you that the judges feel like there has been an upswing in these things, let's say within the past 12 months. We haven't gone to the point of quantifying this, but we all agree that we're seeing more of them. And whenever there's something that is effectively ex parte, or at least one sided, there's the potential for bad practices to develop. So since this was going to be an opportunity when I was already going to be on the phone with you fellows, I thought I would take advantage of that.

Because I've had these things where they have proceeded start to finish without me actually talking to another human being, believe it or not. It all just happened on the papers. There's never been any objections, never been any concerns. And so I and my colleagues, we've really been fairly reliant on the good offices of the lawyers involved. And we want to make sure that we're not being too reliant.

So, Mr. Demmy, you've been very patient. What is on your mind, if anything, you want to add?

MR. DEMMY: Well, Your Honor, and thank you for that. Your first question to Mr. Schnabel about, you know, whether or not court approval is needed for the sale, I don't disagree, really, with anything Mr. Schnabel said, although I'm not sure if the actual assignment provides any particular authority that this Court has to take notice of, other than that under State law, you can sell assets as long as you have the title or authority to do so.

I don't know that it bears on the question of whether or not the Court needs to approve the sale, but I agree there's nothing in the statute that requires the Court to approve the sale. And in fact, as Mr. Schnabel said, you do see, in many of these cases, motions for approval of the sale, proposed sale of assets.

Now, I'm not quite sure why that is, but it may be in the nature of a comfort order for buyers. Because it doesn't have the force of, for example, a bankruptcy court order of selling assets free and clear of liens, claims, and interest. I don't think that any sale in this context is free of liens, claims, or interests to the same extent as in a bankruptcy court.

Which gets me to my second point, which is what is the -- you asked what the remedy might be if, for example, there was a commercially unreasonable procedure. I think it is really not one or the other, it's both, of proceeding on the bond, if there is a bond set in the case, and/or, depending on the circumstances, a State law claim.

I think if you know before the sale is closed that it's proceeding in a commercially unreasonable fashion, I think you might have the right to come in and ask the Court to enjoin that sale. If the sale has proceeded and closed and you determine, for example, that it was for consideration, an unconscionably low consideration, I think you'd have your right to sue for a fraudulent transfer.

And there could be a number of other causes of action you might be able to bring, whether in Delaware or some other state, to pursue those State law kinds of rights and remedies. So I really didn't disagree with a whole lot or if anything of what Mr. Schnabel said.

When we get to the issue of the appraisal and the bond -- and I agree the statutory scheme has been -- there's not much guidance. There's not much peace to it, in the sense of requirements of the parties involved in this process. But among the few are the need for an appraisal and a bond.

And I think the statute doesn't say you can satisfy the appraisal by a market test, although I acknowledge that I have seen motions filed by assignees in other cases asking the Court for leave to depart from some of the requirements of the statute and whether to file an inventory or to do an appraisal or to set a bond.

But among the few requirements there

are and the rights the creditors have to rely on, one is the appraisal, one is the bond. And I don't -- the statute doesn't say a market-tested approach substitutes. It says quite clearly that the Court would appoint appraisers, rather.

And I somewhat reject the notion that for these types of assets, only a market approach is appropriate. I think there are experts and appraisers out there who look at technology and serve these kind of assets and business all the time and can accurately and adequately appraise them. And it provides a benchmark. Provides a benchmark for the bond, and also provides a benchmark for the process in which the assignee goes through to get to a commercially reasonable sale. It's a -- it's a protection for creditors that's built into the statute, one of the very few, and I think it should be followed in this circumstance.

THE COURT: Okay. Well, don't worry. I'm not making any rulings on any of these things today. I just wanted to talk through some of these things with you-all. That's very helpful.

Where I would like to leave it is this: I think that what I should do is deny the motion, because there doesn't seem to be any current exigency or any current issue that would require you-all to go off and litigate or me to schedule a hearing or anything like that.

But I think that I would deny the motion with the explicit caution that I'm here, and you-all can find me. And if I hadn't been out of the office last week, we probably would have had this hearing on Tuesday of last week.

If something comes up where AEP or somebody else in the process doesn't feel like things are happening in an appropriate manner -- be that under the rather skeletal statute or the common law or whatever -- I'm going to entertain the application. And I think that, basically, if someone is a creditor or has an interest in the outcome of this process, even based on the idea that maybe if the sale were done in a sufficiently appropriate manner, that money would flow upwards and reach whoever the claimant is, I think that they have standing and that I'm going to hear them and entertain them.

The fact that I'm going to deny the motion today should not be viewed by Mr. Schnabel as any great victory or as conferring any great license on his client to do anything other than do a good job, which I'm sure he would do in any event.

And likewise for Mr. Demmy, the fact that I would be denying the motion today should not be viewed by him as any type of defeat or as providing any indication that I wouldn't be receptive to hearing anything if a dispute did arise. It would simply reflect the fact that right now, given that you guys are talking and things are unfolding, there just doesn't seem, to me, to be anything that anybody's asking me to do.

That's my plan. Before I do that, let me first ask Mr. Demmy, and then I'll ask Mr. Schnabel, whether you have any concerns or problems with that approach, or any questions? Mr. Demmy, you go first.

MR. DEMMY: Yes. Thank you, Your Honor. The only -- it's not a problem. I would just observe that if, in fact, as -- Mr. Schnabel started his presentation by noting that they were going to be filing the petition or the appropriate vehicle to have an appraiser pointed. If, in fact, that is done, I think you're completely right, Your Honor, that there really isn't anything left in our motion. Because what our motion was asking the Court to do is to compel the debtor to do the things that are required by the statute, one being file the inventory, which was filed on Friday; and then, second, proceed with respect to the appraisal.

So if those things are done, then our motion would be moot or deniable, pending other events in the case.

THE COURT: Mr. Schnabel, any thoughts from you?

MR. SCHNABEL: Your Honor we are going to file -- we filed the inventory on Friday. We will file a motion to -- I will have a colloquy with my client, given our discussion today, but I think at the end, we are still going to file the motion to retain appraisers and move forward with the bond in a timely fashion, as the statute requires.

And having said that, as I said earlier -- and we talked with Mr. Demmy and his client about this -- that we do have some sales that will likely close this week. But as we discussed, I think the appraisal process and bond provides protection for them.

The last thing I'd say is with

regards -- and I know Mr. Demmy knows this -- but with regards to everyone else, if there's any issues that anyone has, we're here -- Dorsey is here and Mr. Hogan is available -- and we're happy to try to address those, just like we did once they filed their motion. We picked up the phone and immediately started talking, and will continue to do that, hopefully, and not bother the Court.

THE COURT: So here's what I'm going to do. I'm going to construe Mr. Schnabel's statement as basically an indication that they plan to do what they think is required under the statute. And so if for some reason they don't do what, Mr. Demmy, you think is required, you can just file an application. And I don't think you need a separate motion to expedite next time. Maybe just file a letter requesting a scheduling conference or something like that.

I mean, if it's easier for you to file a separate motion to expedite, maybe that works better. Or you can just call up chambers and try to get a date with me. But bottom line is you'll be able to get ahold of me, and I hope that won't be necessary, because it sounds like you guys are working together cooperatively. But if you need something done, I'm certainly in a position to take care of it.

All right.

MR. DEMMY: Thank you, Your Honor. We appreciate that.

THE COURT: I hope you-all have a good rest of the day.

MR. SCHNABEL: Thank you, Your Honor.

MR. DEMMY: Thank you.

(Hearing concluded at 11:44 p.m.)

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CERTIFICATE

I, JULIANNE LaBADIA, Official Court Reporter for the Court of Chancery of the State of Delaware, Registered Diplomate Reporter, Certified Realtime Reporter, and Delaware Notary Public, do hereby certify the foregoing pages numbered 3 through 32, contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF, I have hereunto set my hand at Wilmington this 5th day of September, 2018.

/s/ Julianne LaBadia

Julianne LaBadia
Official Court Reporter
Registered Diplomate Reporter
Certified Realtime Reporter
Delaware Notary Public

2022 WL 1133118
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

IN RE PLX TECHNOLOGY INC. STOCKHOLDERS LITIGATION

Consolidated C.A. No. 9880-VCL
|
Date Submitted: March 31, 2022
|
Date Decided: April 18, 2022

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MEMORANDUM OPINION

LASTER, V.C.

***1** In 2016, the court approved a settlement between a class of stockholders of PLX Technology, Inc. ("PLX") and all but one of the defendants. The settlement resolved challenges to the acquisition of PLX by merger in 2014 (the "Merger"). The settlement called for a settlement administrator (the "Administrator") to distribute the settlement proceeds on a pro rata basis to all holders of record of shares of PLX common stock at the effective time of the Merger, except for the defendants and their affiliates (the "Excluded Holders").

In an attempt to reduce administrative costs and avoid a complex notice-and-claim process, plaintiffs' counsel ("Class Counsel") and the Administrator sought to distribute the settlement proceeds through the Depository Trust Company ("DTC"). It turns out that DTC has adopted a policy against distributing settlement proceeds to a DTC participant that held shares on behalf of an Excluded Holder unless it has received a "Payment Suppression Letter" from the DTC participant. In the Payment Suppression Letter, the DTC participant instructs DTC to exclude the settlement consideration associated with the Excluded Holder and undertakes to indemnify DTC against any claims arising from the distribution.

An impasse has arisen because almost all of the DTC participants who held shares for Excluded Holders have failed to provide Payment Suppression Letters. Some DTC participants have simply refused. Others have studiously ignored persistent inquiries from the Administrator and Class Counsel.

Currently, the Administrator is in the untenable position of being required to distribute the settlement proceeds to record holders and not to Excluded Holders, yet the Administrator cannot accomplish this task because of its inability to obtain Payment Suppression Letters and DTC's refusal to proceed without the letters. The process of settlement administration has ground to a halt.

To break the impasse, Class Counsel has moved for an order modifying the plan of distribution (the "Motion"). The order approving the modified plan will authorize and direct the Administrator to obtain information from DTC about PLX's record holders and Excluded Holders on the date of the Merger. The Administrator then will distribute the settlement proceeds directly to the DTC participants, bypassing DTC and obviating the need for the Payment Suppression Letters.

The request is unopposed, and this decision approves it. The court has issued this decision largely as a public service announcement. Corporate litigators need to be familiar with the bug in this particular settlement technology and understand the fix. Even with the workaround, the method of distributing settlement proceeds to record holders remains more efficient than the traditional notice-and-claim process.

In addition, Class Counsel deserves credit for their assiduousness in working through these challenges. Class Counsel received an award of fees and expenses based on the benefits they conferred in the litigation. That award did not take into account the subsequent burdens associated with a lengthy period of settlement administration. Class Counsel also did not have a client pushing them to figure out the answers. As a judge who has bluntly criticized class action lawyers when they have succumbed to agency costs or otherwise fallen short, [1] I think it important to acknowledge when members of the class action bar have made a special effort to fulfill their obligations.

1 *See, e.g.*, *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940 (Del. Ch. 2010).

I. FACTUAL BACKGROUND

***2** The facts are drawn from the Motion and its supporting documents. Other facts are drawn from earlier docket items in the case or are matters suitable for judicial notice.

A. The Settlement

In 2014, Class Counsel filed a complaint alleging that the directors of PLX breached their fiduciary duties in connection with the Merger, a transaction in which Avago Technologies Wireless (U.S.A.) Manufacturing Inc. ("Avago") used an acquisition subsidiary to acquire PLX. The complaint asserted that Avago, its acquisition subsidiary, and Potomac Capital Partners II ("Potomac") aided and abetted the directors in breaching their fiduciary duties. Class Counsel subsequently amended the complaint to assert that Deutsche Bank, PLX's financial advisor in connection with the Merger, aided and abetted the directors in breaching their fiduciary duties.

The defendants moved to dismiss the amended complaint under Rule 12(b)(6). The court granted the motion in part, dismissing the claims against Avago, its acquisition subsidiary, and two of the director defendants.

On August 17, 2016, Class Counsel settled with all of the defendants except for Potomac. Dkt. 159 (the "Settlement"). The litigation proceeded through trial against Potomac. *See In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (TABLE). In its post-trial decision, the court found that Potomac had aided and abetted a breach of fiduciary duty by the PLX directors, but that the Class Counsel had failed to prove damages.

The Settlement defined the "Class" as a

> non-opt-out class consisting of all record and beneficial holders of PLX common stock who held such stock at any time between and including June 23, 2014 and August 12, 2014, including any and all of their respective successors-in-interest, successors, predecessors-in-interest, predecessors, representatives, trustees, executors, administrators, estates, heirs, assigns and transferees, immediate and remote, and any Person acting for or on behalf of, or claiming under, any of them, and each of them, together with their predecessors-in-interest, predecessors, successors-in-interest, successors, and assigns, but excluding the Settling Defendants, Non-Settling Defendants, Avago, and [Avago's acquisition vehicle], their respective affiliates as to their own accounts (i.e., accounts in which they hold a proprietary interest), and any person, firm, trust, corporation, or other entity affiliated with Avago, [Avago's acquisition vehicle], or any Settling or Non-Settling Defendant.

Settlement ¶ 1(b) (the "Class Definition"). The Class Definition thus excluded the Excluded Holders, which is a standard approach.

The Settlement consideration consisted of $14,125,000 in cash. *Id.* ¶ 1(s) (the "Common Fund"). The Settlement provided for Class Counsel to retain a settlement administrator to administer and distribute the Common Fund. *Id.* ¶ 2(d). Galardi & Co. LLC has served as the Administrator.

After deducting the award of attorneys' fees and expenses to Class Counsel, and after paying the Administrator's costs and expenses, the Settlement called for the Administrator to distribute the amounts remaining in the Common Fund

> ***3** on a pro rata basis to all holders of record of shares of PLX common stock as of the date the Merger closed, except no such payment shall be made to any Person excluded from the Class, except as permitted in Paragraph 1(b).

Id. (the "Plan of Distribution"); *see id.* ¶ 21 (providing that any awarded attorneys' fees and expenses would come "solely from the Common Fund," and that the amount paid to create the Common Fund "shall be wholly inclusive of all fees, expenses, cost disbursements, and expert and consulting fees associated with the creation of the Common Fund").

To facilitate the Plan of Distribution, the Settlement required PLX to provide the Administrator with the following information, to the extent available:

> (i) a list of the holders of record of PLX common stock as of the closing of the Merger containing each holder's name, address, and the number of shares owned and (ii) similar lists or reports available from PLX's Transfer Agent or the [DTC] identifying the beneficial owners of PLX common stock as of the Merger Date, as appropriate for providing notice of the Partial Settlement to the Class.

Id. ¶ 2(f).

On December 20, 2016, the court approved the Settlement. Dkt. 204.

B. Problems With Implementation

To implement the settlement, Class Counsel and the Administrator attempted to follow the method approved by this court in *In re Dole Food Company, Inc. Stockholder Litigation*, 2017 WL 624843 (Del. Ch. Feb. 15, 2017). In *Dole*, the court initially approved a settlement that called for settlement proceeds to be distributed to class members through a traditional notice-and-claims process. The class consisted of holders of 36,793,758 shares. But due to various factors relating to the time allowed for clearing trades, as well as the existence of a significant short interest when the merger closed, claimants submitted facially eligible claims covering 49,164,415 shares. *See id.* at *3–4. The court found that it was "functionally impossible to resolve the share discrepancy in a practical or cost-effective manner. The resulting process would be lengthy, arduous, cumbersome, expensive, and fundamentally uncertain." *Id.* at *4.

As a workaround, class counsel proposed modifying the settlement "to replace the claims process with a *pro rata* distribution through DTC." *Id.* Under that model, members of the class who held their shares in street name as beneficial owners would receive the settlement proceeds in the same manner that they received the merger consideration. The administrator would pay the consideration to Cede & Co., the nominee for DTC and the record holder appearing on PLX's stock ledger. Cede would then distribute the consideration to DTC and the custodial banks and brokers who are DTC participants. From there, the proceeds would flow on, moving through the network of Article 8 entitlement holders until eventually reaching the ultimate beneficial owners.

Using this method meant that "it will be up to the DTC participants and their client institutions to resolve in the first instances any issues over who should receive the settlement consideration." *Id.* at *6. The court explained that

> [s]hifting the burden to them is efficient because they already had to address these issues for purposes of allocating the merger consideration. If new issues arise, the DTC participants and their client institutions have access to their own records, and they have visibility into the terms of their contractual relationships, such as the terms on which shares are borrowed. Any ensuing disputes are between the beneficial owners and their custodial banks and brokers. Those disputes should be resolved pursuant to the contractual mechanisms in the governing agreements or, if necessary, through a judicial proceeding limited to the parties. Addressing those disputes is not part of the settlement

> process and therefore not a task for [the settlement administrator] or this court.

***4** *Id.* (citation omitted).

The court observed that distributing the consideration through DTC created potential problems of its own. For example, "under this method, consideration could flow to holders of shares that are excluded from the class under the terms of the settlement, such as shares for which appraisal was sought or those held by certain defendants." *Id.* at *7. Class counsel reported, however, that DTC could "tailor the distribution to bypass the excluded holders if provided with the names of the account holders, the account numbers, the custodial banks or brokers, and the number of shares held in each account." *Id.* To enable DTC to tailor the distribution, the court directed the parties in *Dole* to "provide this information to DTC to the extent the information is within their possession, custody, or control." *Id.*

The *Dole* court observed that there was nothing unique about the problems that infected the settlement. "The only difference was the magnitude of the discrepancy, which made the issues visible." *Id.* at *7. The court concluded that "[d]istributing the settlement consideration in merger cases to record holders from the outset would mitigate both pathologies and reduce overall administrative expenses, which in turn will benefit the class." *Id.*

The parties in this case heeded the guidance from the *Dole* decision and sought to proceed from the outset by distributing the settlement proceeds to record holders through DTC. But since the *Dole* settlement, DTC has imposed additional requirements. Now, DTC also requires a Payment Suppression Letter from each DTC participant that held shares on behalf of an Excluded Holder. In the Payment Suppression Letter, the DTC participant confirms that DTC can withhold payment for the excluded shares, and the DTC participant agrees to indemnify DTC against any claims arising from the withholding of that payment.

Presumably, a well-meaning lawyer for DTC dreamed up the Payment Suppression Letter as a way to build in additional protections for DTC in the event that DTC's reliance on a court order was deemed insufficient to insulate DTC from liability in some form of litigation brought against DTC as a result of the settlement distribution. Unfortunately, introducing the Payment Suppression Letter not only adds another step to the process, but the additional step requires a deliverable from a party outside the court's control, who can readily ignore the request. Moreover, the Payment Suppression Letter requires that the DTC participant undertake an obligation to indemnify DTC, which the DTC participant understandably might resist. [2]

2 I make this observation without any meaningful insight into whether or the degree to which the request for indemnification actually alters the existing internal governance relationship between DTC and its participants and their respective obligations. It would not be surprising to find out that there are already detailed internal governance agreements between the parties that contemplate indemnification, exculpation, waivers of rights and obligations, and numerous other features. The fact that DTC asked for indemnification in the Payment Suppression Letter nevertheless implies that DTC thought it was getting something additional, and a DTC participant might well reject the request on that basis. After all, what was the DTC participant receiving in return other than the opportunity to pass on the consideration its own entitlement holders?

***5** In this case, the defendants and PLX have already provided DTC with the *Dole* information, *viz.* the names of the account holders associated with Excluded Holders, the custodial banks or brokers, and the number of shares held in each account. The impediment is the need for Payment Suppression Letters. The custodial banks or brokers have either declined to provide them, or they have failed to respond to the Administrator and Class Counsel. DTC therefore has not received the Payment Suppression Letters that it requires, and the process for distributing the Common Fund has seized up.

Class Counsel conferred with DTC and the Administrator regarding potential solutions, and they developed a workaround. To implement it, Class Counsel filed the Motion. Dkt. 409.

In the Motion, Class Counsel asks the court to approve a modified plan of distribution (the "Modified Plan"). The order approving the Modified Plan would empower and instruct the Administrator to obtain from DTC:

(1) an allocation report used by DTC to distribute the Merger consideration,

(2) any additional information necessary to identify all DTC participants who received the merger consideration in exchange for their shares of PLX common stock,

(3) the number of shares as to which each DTC participant received payment or the amount of consideration each DTC participant received, and

(4) the correct address or other contact information used to communicate with the appropriate representatives of each DTC participant that received Merger consideration.

Id., Proposed Order ¶ 1 (the "Additional Information"). The Modified Plan would authorize the Administrator, rather than DTC, to use the Additional Information to send payments directly to the DTC participants. By relieving DTC of the responsibility for distributing the proceeds, this solution avoids the need to obtain Payment Suppression Letters and should enable the Administrator to distribute the proceeds promptly.

II. LEGAL ANALYSIS

A distribution plan "must be fair, reasonable, and adequate." *Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009), *overruled on other grounds by Urdan v. WR Cap. P'rs, LLC*, 244 A.3d 668, 678 (Del. 2020). Where a movant seeks to modify a settlement to alter the plan of distribution, the court treats it as a "request to modify the plan of [distribution] for good cause shown." *Dole*, 2017 WL 624843, at *4. When considering the reasonableness of a plan of distribution, the court can "take into account the administrative difficulties involved in achieving a proposed plan of allocation, including the anticipated expenses." *Id.*

The Modified Plan is fair, reasonable, and adequate, and good cause exists to adopt it. As noted, the Administrator is currently unable to distribute the settlement proceeds to record holders through DTC because of the inability to obtain the Payment Suppression Letters. The current Plan of Distribution has gotten stuck.

The court's ability to address this particular logjam is limited. DTC is not a party to this proceeding, and the court has no power to order DTC to modify its approach. The DTC participants who have failed to provide Payment Suppression Letters also are not parties to this proceeding, and the court can neither order them to respond, nor direct them to provide the Payment Suppression Letters.

Under the Modified Plan, the Administrator will be instructed and empowered to obtain the Additional Information from DTC. Class Counsel has indicated that DTC is willing to provide the Additional Information if the court enters the proposed form of order. There are potential means by which Class Counsel might be able to use the judicial process to secure information from DTC, but hopefully it will not be necessary to explore those avenues. The court expresses its appreciation to DTC for having worked with Class Counsel in an effort to move the settlement forward.

***6** With the Additional Information, the Administrator will distribute to each DTC participant its pro rata share of the Common Fund, less its share of the proceeds associated with shares held by an Excluded Holder through that DTC participant. The Administrator will send instructions to each DTC participant to withhold payments from the Excluded Holders. As in *Dole*, however, it will be up to each DTC participant to distribute its share of the settlement consideration to its entitlement holders, and any disputes about whether the DTC participant distributed the settlement consideration properly will be "between the beneficial owners and their custodial banks and brokers." *Dole*, 2017 WL 624843, at *6. "Addressing those disputes is not part of the settlement process and therefore not a task for [the Administrator] or this court." *Id.* The Modified Plan appropriately places the "risks inherent in choosing to hold in street name" on the "beneficial owner who made that choice," including the risks that "[a] custodial bank or broker could err in processing the settlement consideration and the beneficial owner might not find out" or that "a beneficial owner might have to sue its custodial bank or broker" to correct the issue. *Id.* at *6.

To assist beneficial owners in overseeing the distribution process, the Administrator shall update the settlement website,[3] promptly after making the distribution, to reflect the date and per-share amount. That information will enable members of the Class to make inquiries if they do not receive the settlement proceeds that they expect.

3 http://www.plxsecuritieslitigation.com.

III. CONCLUSION

The Modified Plan is fair, reasonable, and adequate. The Motion is granted.

All Citations

Not Reported in Atl. Rptr., 2022 WL 1133118

270 A.3d 833 (Table)
Unpublished Disposition
This unpublished disposition is
referenced in the Atlantic Reporter.
Supreme Court of Delaware.

Carter PAGE, Defendant Below, Appellant,
v.
OATH INC., Plaintiff Below, Appellee.

No. 69, 2021
|
Submitted: November 10, 2021
|
Decided: January 19, 2022

Court Below—Superior Court of the State of Delaware, C.A. No: S20C-07-030

Before SEITZ, Chief Justice; VALIHURA, VAUGHN, TRAYNOR, and MONTGOMERY-REEVES, Justices, constituting the Court en banc.

ORDER

PER CURIAM:

***1** This 19th day of January, 2022, the Court has considered the parties' briefs, the record on appeal, and the argument of counsel, and it appears that:

(1) In July 2020, Carter Page filed a defamation action in the Superior Court against Oath, Inc., alleging that certain of Oath's subsidiaries had published articles falsely accusing him of colluding with Russian agents to interfere with the 2016 presidential election.

(2) Shortly after that, Page's Delaware counsel moved under Delaware Superior Court Civil Rule 90.1 for the admission *pro hac vice* of L. Lin Wood, a lawyer licensed to practice in Georgia, so that he could appear as Page's attorney in Page's defamation action. The court granted the motion.

(3) After Page filed an amended complaint, Oath moved to dismiss it. The parties briefed the motion and, on December 16, 2020, the court notified counsel that the court would hear oral argument on the motion on January 13, 2021.

(4) Two days later, the Superior Court *sua sponte* issued a Rule to Show Cause directing Wood to show why his admission *pro hac vice* should not be revoked. According to the Rule, "[i]t appear[ed] to the Court that, since the granting of Mr. Wood's [*pro hac vice*] motion, he ha[d] engaged in conduct in other jurisdictions, which, had it occurred in Delaware, would violate the Delaware Lawyers' Rules of Professional Conduct. ..." [1]

1 App. to Opening Br. at A5.

(5) The Rule identified specific concerns regarding Wood's conduct in litigation in Georgia and Wisconsin related to the recent 2020 presidential election on November 3, 2020. Specifically, the court pointed to several pleading irregularities in an action filed in the United States District Court for the Eastern District of Wisconsin. As far as we can tell, the pleadings in that case were not signed by Wood but named him as an "attorney to be noticed." The court also referred to a complaint of questionable merit filed in the United States District Court for the Northern District of Georgia, in which, the court suspected, "Wood filed or caused to be filed [an expert affidavit] ... [,] which contained materially false information. ..." [2] In the Georgia case, Wood was the named plaintiff and was represented by counsel.

2 App. to Opening Br. at A7.

(6) The court directed Wood and his Delaware counsel to respond to the Rule to Show Cause by January 6, 2021, and stated that it would "hear counsel on [January 13, 2021—the date set for oral argument on the pending motion to dismiss] in response to the Rule to Show Cause." [3] The court also invited Oath to state its position, if it had one, but Oath declined.

3 *Id.* at A8.

(7) In his response, Wood denied generally that he had violated "any of the Delaware Professional Conduct Rules or conduct rules in any other jurisdiction in connection with his involvement in the matters cited by the Court." [4] More specifically, he noted that he had not appeared as counsel in the Georgia litigation but was the plaintiff and represented by counsel in that matter. And he further stated that there had been "no claim of sanctionable or disciplinary conduct against [his counsel] or his firm and certainly none against Wood as plaintiff" [5] in the Georgia litigation. In connection with a questionable affidavit referred to in the Rule to Show Cause,

Wood "denied any intent of the parties, including himself, to mislead the Court." [6]

4 *Id.* at A12.

5 *Id.* at A11.

6 *Id.* at A12.

***2** (8) As to the Wisconsin litigation, Wood pointed out that he was not the attorney of record in that matter and was merely listed as "Counsel to be Noticed" [7] on the court's docket sheet. He further stated that he "never appeared" in the case during the brief eight-day period between the filing date and the date of dismissal.

7 *Id.*

(9) Despite legal argument that revocation of his *pro hac vice* admission was not warranted, Wood "request[ed] to withdraw his application for *pro hac vice* admission and his appearance" [8] in this case.

8 *Id.* at A14.

(10) On January 11, 2021, two days before the hearing on the defendant's motion to dismiss and the court's Rule to Show Cause, the Superior Court issued a Memorandum Opinion and Order revoking its prior order admitting Wood *pro hac vice* and cancelling the January 13 argument on the motion to dismiss. As of that date, neither the Georgia nor the Wisconsin court had cited Wood for sanctionable conduct.

(11) After Wood appealed to this Court, we appointed Matthew F. Boyer, Esquire as *amicus curiae* to file an answering brief in opposition to Wood's opening brief. [9]

9 We thank Mr. Boyer and his associate, Lauren P. DeLuca, for their assistance, which was professionally rendered in the best traditions of the Delaware Bar.

(12) Superior Court Civil Rule 90.1(e) provides that "[t]he Court may revoke a pro hac vice admission sua sponte or upon the motion of a party, if it determines, after a hearing or other meaningful opportunity to respond, the continued admission pro hac vice to be inappropriate or inadvisable." We review a trial court's decision to revoke a lawyer's *pro hac vice* motion for abuse of discretion. [10]

10 *Vrem v. Pitts*, 44 A. 3d 923, 2012 WL 1622644, at *2 (Del. May 7, 2012) (TABLE) (noting that "the decision whether to admit an out-of-state attorney *pro hac vice* lies within the discretion of the Superior Court" and reviewing the trial court's revisiting and vacating of its prior order admitting attorney under abuse-of-discretion standard).

(13) Despite the concerns expressed by the Superior Court in its Rule to Show Cause regarding whether Wood's conduct in the Georgia and Wisconsin case, had it occurred in Delaware, violated the Delaware Lawyers' Rule of Professional Conduct, it insisted in its opinion and order that it was not engaging in lawyer discipline. Instead, according to the court, it was merely making a determination under Superior Court Civil Rule 90.1(e) of the appropriateness and advisability of Wood's continued *pro hac vice* admission.

(14) The court did not explain, however, why Wood's request to withdraw his *pro hac vice* application and appearance did not adequately address the court's putatively limited concern. Instead, without affording Wood the opportunity to appear at the hearing that was scheduled two days hence, the stated purpose of which was to hear his response to the Rule to Show Cause, the court made factual findings adverse to Wood. For instance, the Court found that Wood's conduct in the Georgia and Wisconsin litigation, "albeit not in [the court's] jurisdiction, exhibited a toxic stew of mendacity, prevarication and surprising incompetence." [11]

11 *Page v. Oath, Inc.*, 2021 WL 82383, at *2 (Del. Super. Ct. Jan. 11, 2021).

(15) The Court also found that the Georgia court's conclusion that there was "no basis in fact or law to grant [Wood] the [injunctive] relief he [sought]," [12] "indicate[d] that the Georgia case was textbook frivolous litigation." [13] Yet neither the Georgia trial court nor the Eleventh Circuit Court of Appeals, [14] to which Wood appealed, made any findings that Wood's complaint was frivolous or filed in bad faith. As to this point, we do not view the Georgia court's determination that Wood's request for injunctive relief was without factual or legal merit as equivalent to a finding that his complaint was frivolous. To the contrary, our own ethical rules, by prohibiting a lawyer from asserting claims "unless there is a basis in law for doing so that is not frivolous," [15] implicitly recognize that a claim ultimately found to lack a basis in law and fact can nonetheless be non-frivolous.

12 501 F. Supp. 3d at 1331.

13 2021 WL 82383 at *2.

14 *See Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020).

15 DPCR Rule 3.1.

***3** (16) More questionable yet was the court's insinuation that Wood was at least partially responsible for the troubling events that occurred at the United States Capitol on January 6, 2021—a topic not addressed in the Rule to Show Cause.

(17) In reaching these conclusions, the Superior Court resolved factual issues raised in Wood's written response and did so on a paper record and in advance of a hearing that had been scheduled to address the matter. And though the court said that its decision was not influenced by its conjecture that Wood's conduct had precipitated the traumatic events of January 6, its willingness to pin that on Wood without any evidence or giving Wood an opportunity to respond is indicative of an unfair process.

(18) Both the tone and the explicit language of the Superior Court's memorandum opinion and order suggest that the court's interest extended beyond the mere propriety and advisability of Wood's continued involvement in the case before it. In fact, one cannot read the court's order without concluding that the court intended to cast aspersions on Wood's character, referring to him as "either mendacious or incompetent" [16] and determining that he was not "of sufficient character" [17] to practice in the courts of our State. We offer no opinion on the accuracy of these characterizations, but we see no evidence in the Superior Court's record that supports them. Similarly, the court's foray into the events of January 6 and its unequivocal finding that "[n]o doubt [Wood's] tweets ... incited the [ ] riots," [18] was not justified given the scope of the Rule to Show Cause and the record.

16 2021 WL 82383 at *2.

17 *Id.*

18 *Id.*

(19) Because the Superior Court's revocation order is based on factual findings for which there is no support in the record and because the court failed to explain why Wood's withdrawal would not moot the court's concerns about the appropriateness or advisability of Wood's continued admission, we find that the court's revocation order was an abuse of discretion.

(20) To be clear, when a lawyer admitted *pro hac vice* to practice in a trial court of this state is accused of serious misconduct in another state, the admitting trial court is not powerless to act. It might be appropriate to issue—as the court did in this case—a rule to show cause why the out-of-state lawyer's *pro hac vice* status should not be revoked, and to act upon that rule if cause is not shown. But when, as here, the allegations of misconduct in another state have not yet been adjudicated, there is no assertion that the alleged misconduct has disrupted or adversely affected the proceedings in this State, and the lawyer agrees to withdraw his appearance and *pro hac vice* admission, it is an abuse of discretion to preclude the lawyer's motion to withdraw in favor of an involuntary revocation of the lawyer's admission.

NOW, THEREFORE, the Superior Court's January 11, 2021 Memorandum Opinion and Order revoking its August 18, 2020 Order granting Wood's application for admission to practice in this action *pro hac vice* is hereby VACATED.

All Citations

270 A.3d 833 (Table), 2022 WL 162965

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Deborah PETTRY and Gail Friedt
v.
GILEAD SCIENCES, INC.
Richard C. Collins
v.
Gilead Sciences, Inc.
Hollywood Police Officers' Retirement System
v.
Gilead, Sciences, Inc.
Anthony Ramirez
v.
Gilead Sciences, Inc.

C.A. No. 2020-0132-KSJM, C.A. No. 2020-0138-KSJM, C.A. No. 2020-0155-KSJM, C.A. No. 2020-0173-KSJM
|
July 22, 2021

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Opinion

KATHALEEN ST. JUDE MCCORMICK, Chancellor

***1** Dear Counsel:

This letter resolves Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses. The Post-Trial Memorandum Opinion in this matter (the "Memorandum Opinion") supplies the factual background germane to this letter decision. [1]

1 *See* C.A. No. 2020-0173-KSJM, Docket ("Dkt.") 108 ("Mem. Op."). Defined terms used in this Order have the same meaning ascribed to them in the Memorandum Opinion.

Delaware courts follow the American Rule that each party is expected to pay its own attorneys' fees regardless of the outcome of the litigation. This court, however, retains the ability to shift fees when faced with vexatious litigation conduct "to deter abusive litigation and to protect the integrity of the judicial process." [2] This court may award fees "in its discretion ... 'where equity requires.' " [3] This court has used fee-shifting as "a method for reducing and appropriately allocating the costs of vexatious behavior sufficiently serious that justice requires such mitigation." [4] This exception is frequently referred to as the "bad faith" exception to the American rule, although the exception itself is perhaps more expansive, and there is "no single, comprehensive definition of 'bad faith' that will justify a fee-shifting award." [5] To capture the sorts of vexatious activities that the bad-faith exception is intended to address, this court employs the "glaring egregiousness" standard. [6]

2 *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005).

3 *Scion Breckenridge Managing Member, LLC v. ASB Allegiance Real Estate Fund*, 68 A.3d 665, 687 (Del. 2013) (quoting *Burge v. Fidelity Bond & Mortg. Co.*, 648 A.2d 414, 421 (Del. 1994)).

4 *Martin v. Harbor Diversified, Inc.*, 2020 WL 568971, at *1 (Del. Ch. Feb. 5, 2020).

5 *Montgomery Cellular*, 880 A.2d at 227.

6 *See, e.g.*, *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 879 (Del. 2015) (affirming this court's determination to shift fees under the "glaring egregiousness" standard); *Isr. Disc. Bank of N.Y. v. First State Depository Co.*, 2013 WL 2326875, at *28–29 (Del. Ch. May 29, 2013) (applying the "glaring egregiousness" standard in assessing potential fee shifting); *eBay Domestic Hldgs., Inc.*

v. Newmark, 16 A.3d 1, 47–48 (Del. Ch. 2010) (same); *In re Charles Wm. Smith Tr.*, 1999 WL 596274, at *2–4 (Del. Ch. July 23, 1999) (same).

Delaware courts have shifted fees for glaringly egregious conduct, such as forcing a plaintiff to file suit to "secure a clearly defined and established right," [7] "unnecessarily prolong[ing] or delay[ing] litigation, falsif[ying] records, or knowingly assert[ing] frivolous claims." [8]

7 *McGowan v. Empress Ent., Inc.*, 791 A.2d 1, 4 (Del. Ch. 2000) ("If McGowan had a clearly established legal right to inspect Empress's books and records, and Empress's conduct forced him to bring this action to secure that right, then the defendant can be found to have acted in bad faith and be ordered to pay the plaintiff's legal fees and expenses."); *accord. Donnelly v. Keryx Biopharmaceuticals, Inc.*, 2019 WL 5446015, at *6 (Del. Ch. Oct. 24, 2019); *Norman v. US MobilComm, Inc.*, 2006 WL 1229115, at *4 (Del. Ch. Apr. 28, 2006).

8 *RBC Cap. Mkts., LLC v. Educ. Loan Tr. IV*, 2016 WL 703852, at *3 (Del. Super. Feb. 17, 2016) (quoting *Johnston v. Arbitrium (Cayman Islands) Handels AG*, 720 A.2d 542, 546 (Del. 1998)); *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 2013 WL 5152295, at *10 (Del. Ch. Sept. 16, 2013) (quoting *Beck v. Atl. Coast PLC*, 868 A.2d 840, 851 (Del. Ch. 2005)); *In re SS & C Techs., Inc. S'holders Litig.*, 948 A.2d 1140, 1150 (Del. Ch. 2008) (quoting *Johnston*, 720 A.2d at 546).

***2** Although there is a fine line between glaringly egregious conduct and an aggressive litigation position, Gilead crossed the line in this case.

After Gilead declined to produce a single document to any of the five Plaintiffs thereby forcing them to commence litigation, Gilead took a series of positions during litigation that, when viewed collectively, were glaringly egregious.

Gilead argued that Plaintiffs had not met the credible basis requirement to investigate wrongdoing—a requirement that imposes "the lowest possible burden of proof" [9]—even though Plaintiffs had ample support for their proposition. [10]

9 *Seinfeld v. Verizon Comm'ns, Inc.*, 909 A.2d 117, 123 (Del. 2006).

10 *See* Mem. Op. at 25–33 (explaining that Plaintiffs' support included an ongoing, multi-billion dollar antitrust lawsuit, including a 134-page complaint; a motion to dismiss that lawsuit with 38 exhibits; a decision of the federal court denying the motion to dismiss; pleadings accompanying mass tort claims by over 15,000 plaintiffs in multiple jurisdictions; a lawsuit by the DOJ alleging patent infringement and a subsequent ruling by the Patent Trial and Appeals Board; DOJ investigations into False Claims Act violations, including accompanying subpoenas and a related federal litigation; and congressional testimony).

Gilead claimed that Plaintiffs were not entitled to inspection because any follow-on claims challenging the wrongdoing at issue would be dismissed, ignoring that "[t]he stockholder need not demonstrate that the alleged mismanagement or wrongdoing is actionable" in order to be entitled to inspection. [11] In developing this argument, Gilead also misrepresented the record. [12]

11 *See AmerisourceBergen Co. v. Lebanon Cnty. Emps. Ret. Fund*, 243 A.3d 417, 437 (Del. 2020).

12 Mem. Op. at 45–47 (detailing Gilead's various misrepresentations of the record).

Gilead pursued at trial a *Wilkinson* defense as to each Plaintiff, although deposition testimony revealed that all Plaintiffs "were knowledgeable about the basis for their Demands" and requested the books and records as an exercise of their statutory rights as stockholders. [13]

13 *Id.* at 34.

Gilead took aggressive positions in discovery, although the "purpose and nature of Section 220 proceedings" are better served when "managed expeditiously." [14]

14 *See AmerisourceBergen*, 243 A.3d at 437.

Perhaps one of these positions, standing alone, could be forgiven as merely an aggressive defense. Perhaps not. I do not need to make that difficult call because, collectively, these positions rise to the level of glaringly egregious litigation conduct.

While Gilead admits that it vigorously defended the lawsuit, it contends that it did so on the "good-faith belief that the case law and factual record developed through discovery supported its arguments." [15] Gilead further argues that to obtain fee shifting, Plaintiffs "must show by *clear evidence* that Gilead acted in *subjective* bad faith that rose to the level of *glaring egregiousness.*" [16]

15 Dkt. 121 ¶ 2.

16 *Id.* (emphasis in original).

Gilead overstates the law on this point. Although Delaware courts have described the bad faith standard as "subjective," this court has shifted fees based on litigation conduct without launching a fact-intensive investigation into the offending party's state of mind. [17] Moreover, where this court shifts fees to curb and correct for overly vexatious litigation behavior, a showing of glaringly egregious litigation conduct is enough. To the extent that a finding of bad faith is necessary, then the court can infer bad faith based on the litigation conduct alone. In this case, such an inference is appropriate.

17 *See, e.g.*, *McGowan*, 791 A.2d at 4 (holding that the defendant "acted in subjective bad faith by failing to honor its promises to produce its books and records, and later by opposing [the plaintiff's] § 220 action to enforce his legal right to inspect those books and records," despite there being no record of the defendant's state of mind).

***3** For the foregoing reasons, Plaintiffs' Motion for an Award of Attorneys' Fees and Expenses is GRANTED.

IT IS SO ORDERED.

Sincerely,

/s/ Kathaleen St. Jude McCormick
Kathaleen St. Jude McCormick

Chancellor

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

AB STABLE VIII LLC, Plaintiff/ Counterclaim-Defendant,
v.
MAPS HOTELS AND RESORTS ONE LLC, Mirae Asset Capital Co., Ltd., Mirae Asset Daewoo Co., Ltd., Mirae Asset Global Investments, Co., Ltd., and Mirae Asset Life Insurance Co., Ltd., Defendants/Counterclaim-Plaintiffs.

C.A. No. 2020-0310-JTL
|
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Date Decided: November 30, 2020

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MEMORANDUM OPINION

LASTER, V.C.

***1** AB Stable VIII LLC ("Seller") is an indirect subsidiary of Dajia Insurance Group, Ltd. ("Dajia"), a corporation organized under the law of the People's Republic of China. Dajia is the successor to Anbang Insurance Group., Ltd. ("Anbang"), which was also a corporation organized under the law of the People's Republic of China. For simplicity, and because Anbang was the pertinent entity for much of the relevant period, this decision refers to both companies as "Anbang."

Through Seller, Anbang owns all of the member interests in Strategic Hotels & Resorts LLC ("Strategic," "SHR," or the "Company"), a Delaware limited liability company. Strategic in turn owns all of the member interests in fifteen limited liability companies, each of which owns a luxury hotel.

Under a Sale and Purchase Agreement dated September 10, 2019 (the "Sale Agreement" or "SA"), Seller agreed to sell all of the member interests in Strategic to MAPS Hotel and Resorts One LLC ("Buyer") for a total purchase price of $5.8 billion (the "Transaction"). Buyer is a special purpose vehicle formed to acquire Strategic. Buyer's ultimate parent company is Mirae Asset Financial Group ("Mirae"), a financial services conglomerate based in Korea with assets under management of over $400 billion. Three of Mirae's affiliates executed equity commitment letters that bound them to contribute a total of $2.2 billion to Buyer at closing. The balance of the purchase price would be funded with debt. Due to a combination of factors, Buyer was not able to obtain debt financing.

On April 17, 2020, the scheduled closing date, Buyer asserted that a number of Seller's representations and warranties were inaccurate and that Seller had failed to comply with its covenants under the Sale Agreement. Buyer contended that as a result, Seller had failed to satisfy all of the conditions to closing, and Buyer was not obligated to close. Buyer informed Seller that if the breaches were not cured on or before May 2, 2020, then Buyer would be entitled to terminate the Sale Agreement.

On April 27, 2020, Seller filed this action seeking a decree of specific performance (i) compelling Buyer to perform its obligations under the Sale Agreement and (ii) directing Buyer's three affiliates to contribute $2.2 billion under the equity commitment letters. After Seller filed suit, Buyer purported to terminate the Sale Agreement. Buyer then filed counterclaims seeking determinations that Seller failed to satisfy conditions to closing, breached its express contractual obligations, breached implicit obligations supplied by the implied covenant of good faith and fair dealing, and committed fraud.

The initial set of issues involves Buyer's obligation to close. The factual underpinnings of those issues fall into two largely distinct categories: the “COVID Issues” and the “DRAA Issues.”

The COVID Issues are factually straightforward and result from the COVID-19 pandemic. First, Buyer was not obligated to close if Seller's representations were inaccurate and the degree of the inaccuracy was sufficient to result in a contractually defined Material Adverse Effect (the “Bring Down Condition”). Seller represented that since July 31, 2019, there had not been any changes, events, states of facts, or developments, whether or not in the ordinary course of business that, individually or in the aggregate, have had or would reasonably be expected to have a Material Adverse Effect. (the “No-MAE Representation”).

***2** According to Buyer, the business of Strategic and its subsidiaries suffered a Material Adverse Effect due to the onset of the COVID-19 pandemic, rendering the No-MAE Representation inaccurate, causing the Bring-Down Condition to fail, and relieving Buyer of its obligation to close. Assuming for purposes of analysis that Strategic suffered an effect that was both material and adverse, Seller nevertheless proved that the consequences of the COVID-19 pandemic fell within an exception to the definition for effects resulting from “natural disasters and calamities.” Consequently, the business of Strategic and its subsidiaries did not suffer a Material Adverse Effect as defined in the Sale Agreement.

Second, Buyer was not obligated to close if Seller failed to comply with its covenants between signing and closing (the “Covenant Compliance Condition”). Seller's covenants included a commitment that the business of Strategic and its subsidiaries would be conducted only in the ordinary course of business, consistent with past practice in all material respects (the “Ordinary Course Covenant”).

Buyer proved that due to the COVID-19 pandemic, Strategic made extensive changes to its business. Because of those changes, its business was not conducted only in the ordinary course of business, consistent with past practice in all material respects. The Covenant Compliance Condition therefore failed, relieving Buyer of its obligation to close.

Unlike the COVID Issues, the DRAA Issues are factually complex. They relate to a fraudulent scheme whose origins date back to 2008, when Anbang began a series of disputes with a shadowy and elusive figure named Hai Bin Zhou. [1] At least one of Hai Bin Zhou's business strategies involves using otherwise passive entities to register trademarks associated with established businesses, with the expectation that companies will settle to secure their marks.

1 Hai Bin Zhou appears to work with a number of other individuals in the United States and in the People's Republic of China. It is therefore more precise to refer to Hai Bin Zhou and his associates. For simplicity, this decision refers to Hai Bin Zhou. Hai Bin Zhou and his associates are not parties to this action. Although both sides served subpoenas on Hai Bin Zhou and many of his entities, no one produced discovery or appeared for deposition. Anbang likely could have filled some of the gaps in the record, because Anbang has repeatedly investigated Hai Bin Zhou in connection with their long-running disputes. During this litigation, however, Anbang maintained that counsel conducted the investigations and invoked the attorney-client privilege to shield them from discovery. The record for purposes of this litigation is therefore thinner than it might have been. The record is nevertheless sufficient for the court to make findings with a high degree of confidence regarding Hai Bin Zhou and the fraudulent nature of his activities.

Hai Bin Zhou pursued this strategy against Anbang. Anbang fought back until 2018, when the insurance regulator in the People's Republic of China took over Anbang's operations and placed the company in receivership. The regulatory team decided to stop asserting Anbang's rights to its trademarks in the United States. As a result, Anbang defaulted in litigation with Hai Bin Zhou before the United States Patent and Trademark Office (the “USPTO”). For Hai Bin Zhou, the default judgment was a near-term tactical victory but a long-term strategic defeat, because it undermined his ability to extract consideration from Anbang through trademark litigation in the United States

To create a new source of leverage, Hai Bin Zhou turned to fraud. He interwove the history of trademark disputes with the events that led to Anbang's regulatory takeover in what might be regarded begrudgingly as an inspired work of fiction. But instead of producing a captivating novella or screenplay, he generated a spurious agreement, purportedly between Anbang and five of his affiliates. The ersatz contract ostensibly bound Anbang to pay billions of dollars, with the obligation secured by Anbang's ownership interests in its subsidiaries and other assets. The apocryphal agreement also contained a durable power of attorney that supposedly gave Hai Bin Zhou's affiliates the authority to transfer Anbang's assets to satisfy its liabilities. Ingeniously, Hai Bin Zhou recognized that the Delaware Rapid Arbitration Act (the "DRAA") contained few procedural protections against the confirmation and enforcement of fake arbitral awards. Perceiving that the DRAA could be used to facilitate fraud, Hai Bin Zhou styled the counterfeit agreement as providing for arbitration under the DRAA and labeled it the "DRAA Blanket Agreement." This decision shortens that term to the "DRAA Agreement."

***3** Beginning in summer 2018, Hai Bin Zhou filed a series of grant deeds in the county record offices in California where Strategic owned hotels (the "Fraudulent Deeds"). The Fraudulent Deeds purportedly transferred ownership of the hotels from Strategic's subsidiaries to Hai Bin Zhou's affiliates.

In August 2019, Hai Bin Zhou caused four of his affiliates to sue Anbang and the fifth affiliate in this court, ostensibly to appoint arbitrators to resolve a dispute under the DRAA Agreement. *World Award Found. v. Anbang Ins. Gp. Co., Ltd*, C.A. No. 2019-0606-JTL (the "DRAA Chancery Action"). In September 2019, a California lawyer sent the court a package of documents. To establish a public record of the *ex parte* submission, the court docketed the documents under a notice stating that "[t]he filing of these materials by the court does not have any implications under Delaware Rapid Arbitration Act."

The submission contained a series of spurious arbitral awards. Despite facially apparent problems with the awards, Hai Bin Zhou convinced a Delaware lawyer to file actions in the Delaware Superior Court to enforce the awards as judgments. The same Delaware lawyer obtained an exemplified copy of one of the judgments, which Hai Bin Zhou used to bring an enforcement action against Anbang in California.

Anbang discovered the Fraudulent Deeds in December 2018, but chose not to disclose them to any potential buyers. Anbang did not disclose the Fraudulent Deeds to Mirae until August 2019, just before signing the Sale Agreement. When disclosing the Fraudulent Deeds, Anbang did not reveal what it knew about Hai Bin Zhou or their history of trademark disputes. Anbang misled Mirae into thinking that the Fraudulent Deeds were the work of a twenty-something Uber-driver with a felony conviction. By the time it disclosed the existence of the Fraudulent Deeds, Anbang had learned about the DRAA Chancery Action and understood the connection to Hai Bin Zhou, but Anbang did not disclose the existence of the litigation.

After Hai Bin Zhou brought the enforcement action in California, Anbang engaged in extensive litigation efforts in this court, the Delaware Superior Court, and the California court to address the threat that these actions posed to the Transaction. During those litigation efforts, Anbang provided the courts with partial and misleading accounts of what it knew about Hai Bin Zhou and his activities.

Despite seeking emergency relief from three courts because of the threat that Hai Bin Zhou's activities posed to the Transaction, Anbang did not disclose anything to Mirae. Instead, the lawyers for Mirae's financing syndicate discovered the proceedings just as Mirae was attempting to secure financing. After the lawsuits were revealed, Anbang again failed to provide the full story about its history of disputes with Hai Bin Zhou.

For a time, Anbang managed to reassure Mirae, but the threat posed by Hai Bin Zhou and his activities resurfaced when a major law firm disclosed that it was evaluating whether to represent Hai Bin Zhou. The law firm provided information about the history of trademark disputes between Anbang and Hai Bin Zhou that conflicted with Anbang's longstanding claims. That was the third strike against Anbang's credibility.

The Sale Agreement conditioned Buyer's obligation to close on Seller obtaining documentation (i) expunging the Fraudulent Deeds from the public record (the "Expungement Condition") and (ii) enabling Buyer to obtain title insurance that either did not contain an exception from coverage for the Fraudulent Deeds or which included an exception and then affirmatively provided coverage through an endorsement (the "Title Insurance Condition"). Seller obtained documentation that satisfied the Expungement Condition, but the title insurers refused to issue title commitments that satisfied the Title Insurance Condition. Although the commitments did not contain a specific exception for the Fraudulent Deeds, the commitments included a broad exception for any matter arising out of or disclosed in the DRAA Agreement, the DRAA Chancery Action, the Delaware Superior Court enforcement actions, or the California enforcement action (the "DRAA Exception").

***4** As framed, the DRAA Exception encompassed the Fraudulent Deeds, causing the Title Insurance Condition to fail. Seller sought to prove that Buyer caused the title insurers to include the DRAA Exception, thereby breaching its obligation to use reasonable efforts to complete the Transaction and excusing the failure of the Title Insurance Condition. There is evidence to support Seller's theory. On balance, however, a combination of the factual evidence and expert testimony demonstrates that Buyer did not breach its contractual obligation and did not cause the title insurers to include the DRAA Exception.

Buyer thus proved that it was not obligated to perform at closing because the Covenant Compliance Condition and the Title Insurance Condition failed. Seller did not cure its breach of the Ordinary Course Covenant, resulting in Buyer gaining the right to terminate the Sale Agreement. Buyer validly exercised that right. Since then, the outside date for completing the Transaction has passed, giving Buyer a second basis to terminate the Sale Agreement.

Under the terms of the Sale Agreement, Buyer is entitled to the return of its deposit plus associated interest. In addition, Buyer is entitled to transaction-related expenses (effectively reliance damages) in the amount of $3.685 million, plus its attorneys' fees and expenses as the prevailing party. Seller is not entitled to any relief.

I. FACTUAL BACKGROUND

The factual record is immense. During a five-day trial conducted using the Zoom videoconferencing system, the court heard testimony from six fact witnesses and eight expert witnesses. The parties introduced 5,277 exhibits into evidence and lodged forty-six deposition transcripts, with twenty-nine from fact witnesses and seventeen from experts. Reflecting the zeal with which the lawyers represented their clients, the parties reached agreement on only sixty-three stipulations of fact in the pre-trial order. [2]

2 Citations in the form "PTO ¶" refer to stipulated facts in the pre-trial order. JX 5171. Citations in the form "[Name] Tr." refer to witness testimony from the trial transcript. Citations in the form "[Name] Dep." refer to witness testimony from a deposition transcript. Citations in the form "JX —— at ——" refer to trial exhibits using the internal page number of the exhibit, or if not internally paginated, the last three digits of the control number. If a trial exhibit used paragraph numbers or sections, then references are by paragraph or section.
To constrain the proliferation of footnotes, citations to single authorities generally appear in the text. In some instances, typically involving short paragraphs or background information, the supporting citations for a paragraph are collected in a single footnote.

The parties assembled this record during a four-month period from April until August 2020. The principal litigants were based in China and Korea, and many of the documents had to be translated, as did the testimony of certain witnesses. Under any circumstances, that feat would be impressive. In this case, the parties engaged in expedited litigation during the COVID-19 pandemic, making their achievement extraordinary.

Sifting through the immense record to make factual findings was a challenging task. Because fact finding inherently involves uncertainty, courts evaluate evidence using a standard of proof. For the court to find that an alleged fact is true, the evidence must be sufficient to surpass a standard of proof. The burden of clearing that hurdle (and the consequence of losing if the burden is not met) is typically assigned to the party that seeks to establish the fact in question.

***5** The standard of proof was a preponderance of the evidence. *See Estate of Osborn ex rel. Osborn v. Kemp,* 2009 WL 2586783, at *4 (Del. Ch. Aug. 20, 2009), *aff'd*, 991 A.2d 1153 (Del. 2010). The allocation of the burden of proof varied by issue. Ultimately, the burden of proof did not play a role in the case. The Delaware Supreme Court has explained that the real-world effect of the burden of proof is "modest" and only outcome-determinative in "very few cases" where the "evidence is in equipoise." *Ams. Mining Corp. v. Theriault,* 51 A.3d 1213, 1242 (Del. 2012) (internal quotation marks omitted). In this case, the evidence was not in equipoise. The factual findings would be the same regardless of the assignment of the burden of proof.

A. Wu Xiaohui, Anbang, And Strategic

In 2004, Wu Xiaohui founded Anbang, which started life as a regional car insurance company. Anbang quickly received licenses from the Chinese government to conduct nearly every type of financial service, and it expanded rapidly. At its height, Anbang claimed to be an insurance and financial services conglomerate with over $300 billion in assets.

In 2014, Anbang made headlines in the United States by acquiring the Waldorf Astoria Hotel for $1.95 billion. [3] News accounts described Anbang's purchase as part of a larger international buying spree that saw Anbang invest billions of dollars overseas. [4] In addition to making acquisitions worldwide, Anbang reportedly acquired stakes in major Chinese banks. [5]

3 *See* JX 52; JX 54; *see also* JX 77.

4 *See* JX 58; JX 80; JX 84; JX 86; JX 112; JX 113.

5 *See, e.g.*, JX 111; JX 113.

During its meteoric rise, Anbang reportedly benefitted from connections to China's political elite. Wu Xiaohui married a granddaughter of Deng Xiaoping, the Premier of the People's Republic of China from 1978 until 1989. Another early backer was the son of Chen Yi, a marshal in the People's Liberation Army and ally of Zhou Enlai, the first Premier of the People's Republic of China. Another notable figures associated with Anbang was the son of Zhu Rongji, Premier of the People's Republic of China from 1998 to 2003. Particularly after Anbang's international buying spree, media accounts frequently described Anbang's connections to these and other luminaries. [6]

6 *See* JX 54; JX 59; JX 80; JX 83; JX 84; JX 111; JX 166; JX 186.

Adding to its mystique, Anbang was a privately held company. Many of its approximately forty stockholders were shell companies or nominees. The opaque ownership structure concealed who really owned Anbang. Press accounts focused on the mystery, implying that China's political elite were its real owners.

In 2016, Anbang acquired Strategic. [7] Until 2015, Strategic had been a publicly traded real estate investment trust. *See* JX 26. In December 2015, a private equity fund managed by Blackstone acquired Strategic for approximately $6 billion. Three months later, Anbang agreed to buy Strategic from Blackstone for approximately $6.5 billion.

7 *See* JX 77; JX 78; JX 79.

After the acquisition, Anbang owned Strategic indirectly through two subsidiaries. The first-tier subsidiary was Anbang Life Insurance Co., Ltd., a wholly owned subsidiary of Anbang. The second-tier subsidiary was Seller.

During 2016, Wu Xiaohui reportedly courted Jared Kushner regarding an investment in the redevelopment of 666 Fifth Avenue, the centerpiece of the Kushner family's real estate empire. Press accounts covered these developments as well. [8]

8 *See* JX 93; JX 109.

B. Hai Bin Zhou And His Affiliates

Since 2008, Anbang has engaged in trademark disputes with a shadowy and elusive group of individuals and entities. The principal antagonist has been Hai Bin Zhou, an individual who operates under multiple aliases and through an assortment of shell companies. Anbang's lead representative for purposes of the Transaction, Zhongyuan Li, described Hai Bin Zhou as a “trademark troll.” Li Tr. 493. That characterization aptly describes at least one of Hai Bin Zhou's business strategies, which involves using passive entities to register trademarks associated with established businesses. The USPTO's records show that between 2012 and 2019, entities affiliated with Hai Bin Zhou have been involved in twenty-five trademark disputes with companies like WhatsApp Inc., Apple Inc., GoPro, Inc., and Alibaba Group Holding Limited. [9]

9 *See* JX 4402 at 25–26; JX 4877 at 79–84.

***6** In 2008, Anbang petitioned China's Trademark Review and Adjudication Board (the “Trademark Board”) to recognize Anbang's exclusive rights to use its trademarks in China and to deny trademark rights to Beijing Great Hua Bang Investment Group Company Limited (“Great Hua Bang”), a company formed under Chinese law in 2002. [10] Anbang's petition asserted that, in 2004, after the China Insurance Regulatory Commission announced a plan to grant insurance license to eighteen new insurance companies, Great Hua Bang registered the names of Anbang and two other companies as its trademarks. Great Hua Bang never obtained an insurance license and never conducted any operations under the "Anbang" name. [11] Filings in other trademark disputes establish that Great Hua Bang is affiliated with Hai Bin Zhou.

10 *See* JX 4482 at 7; JX 38 at 7–9, JX 45 at 12–21.

11 JX 45 at 12, 17–20.

In January 2013, the Trademark Board denied Anbang's petition and awarded trademark rights to Great Hua Bang. *See* JX 4482 at 7. Anbang responded by challenging the Trademark Board's ruling in the Beijing No. 1 Intermediate People's Court. [12] In February 2014, the Intermediate People's Court vacated the Trademark Board's ruling and remanded with instructions to the Trademark Board to issue a new decision. [13] In April 2015, the Trademark Board ruled in favor of Anbang. JX 65 at 6.

12 *See* JX 45 at 12; JX 65 at 5.

13 *See* JX 4482 at 8; JX 65 at 56; JX 4971.

Meanwhile, with Anbang expanding overseas, Hai Bin Zhou repeated his trademark-registration strategy in other countries. Between 2008 and 2019, Anbang litigated against Hai Bin Zhou and his affiliates in a total of sixteen cases brought in five different countries. *See* JX 4482 at 5–9.

One of the many entities that Hai Bin Zhou controls is Amer Group Inc. ("Amer"). [14] In 2015, Hai Bin Zhou caused Amer to register "An Bang Group" and related marks with the USPTO. When Anbang applied to use its marks in the United States, Amer asserted its rights, and the USPTO rejected Anbang's application. The USPTO ruling was a major success for Hai Bin Zhou and became the centerpiece of his campaign against Anbang. [15]

14 Amer Group Inc. was formed on January 26, 2011. On May 18, 2018, it was converted into a limited liability company and changed its name to Amer Group LLC. JX 5221.

15 *See* JX 88; JX 90; JX 94; JX 95; JX 100; JX 105; *see also* JX 119.

In 2016, Anbang applied to use its marks in Hong Kong. Amer and Great Hua Bang opposed the application. To bolster their claims, Hai Bin Zhou changed the name of another of his entities to An Bang Group LLC ("An Bang Delaware"). [16] Relying heavily on the USPTO ruling, An Bang Delaware, Amer, and Great Hua Bang argued that Anbang should not be permitted to register its marks in Hong Kong. *See* JX 99.

16 JX 106 at '428; *See* JX 819 at 9; JX 1385. An Bang Delaware started its corporate existence in December 2005 as LMK Management, Inc. In 2007, Hai Bin Zhou changed its name to Showsum, Inc. See JX 1385 at 3. On January 9, 2017, Hai Bin Zhou converted Showsum into An Bang Delaware. JX 106 at '428.

These events caused a stir at Anbang, and one of Anbang's representatives in the United States secured the corporate filings for Amer and An Bang Delaware. [17] Anbang also hired investigators to gather information about these entities. [18]

17 *See* JX 98; JX 101.

18 *See* JX 116; JX 117.

C. The Arrest Of Wu Xiaohui And The Arrival Of The Regulatory Team

During the first half of 2017, significant events involving Anbang unfolded in China. Chinese authorizes conducted an investigation of Wu Xiaohui, culminating in his arrest on June 8, 2017, at Anbang's offices on charges of embezzlement and manipulating Anbang's financial statements. [19] On June 14, 2017, Anbang issued a press release stating, "Chairman Wu Xiaohui is temporarily unable to fulfil [sic] his role for personal reasons. He has authorized relevant senior executives to continue running the business, which is operating as normal." JX 124.

19 *See* JX 125; JX 127; JX 183; He Dep. 38.

***7** Within days of Wu Xiaohui's arrest, the China Banking and Insurance Regulatory Commission (the "CBIRC") [20] dispatched a regulatory team to supervise Anbang's operations. [21] Except for Wu Xiaohui, Anbang's existing managers remained in place and continued to run the company, subject to the oversight of the regulatory team. [22]

20 The CBIRC was formed in April 2018 through a merger of the China Banking Regulatory Commission and the China Insurance Regulatory

Commission, which were previously separate regulatory agencies. Before April 2018, Anbang's was overseen by the China Insurance Regulatory Commission. *See* Luo Dep. 31–34.

21 Luo Dep. 45–48; He Dep. 23–25, 32–33.

22 Luo Dep. 48; He Dep. 25, 28–30.

Before the regulatory team arrived, Anbang's management team had decided to file an action with the USPTO challenging Amer's rights to use the "Anbang" marks. The petition was based in part on earlier trademark registrations that Anbang had filed in 2008, which Anbang sought to renew.[23] Anbang formally filed its petition on June 8, 2017, coincidentally one day before Wu Xiaohui's arrest.[24] The petition reflected the fruits of Anbang's investigation into Hai Bin Zhou and his affiliates. It noted that although Amer claimed to have offices at "One Blackfield, Suite 416, Tiburon, California," that address was the site of a UPS Store, and "Suite 416" did not exist. Amer simply rented mailbox number 416. Anbang also reported that Amer's status with the Delaware Secretary of State was "delinquent." JX 119 ¶ 4.

23 *See* JX 15; JX 16; JX 17; JX 146; JX 152; JX 155.

24 *See* JX 119; *see also* JX 120; JX 121.

Hai Bin Zhou retained Venable LLP to represent Amer. Venable countered Anbang's petition by filing a petition to cancel Anbang's earlier registrations.[25] After some procedural jockeying, the USPTO consolidated the cases and entered a schedule.[26]

25 *See* JX 139 at 4–6; JX 144; JX 145; JX 156; JX 157; JX 160.

26 *See* JX 153; JX 158; JX 162; JX 165; JX 170. Litigation between Anbang, Amer, Great Hua Bang, and Anbang Delaware also continued in Hong Kong. *See* JX 154.

D. The Sentencing Of Wu Xiaohui And The Arrival Of The Takeover Team

In March 2018, Wu Xiaohui pled guilty to "fraudulent fundraising" and "work-related embezzlement."[27] In June 2018, he was sentenced to eighteen years in prison.[28]

27 *See* JX 173; JX 175; JX 188.

28 JX 183; JX 184; *see* JX 164.

After the sentencing, the CBIRC replaced the regulatory team at Anbang with a "Takeover Team." Unlike the regulatory team, the Takeover Team had full authority to manage Anbang, displacing its board of directors and managers.[29] Xiafeng He ("Chairman He") led the Takeover Team. Sheng Luo ("Vice Chairman Luo") was the second in command.[30]

29 Luo Dep. 47; JX 169.

30 *See* Luo Dep. 47; He Dep. 33, 66–67.

The Takeover Team reviewed the various proceedings involving Anbang's trademarks and made the following decisions:

1. In the United States and Canada, we shall discontinue the trademark application because there will be no business demand in these markets in the foreseeable future. When there is business demand in the future, the trademark application should be restarted as appropriate;

2. In Europe, since our trademark applications have met the business needs in the future, and from the comprehensive consideration of costs and business needs, we shall suspend the opposition proceeding regarding the similar trademarks with AMER GROUP;

***8** 3. In Hong Kong, the trademark application shall be prosecuted according to the actual business needs. See the attachment for the detailed budget involved in the relevant legal process.[31]

In the near-term, the Takeover Team's decision to abandon Anbang's marks in the United States, Canada, and Europe proved to be a gift to Hai Bin Zhou.

31 JX 178; *see* JX 180. Hai Bin Zhou continued to find new ways to assert rights to Anbang trademarks. For example, in December 2017, he caused another one of his entities, World Award LLC, to register "AnbangGroup.com" as a service mark in the United States. JX 181.

After the Takeover Team's decision, Anbang stopped participating in the trademark dispute before the USPTO. In August 2018, Venable moved for a default judgment. The USPTO ordered Anbang to show cause why judgment should not be entered. Anbang did not respond and defaulted.[32]

32 *See* JX 209; JX 211; JX 299.

The resulting default judgment canceled Anbang's rights to its marks and established Amer's rights. [33] As with the USPTO's earlier ruling, the default judgment became a cornerstone of Hai Bin Zhou's campaign against Anbang.

33 JX 305; JX 306; *see* JX 415; JX 602.

Meanwhile, Hai Bin Zhou had reactivated his challenge to Anbang's trademarks in China. In July 2018, Great Hua Bang filed a petition against Anbang in the Beijing Intellectual Property Court (the "Beijing IP Court"). The petition sought to vacate the Trademark Board's ruling, issued after the remand from the Intermediate People's Court, that had awarded trademark rights to Anbang. Great Hua Bang claimed that it had not received notice of the proceedings and that its affiliates—An Bang Delaware and World Award Foundation—had used the Anbang marks in the United States since 2001. To support its claims, Great Hua Bang relied heavily on the USPTO's ruling. *See* JX 205.

E. The Fraudulent Deeds

Anbang's default in the USPTO proceedings gave Hai Bin Zhou a tactical victory. But it was a strategic defeat for his efforts to extract consideration from Anbang, because Anbang was no longer seeking to control its marks in the United States. Anbang was still litigating in Hong Kong, and Hai Bin Zhou had renewed his challenge in China, but in those jurisdictions Anbang was on its home turf, and Hai Bin Zhou was unlikely to prevail.

Hai Bin Zhou needed a new source of leverage. Drawing on the news stories that described Anbang's origins, its acquisition spree, and Wu Xiaohui's downfall, Hai Bin Zhou imagined an account in which Wu Xiaohui, shortly before his arrest, caused Anbang to enter into the DRAA Agreement with Amer, Great Hua Bang, An Bang Delaware, an entity named AME Group, Inc., [34] and an entity named World Award Foundation, Inc. [35] Supposedly dated May 15, 2017, the fictitious agreement purportedly bound Anbang to pay billions of dollars to Hai Bin Zhou's entities, secured by Anbang's ownership interests in its subsidiaries and other assets. [36] Shrewdly fitting his account to events that had already occurred, Hai Bin Zhou made Anbang's default in the trademark proceedings before the USPTO the triggering event for Anbang's liability, and he drafted the DRAA Agreement to grant his entities a durable power of attorney that supposedly gave them authority to transfer the assets of Anbang and its subsidiaries to satisfy Anbang's liabilities. [37] To make the DRAA Agreement look authentic, Hai Bin Zhou copied the seals that Anbang's representatives had placed on documents in the various trademark proceedings and used their images to create purported seals on the agreement. [38] He also fabricated the seal of Chen Xiaolu, one of the famous individuals who reportedly was an early backer of Anbang. [39] Ingeniously perceiving that the widely publicized Delaware Rapid Arbitration Act contained few procedural protections against the confirmation of fabricated arbitral awards, he styled the DRAA Agreement as providing for arbitration under the DRAA.

34 AME Group was formed it in 2002. On May 15, 2018, Hai Bin Zhou would convert it into an LLC named AB Stable Group LLC, adopting a name that closely resembled Seller's. *See* JX 819 at 10–14; JX 1421 at 3; JX 1422.

35 World Award Foundation, Inc. was formed in 2000 under the name SHR Acquisition, Inc. In 2007, its name was amended to Iamel Foundation Inc. In February 2014, its name was changed to World Award Foundation Inc. under a filing signed by Hai Bin Zhou. JX 4372; *see* JX 1393 at 3–4.

36 JX 115; *see* JX 3847. As discussed below, the parties did not obtain a copy of the DRAA Agreement until April 2020. Because the DRAA Agreement is fraudulent, it is not clear precisely when it was created.

37 Even though the DRAA Agreement supposedly addressed the trademark disputes between Anbang and the other parties to the agreement, Anbang's trademark counsel from the proceedings before the USPTO had never heard of it. *See* Harrison Dep. 155–164, 166, 170–71.

38 At trial, Seller introduced persuasive testimony from an expert who demonstrated that the signatures and stamps on the DRAA Agreement were copied electronically from elsewhere, manipulated, and then pasted into the document. *See* Mohammed Tr. 944–61.

39 Chen Xiaolu's signature is also one of the many indications that the DRAA Agreement is

> fraudulent, as he resigned more than a year before the purported signing of the DRAA Agreement. *See* JX 4808 at 28; Li Tr. 202–03. There are no references to the DRAA Agreement in the minutes of any board or shareholder meetings of Anbang, no references to it in Anbang's electronic database of material contracts, and no copies in Anbang's archives. *See* Li Tr. 204–18, 225–30.

***9** Notwithstanding the elaborate scheme and far-fetched account, the basic strategy was the same. Hai Bin Zhou would assert rights to Anbang's property, anticipating that Anbang would settle to end the harassment.

Between September and December 2018, Hai Bin Zhou caused the Fraudulent Deeds to be filed on the six hotels that Strategic owned in California (the "California Hotels"). The first was recorded on September 17, 2018, for the Westin St. Francis in San Francisco, California. JX 213. Dated September 5, 2018, it contained the following recitation:

> FOR GROUP IP, WITH NO PAYMENT CONSIDERATION, receipts of which are hereby acknowledged, SHC GROUP LLC (SHC St Francis 2017051POA), a Delaware Limited Liability company [sic] hereby GRANT(S) to
>
> SHC Group LLC, a Delaware Limited Liability company.
>
> The following described real property ....

Id. at 2. The deed thus cleverly linked the transfer to "GROUP IP," ostensibly grounding the deed in the trademark rights that Amer held. The deed also cited a "2017051POA," referencing the power of attorney in the manufactured DRAA Agreement.

The deed was signed by Daniil Belitskiy, who listed his title as "vice president [sic]." *Id.* The representation that zero transfer tax was owed was signed by "Andy Bang Zhou," a pseudonym of Hai Bin Zhou. *Id.* The transferee was an affiliate of Hai Bin Zhou that he had caused to be formed on May 25, 2018.[40]

40 *See* JX 641 at 25; JX 945 at 26–27; JX 1389 at 3.

The second deed was recorded on September 19, 2018, for the Ritz-Carlton Half Moon Bay in San Mateo County, California. JX 212. Also dated September 5, 2018, it contained a similar recitation:

> FOR GROUP IP, WITH NO PAYMENT CONSIDERATION, receipts and sufficiency are hereby acknowledged, SHC GROUP LLC (SHC Half Moon bay [sic] 2017051POA), a Delaware Limited Liability company [sic], described in Exhibit "A" hereto (the "Land"), that certain real property located in the County of San Mateo, State of California, hereby grants to
>
> 1. SHC GROUP LLC, a Delaware Limited Liability company.
>
> 2. AB Stable Group LLC, a Delaware Limited Liability company.

JX 212. The deed was signed by Belitskiy, who listed his title as "Vice President" *Id.* The new entity, AB Stable Group LLC, was the new incarnation of AME Group, Inc., an entity Hai Bin Zhou formed in 2002, then converted into an LLC on May 15, 2018, using a new name that closely resembled the formal name of Seller.[41]

41 *See* JX 819 at 10–14; JX 1421 at 3; JX 1422.

In October 2018, Hai Bin Zhou caused three more grant deeds to be filed. On October 12, 2018, a deed was filed for the Four Seasons Palo Alto in San Mateo County. Dated October 10, 2018, it contained similar recitations, referenced a "2017015 DPOA," and purported to transfer ownership to AB Stable Group LLC and SHRC Group LLC. JX 233. SHRC Group LLC was an affiliate of Hai Bin Zhou, who caused it to be formed on May 25, 2018.[42] The deed was again signed by Belitskiy as "Vice President" JX 233 at 1.

42 *See* JX 945 at 28–29; JX 1391 at 3.

On October 30, 2018, a deed was filed for the Montage Laguna Beach in Orange County. JX 245. Dated October 26, 2018, it contained similar recitations, referenced a "2017 DPOA," and purported to transfer ownership to SHRC Holding Group LLC. JX 245. The deed was signed by Belitskiy, who listed his title as "Vice President" *Id.*

***10** On October 31, 2018, a deed was filed for the Ritz-Carlton Laguna Niguel in Orange County. JX 246. Dated October 26, 2018, it contained similar recitations, referenced a "2017 DPOA," and purported to transfer ownership to SHC Holdings Group LLC. *Id.* That was another affiliate of Hai Bin Zhou, who caused it to be formed on August 24, 2018. *See*

JX 1390. Belitskiy signed the deed, listing his title as "Vice President." JX 246.

From October 29 until November 4, 2018, Hai Bin Zhou stayed at the Montage Laguna Beach under the alias "Andy Zhou." *See* JX 1260. He informed the general manager that he was affiliated with Wu Xiaohui and might be involved in a change of ownership with the hotel. [43] I suspect he was trying to get Anbang's attention to open settlement talks. His presence was sufficiently concerning that the information was relayed up the chain of command to Xu (Leo) Liu, a representative of Anbang who served on Strategic's board of directors and was a principal point of contact with Anbang. [44]

43 JX 1449 at 1, 13; JX 1466 at 1; Hart Dep. 81–84; Hogin Dep. 124.

44 Hart Dep. 82, 104–05; JX 1449 at 5–6; Liu Dep. 170–72.

The last three grant deeds were filed in December 2018. Two were for properties where Hai Bin Zhou had already recorded deeds. On December 20, 2018, a second deed was recorded for the Montage. Dated December 12, 2018, it purported to transfer the hotel to Andy Bang LLC. JX 291 at 1. That entity was another affiliate of Hai Bin Zhou that he caused to be formed on November 20, 2018. [45] The same day, a second deed was filed for the Ritz Carlton Laguna Niguel. Also dated December 12, 2018, it purported to transfer the hotel to World Award Group LLC. JX 292 at 1. That entity was another affiliate of Hai Bin Zhou that he caused to be formed on November 27, 2018. *See* JX 945 at 30–31.

45 *See* JX 945 at 24–25; JX 1387.

The eighth and final grant deed was filed on December 28, 2018. It purported to transfer the Lowes Hotel in Santa Monica to SHC Holdings Group LLC. JX 290 at 2. It too was signed by Belitskiy. *Id.* at 3.

During the same period that Hai Bin Zhou and Belitskiy were filing the Fraudulent Deeds, Hai Bin Zhou continued to challenge Anbang's trademarks in Hong Kong. In October and November 2018, Amer, An Bang Delaware, and Great Hua Bang (the "Amer Parties") submitted declarations in which Belitskiy averred that he was "a Vice President" of each entity, had served in that position since 2010, and had "free access to the records of [Amer] relating to their trademarks and their use." JX 436 at 27. The declarations claimed that

- Amer's marks had been used in the United States since 2001. *Id.* at 28, 30.
- Great Hua Bang had obtained a decision in China in 2011 in favor of its marks. *Id.* at 31.
- The USPTO had rejected Anbang's applications for its marks. *Id.* at 32.
- The USPTO had canceled Anbang's earlier registration of its marks. *Id.* at 32–33.

The declarations also introduced a story line about Wu Xiaohui and his conviction, asserting that "[Anbang's] founder Wu Xiaohui was sentenced to 18 years in prison .... It is apparent that fraud was involved in the operation of [Anbang's] business when the subject application was filed in 2016.... [Anbang] must have copied the [Amer Parties'] Marks in order to ride on the reputation build up by the [Amer Parties]." *Id.* at 33.

F. The Takeover Team Decides To Sell Strategic.

Meanwhile, the Takeover Team was deciding what to do with Anbang's far-flung real estate empire. In August 2018, the Chinese government imposed limitations on the ability of Chinese companies to own overseas investments. Deciding to sell Anbang's overseas assets was an easy call. [46]

46 *See* JX 208; JX 533 at 16, 19.

***11** Through Strategic and its subsidiaries, Anbang owned fifteen luxury hotels in the United States. In addition to the six California Hotels, Strategic owned the Fairmont Chicago, the Fairmont Scottsdale Princess, the Four Seasons Hotel Austin, the Four Seasons Jackson Hole, the Four Seasons Resort Scottsdale at Troon North, the Four Seasons Washington, D.C., the InterContinental Chicago, the InterContinental Miami, and the JW Marriott Essex House Hotel (collectively, the "Hotels").

After some initial one-off discussions with potential buyers, the Takeover Team decided to sell Strategic through a fully marketed process. In November 2018, Anbang hired Bank of America Merrill Lynch ("BAML") as its financial advisor and Gibson Dunn & Crutcher LLP as its legal counsel. Stephen Glover was the lead M&A attorney. Andrew Lance was the lead real estate attorney. Working together, the Anbang team began planning a sale process, although third-party outreach would not begin until April 2019.

G. Early Indications Of A Fraudulent Scheme

While preparing for the sale process, Gibson Dunn and Anbang received early indications that someone was engaged in a fraudulent scheme. On December 21, 2018, Lance received title reports on the Hotels from Fidelity National Title Insurance Company. JX 302 (the "December 2018 Title Reports"). The reports identified the grant deeds that had been filed on the St. Francis Hotel, the Ritz-Carlton Half Moon Bay, the Four Seasons Palo Alto, and the Ritz-Carlton Laguna Niguel.

Lance printed out a copy of the December 2018 Title Reports and reviewed them. *See* JX 304 at 1. He also forwarded the December 2018 Title Reports to Stephen Chan, Anbang's senior in-house counsel, with an email that was redacted for privilege. JX 302 at 1. The description of the document on Anbang's privilege log stated, "Email reflecting legal advice and request for information to facilitate legal advice from A. Lance* regarding updates to title commitments in connection with sale process." JX 5036 No. 1,514AA.

In this litigation, Anbang has tried to downplay the December 2018 Title Reports, but when making a formal report to Chinese law enforcement in March 2020, Anbang represented that it discovered four of the Fraudulent Deeds "in December 2018." JX 3160 at 6. Lance and a team of real estate lawyers from Gibson Dunn were conducting due diligence in advance of a sale process for a major hotel owner and operator. It is therefore more likely than not that Gibson Dunn and Anbang learned about four of the Fraudulent Deeds in December 2018 and investigated them, just as they told Chinese law enforcement.[47] It is equally likely that, in light of Anbang's extensive experience with Hai Bin Zhou and his entities in various trademark proceedings, as well as the relatively recent declarations that Belitskiy had filed in the Hong Kong trademark proceeding, Anbang identified the connection between the Fraudulent Deeds and Hai Bin Zhou.

47 *See, e.g.*, JX 355; JX 356; JX 357; JX 358; JX 359.

In January 2019, one month after Lance received the December 2018 Title Reports and forwarded them to Anbang's in-house counsel, Anbang received another indication that a fraudulent scheme was afoot. In January 2019, the CBIRC sent the Takeover Team a document dated December 28, 2018, and titled "Proof of [An Bang Delaware], World Award Foundation, etc. Entrusting Beijing Great Hua Bang Investment Group Co., Ltd. to Apply for the Registration of the Anbang Trademark and DRAA Agreement." JX 340 (the "DRAA Summary").[48]

48 *Id.* at 9. The original DRAA Summary is written in Chinese. Competing translations appear in the record at JX 4411 and JX 4748. The translations read differently, with certain translations offering more fluid phrasings for different parts of the document. It is worth reading each of them to get a sense of the possible interpretations.

***12** Four entities signed DRAA Summary: Amer, An Bang Delaware, AB Stable Group LLC, and World Award Foundation. Amer and An Bang Delaware were players in the long-running trademark disputes with Anbang, and Anbang Delaware and AB Stable Group LLC appeared on two of the Fraudulent Deeds. World Award Foundation, Inc. had not previously made its appearance, but Great Hua Bang had referred to a "World Award Foundation" in the trademark litigation before the Beijing IP Court, and another "World Award" entity (World Award Group LLC) appeared on one of the Fraudulent Deeds.[49] The DRAA Summary was signed by Hai Bin Zhou using the alias "Andy Bang."[50]

49 *See* JX 205 at 5; JX 292 at 1.

50 *See* JX 4411 at 4; JX 4748 at 7.

The DRAA Summary set out the basic account that Hai Bin Zhou invented to justify the filing of the Fraudulent Deeds. According to DRAA Summary, the signatories "invested and participated in the ... establishment of three insurance companies, including [Anbang] led by Mr. CHEN Xiaolu." JX 340 at 9. They claimed that in return, Anbang had entrusted Great Hua Bang with the rights to the Anbang trademarks, and they noted that the Trademark Board had ruled in favor of Great Hua Bang's marks. That was a reference to the Trademark Board's original decision in 2013 that the Intermediate People's Court later vacated, after which the Trademark Board ruled in favor of Anbang. The signatories claimed not to have received notice of the subsequent decision by the Trademark Board, and they pinned the blame on Wu Xiaohui:

> We believe none of the people reading this certificate is as powerful as [Wu Xiaohui], who kidnapped [a] hostage, caused a default judgment at

> [a] hearing by [withholding] notice from the [Beijing People's Court], and played tricks in collusion with the Trademark Office. He defrauded [us] of hundreds of billions of yuan by taking advantage of [our capital] and our trademark without investing a single penny, but he could escape the punishment [of law] ultimately. Why don't we join hands to uphold the rule of law?

Id.

The signatories to the DRAA Summary next claimed that they had been using Anbang's marks in the United States since January 2001. The DRAA Summary described the proceedings before the USPTO and claimed that the USPTO had "officially certified that we had been using the 'Anbang Group' and 'AB' figurative trademarks in classes of investment insurance and investment since January 2001." JX 4748 at 4. According to the DRAA Summary,

> Such revocation put to an end the 15 years of malicious embezzlement and robbery of trademarks [by Anbang] in the United States, but the malicious plagiarism and infringement of intellectual property rights also constituted one of the causes to trigger the trade war between China and the United States. If [Anbang] continues to violate the laws and regulations ... or even deliberately undermines the consensus between the heads of state of China and the United States on ceasing the trade war, it will definitely be recorded in the history as a notorious disgusting figure.

JX 340 at 9.

The signatories to the DRAA Summary then signaled their interest in reaching a settlement, which seems to have been the goal all along. To that end, they asked the Beijing IP Court and Chairman He whether Anbang would engage in mediation. *Id.*

At the time, Great Hua Bang had filed a petition against Anbang in the Beijing IP Court, in which Great Hua Bang sought to vacate the Trademark Board ruling that had granted trademark rights to Anbang. *See* JX 205. The signatories to the DRAA Summary contended that under a purported DRAA Agreement, all litigation "should be ceased for one year." JX 4411 ¶ 8. They further asserted that "no party can change or sell its shares, equity, assets, and any rights and interests without paying the full penalty for breach of contract, which is common sense; otherwise, shall bear the penalty of one hundred eighty billion US dollars ($180 billion)." *Id.* ¶ 9. The signatories maintained that if Anbang's assets were not sufficient to pay the contractual damages, then the CBIRC or the Chinese government should pay the difference. *Id.* ¶ 10.

***13** The DRAA Summary concluded with additional aggrandized claims:

> The heads of the two countries of China and the United States reached the consensus to purchase 1,200 billion worth of products from the United States within two years. We propose that [Chairman He] follow the DRAA agreement, let us achieve the consensus between the heads of the two countries of China and the United States. First of all, make the payment of $90 billion of the penalty for breach of contract. Second, at the same time we can make the arrangement as part of compensation for the trade deficit. At the same time, third, we will provide the compensation of sixty-one billion Yuan (61 billion) and the interest[ ] to the Insurance Fund so that the State will not lose a single penny. At the same time, fourth, terminate all the lawsuits immediately. Also, fifth, make our own contribution to the early termination of the trade war between China and the United States. Sixth, assist the China Communist Party Central Authority and the country to restore the peaceful order of normal trade and intellectual properties. As such, not just one stone for two birds,

> but one stone for six birds. Why not do
> it?

JX 4411 ¶ 12.

The DRAA Summary was sent to (i) Shuqing Guo, the Chairman of the CBIRC, (ii) the judges of the Beijing IP Court, and (iii) Chairman He, as head of the Takeover Team. *See* JX 340 at 7. In its letter conveying the DRAA Summary to Anbang, the CBIRC noted that the Takeover Team was charged with accepting or rejecting the request within ten days. *Id.* at 8.

In this litigation, Anbang has claimed that it "had no communications with" the CBIRC about the request. JX 4482 at 23. That is not credible. It would mean that Anbang failed to notice or respond to a communication from its primary regulator. During his deposition, Chairman He recalled receiving and reviewing the DRAA Summary as part of his role on the Takeover Team, explaining that he thought the document was ridiculous. He Dep. 106–109, 135–38.

Two months later, Anbang received another copy of the DRAA Summary. On March 5, 2019, during the trial in the Beijing IP Court between Great Hua Bang and Anbang, Great Hua Bang introduced the DRAA Summary into evidence. *See* JX 4414 at 4–6. YuLin Song and TianZhen Fan, both in-house attorneys for Anbang, appeared in the litigation, received a copy of the DRAA Summary, and, while still in the courtroom, signed and verified the accuracy of the trial transcript that identified the DRAA Summary. *Id.* at 7–8. A record of the proceeding documents the introduction of the DRAA Summary and includes handwritten notes stating:

> Plaintiff: Nine. All of [the exhibits] are new ones, and the ninth one is a photo copy of the "Proof of An Bang Group LLC, World Award Foundation, et al.'s Entrustment of Great Hua Bang Investment Group Co Ltd.'s Registration of the 'An Bang' Trademark and the DRAA Agreement." [HAND WRITTEN NOTES: *Such evidence proves that the US entities registered and used the "Anbang" trademark in 2001 in the United States for insurance services and investment services; prior to the incorporation of [Anbang], and authorized [Great Hua Bang] to register the trademark involved in this case in 2004; the US entities together with World Award Foundation, funded and participated in the preparation for the establishment of [Anbang], led by Mr. Chen Xiaolu; [Anbang] breached the DRAA Agreement, for which it shall bear the liability of $180 billion USD. [Anbang] obtained the two trademarks of "Anbang" through fraud and perjury, both of which were revoked by the US Patent and Trademark Office on December 26, 2018; the four US entities [the DRAA Counterparties] are willing to settle under the supervision of the [Beijing IP Court] so as not to damage the trade negotiation between the two heads of states [sic] of the United States and China on the protection of intellectual property, agreed to raise 61 billion Yuan to reimburse the Insurance Fund's contribution. If [Anbang's] assets were not sufficient to compensate for the damage, the [CBIRC] shall contribute, or the State will do so. Otherwise, the legal representative of [Anbang] and other related personnel shall face criminal responsibility of 25-35 years.*]

***14** JX 382 at 3–4.

After the trial, TianZhen Fan gathered all the materials Anbang had relating to the case. She then reported on the trial to the director of Anbang's legal department, Hunan Hou ("Director Hou"), whose position is analogous to the role of general counsel. Between Chairman He and Director Hou, Anbang knew at the highest levels about the DRAA Summary. [51] Shortly after making her report, TianZhen Fan received an email from a colleague that attached Belitskiy's declaration from the Hong Kong trademark litigation. *See* JX 436 at 13, 35–43.

51 *See* JX 374; JX 375; Fan Dep. 33–34.

H. The Sale Process Begins

In April 2019, Anbang launched its formal sale process for Strategic. BAML emailed a "teaser" to a large number of potentially interested parties. One of the recipients was Mirae. [52]

52 *See* PTO ¶ 14; JX 402; JX 404.

Mirae retained Jones Lang Lasalle Americas, Inc. ("Jones Lang") as its financial advisor and Greenberg Traurig, LLP as its legal advisor for purposes of the potential transaction. PTO ¶ 17. Robert Ivanhoe was the lead attorney from Greenberg Traurig.

In early May 2019, BAML received first round bids from seventeen potential bidders, including Mirae. After receiving the bids, Anbang appointed Li to oversee the sale of Strategic, and he acted as the lead decision maker for Anbang on business matters. *See* JX 5058. BAML invited Mirae and six other bidders to participate in the second round of the sale process. *See* JX 527 at 2.

I. Strategic Learns Independently About The Fraudulent Deeds.

Anbang and Gibson Dunn had not shared their knowledge of the Fraudulent Deeds with Strategic. During May 2019, Strategic's general counsel, Patricia Needham, learned independently about two of the Fraudulent Deeds. County officials working on real estate tax issues in the office of the recorder of deeds for San Mateo County were confused about whether the deeds reflected a change of ownership. They contacted one of Strategic's advisors, who contacted Needham. She spoke with the officials, who provided her with information about the deeds for the Ritz-Carlton Half Moon Bay and the Four Seasons Palo Alto. [53] Needham told the officials that ownership had not changed, that the deeds were likely fraudulent, and that representatives of Strategic could provide affidavits confirming those facts. *See* JX 462.

53 *See* JX 466 at 1–4; *see also* JX 457 at 1; JX 651 at 1–2; JX 794 at 5.

In an internal email with her colleagues, Needham stressed language from one of the county official's emails, in which the official expressed frustration about being unable to "get any supporting documentation from either Mr. Danil Belitskiy, who signed all the paperwork, or anyone else at the email address provided on the document anbanggroupllc@gmail.com." JX 466 at 1 (emphasis omitted). According to the official, "The last I heard from them, they said they are having DRAA lawsuits and ownership may change again soon and that 'the guy in charge' is in the EU and they forwarded him my emails." *Id.* (emphasis omitted).

***15** On May 14, 2019, Needham informed David Hogin about the two Fraudulent Deeds that she knew about. [54] Hogin holds the title of Chief Operating Officer at Strategic, but he is the senior-most officer and functions as its CEO. *See* Hogin Tr. 774–75. Needham also informed Xu (Leo) Liu, one of Anbang's representatives on Strategic's board. [55] Needham also contacted Gibson Dunn. JX 461 at 2. Although the contents of her email were withheld as privileged, Lance immediately responded by sending Needham the December 2018 Title Reports. [56] Needham also obtained copies of the two Fraudulent Deeds from San Mateo County, and she obtained documents from the Delaware Secretary of State for the entities on the deeds. [57]

54 Hogin Tr. 863; JX 480 at 1.

55 JX 480; JX 481; Liu Dep. 122–23.

56 Lance Dep. 87–89; JX 460; JX 462; <u>*see*</u> JX 484.

57 *See, e.g.*, JX 463; JX 472; JX 651 at 25–26.

Seller withheld as privileged a number of emails from this period that were exchanged among Needham, Glover, and Lance addressing topics related to the Fraudulent Deeds. [58] These emails indicate that information about the Fraudulent Deeds flowed upward to Chan, Anbang's senior in-house counsel for the Transaction, who knew about Hai Bin Zhou and the years of trademark litigation. [59] Seller claimed privilege for fifty-eight different email conversations involving Needham, Gibson Dunn, or Anbang during May 2019 that mentioned deed or title issued. *See* JX 5036.

58 *See* JX 474; JX 475; JX 516; JX 517; JX 525; JX 4969.

59 *See* JX 475; JX 4969 at 1; JX 4893 at 5–6.

Anbang, Strategic, and Gibson Dunn did not provide potential bidders with any information about the Fraudulent Deeds. Anbang and Gibson Dunn recognized that the deeds were a material issue that would need to be disclosed. Glover Tr. 63–64. They nevertheless made a "deliberate choice" not to disclose the Fraudulent Deeds. Glover Tr. 64. Based on this decision, they did not include any information about the Fraudulent Deeds in the data room. They did not even put the December 2018 Title Reports in the data room, even though Anbang and Gibson Dunn were using those reports for their own analyses. *See* Glover Tr. 60–62. Instead, Anbang and Gibson Dunn populated the data room with outdated title commitments from 2015, 2016, and earlier. [60] Mirae was told that updated title commitments would be provided only to "the final buyer in confirmatory diligence." [61]

60 PTO ¶ 25; *see* JX 60; JX 494; JX 496; JX 497; JX 500; JX 501; JX 509; JX 732; JX 4740; JX 4741; JX 4742; JX 4743; JX 4744; *see also* JX 732 (Glover asking on August 9, 2019, to confirm "what we've provided in the data room regarding

title"; receiving confirmation). Gibson Dunn also did not list the deeds on the draft disclosure schedules. *See* JX 499; JX 688 at 151–52.

61 Hogin Dep. 100–101; *accord* JX 791 at 3.

Anbang, Strategic, and Gibson Dunn also did not take any action to quiet title to the California Hotels. Needham filed fraud complaints with the Office of the District Attorney for San Mateo County, [62] and she also reached out to a law firm about quieting title. [63] But Gibson Dunn specifically told Needham not to engage counsel to quiet title at that time. [64]

62 *See* JX 477; JX 478; JX 486; JX 498; JX 507; JX 603; JX 642; Needham Dep. 159; *see also* JX 641 at 1.

63 *See, e.g.*, JX 641; JX 644; JX 653.

64 Glover Tr. 84–88; *see* Needham Dep. 215.

Seller has claimed in this proceeding that it had no reason to hide the Fraudulent Deeds because a buyer would find out about them eventually, either through its own due diligence or because Anbang and Gibson Dunn eventually disclosed the issue. That is a misleading assertion. Anbang and Gibson Dunn withheld information about the Fraudulent Deeds so that they could choose the manner and timing of the disclosure. It is apparent based on how events transpired that they planned to reveal the information to the final bidders at the eleventh hour, when deal momentum would be at its peak and the finalists would not be inclined to ask too many questions lest they lose the deal. With the benefit of hindsight, the ultimate failure of the Transaction can be traced to Anbang and Gibson Dunn's decisions to withhold information about the Fraudulent Deeds and to delay taking action to remedy the problem. [65]

65 It was during this timeframe that the CBIRC formed Dajia to serve as the successor to Anbang. As part of the reorganization, Dajia acquired all of Anbang's assets below the holding-company level, including Seller. *See* JX 570; JX 613.

J. Mirae's Final Bid

***16** In July 2019, at the end of the second phase of the process, Mirae and two other bidders submitted second round bids. Mirae offered to purchase Strategic at an enterprise value of $5.8 billion. BAML invited Mirae and one other bidder to participate in a final round of bidding. Anbang and BAML pressed the bidders to forego any confirmatory due diligence, contrary to their earlier representations that confirmatory due diligence would be provided. *See* JX 677 at 3–4.

On August 5, 2019, Mirae offered to pay $5.8 billion to acquire a 100% interest in Strategic. JX 698 at 2–3. The term sheet noted that Mirae had formed Buyer "exclusively for the purpose of acquiring the Company." *Id.* at 4. It also noted that Mirae had selected "a total of four (4) leading U.S. lenders, each and all of whom have completed their initial due diligence on this transaction" and had agreed to finance 70% of the purchase price. *Id.* The term sheet stated that affiliates of Mirae would contribute "100% of the equity required for completion of the transaction." *Id.* It was thus clear that Mirae's bid would be made through a special purpose vehicle, supported by equity commitments for 30% of the purchase price and with the balance financed by debt.

Consistent with the term sheet, Mirae had engaged in discussions during summer 2019 with potential lenders about financial arrangements. After receiving bids, Mirae selected Goldman Sachs as its lead lender, with additional banks in the syndicate (together, the "Lenders"). [66] When Mirae submitted its offer on August 5, Mirae had lined up over $4 billion in financing that would take the form of commercial mortgage-backed securities ("CMBS"). [67]

66 *See* JX 632; JX 633; JX 652.

67 Ivanhoe Tr. 514–16, 519–20; Wheeler Dep. 118, 134.

Mirae attached as Exhibit A to its bid letter a copy of the proposed financing commitment, along with emails evidencing internal credit committee approval from each of the Lenders. JX 688 at 3, 54–57. The proposed commitment stated that the financing would be subject to "[s]atisfactory review of title matters and acceptable lender's title insurance." *Id.* at 14; *see* Glover Tr. 101–02. Mirae expected that the transaction would close within sixty to ninety days after signing and intended to enter into a rate lock for that period. [68]

68 Ivanhoe Tr. 520–21; *see* JX 675; JX 680.

During August 2019, Anbang and Gibson Dunn made several attempts to convince Mirae to provide equity commitments for the full amount of the purchase price or a parent-level guarantee. Ivanhoe Tr. 556–57. Mirae rejected those requests. [69] On August 19, Glover reported to Anbang that the "equity backstop has been reduced from full purchase price to approx 1.6 B." [70]

69 Glover Tr. 102, 105–06; Ivanhoe Tr. 557.

70 JX 798 at 1; *see* Glover Tr. 106 (agreeing that Mirae rejected a full equity commitment).

K. Anbang Discloses The Fraudulent Deeds

Beginning on August 6, 2019, the day after receiving Mirae's final bid, Needham, Lance, Glover, and Hogin exchanged a series of emails about the Fraudulent Deeds. [71] A flurry of additional communications took place over the following days that included Needham, lawyers at Gibson Dunn, and Anbang representatives. [72] Anbang asserted privilege over the substance of these communications.

71 *See* JX 701; JX 702; JX 703; JX 709; JX 710; JX 718.

72 *See* JX 712; JX 731; JX 735; JX 739.

Separately, Needham learned about additional Fraudulent Deeds from the same representative who brought the first two to her attention. This time, she learned about deeds filed in December 2018 on the Montage Laguna Beach and Ritz Carlton Laguna Niguel, as well as a deed filed in September 2018 on the Westin St. Francis. A flurry of emails followed. [73] Anbang asserted privilege over the substance of the communications.

73 *See* JX 747; JX 748; JX 749; JX 750; JX 751; JX 752; JX 753; JX 755; JX 757; JX 758; JX 759; JX 760; JX 768; JX 769.

***17** While these events were occurring, the Anbang deal team invited their Mirae counterparts to Beijing to finalize the business issues. *See* JX 764 at 1–2, 4. The evidence indicates that Anbang and Gibson Dunn decided to disclose the existence of the deeds in conjunction with this meeting, when the deal momentum would crest.

1. Blame It On The Uber Driver.

On August 16, 2019, Lance called Ivanhoe. Both were prominent real estate lawyers, and they had known each other professionally for years. Lance said that he had recently learned that a twenty-something-year-old Uber driver with a criminal record had recorded deeds against the California Hotels. [74] When Ivanhoe asked for more information, Lance claimed that he had told Ivanhoe everything that they knew. Ivanhoe Tr. 521–22. Lance described the issue as "a nuisance, but one that his title company should be able to get comfortable with once they know the facts." [75] Based on what he knew at the time, Ivanhoe agreed. JX 786 at 2 ("[Ivanhoe] said that sounds right.").

74 Ivanhoe Tr. 521–22, 536; *see* JX 786; JX 1672 at 4–5.

75 JX 786 at 2; *see* Lance Dep. 156–57.

Lance's claim that he had only recently learned about the deeds was not true. Lance had received the December 2018 Title Reports nine months earlier, and the evidence indicates that Anbang and Gibson Dunn identified the issue then. Regardless, in May 2019, Needham learned about the deeds. Since then, Anbang, Gibson Dunn, and Needham had discussed the deeds extensively.

Lance's representation about a one-time fraud by an unsophisticated Uber driver was not true. Anbang was familiar with entities and names on the deeds—including Hai Bin Zhou and Belitskiy—from years of trademark disputes in multiple jurisdictions. Anbang had received multiple indications that the deeds were part of a larger fraudulent scheme.

Lance's statements about the nature of the fraudulent scheme and the extent of Anbang and Gibson Dunn's knowledge established the pattern that Anbang and Gibson Dunn would follow throughout their dealings with Mirae and Greenberg Traurig. Put bluntly, they committed fraud about fraud.

Technically, Greenberg Traurig already knew about the deeds. Greenberg Traurig had identified them in July 2019, when reviewing title commitments obtained from Chicago Title Insurance Company ("Chicago Title"), which was expected to provide title insurance for the deal. [76] But Greenberg Traurig did not know that the deeds were *fraudulent*. As Ivanhoe explained at trial, the information on the title insurance commitments led Greenberg Traurig to believe that the deeds were transfers between affiliates. Ivanhoe Tr. 523–24. Their fraudulent nature was "not readily discoverable" from the title commitments alone. JX 786 at 2.

76 *See e.g.*, JX 614 at 1; JX 674; JX 1672 at 4.

On August 18, 2019, Seller posted to the data room the deeds for the Ritz Carlton Half Moon Bay, the Four Seasons Palo Alto, the Montage Laguna Beach, and the Westin St. Francis. Seller also uploaded a document relating to the deed for the Ritz Carlton Laguna Niguel and the two real estate fraud complaints Strategic had filed. *See* JX 788.

2. Anbang And Gibson Dunn Learn About The DRAA Chancery Action.

On August 20, 2019, Mirae and Seller executed an exclusivity agreement. [77] That same day, Gibson Dunn learned about the DRAA Chancery Action, which the four signatories to the DRAA Summary—World Award Foundation, Amer, An Bang Delaware, and AB Stable Group LLC (together, the "DRAA Petitioners")—had filed in this court. [78] JX 806. The complaint was titled "Petition for Proceeding under Delaware Rapid Arbitration Act." JX 687. It named as respondents Anbang, Great Hua Bang, and the CBIRC. Hai Bin Zhou thus deceptively caused four of his entities (the DRAA Petitioners) to sue one of his entities (Great Hua Bang), creating the impression that the entities were unrelated.

77 JX 805; *see* JX 810.

78 JX 806. Coincidentally, the action was filed on August 5, 2019, the same day that Mirae and the competing bidder submitted their final bids. *See* JX 687; JX 698.

***18** The petition claimed that the parties had entered into "a written agreement to arbitrate under the Delaware Rapid Arbitration Act." *Id.* ¶ 1. The petition alleged that the parties had "a dispute that they have agreed must be arbitrated under the DRAA." *Id.* ¶ 5. The petition asked the court to "[a]llow and order the agreed-upon arbitration to proceed under its auspices." *Id.* The verification was signed by an individual claiming to be "Andy Bang." JX 686.

Gibson Dunn immediately understood the connection between the DRAA Chancery Action and the Fraudulent Deeds. [79] The two principals on the Anbang deal team, Li and Chan, discussed the petition and recognized the connection to the longstanding trademark disputes with Hai Bin Zhou and his affiliates. *See* Li Tr. 303–04. Gibson Dunn hired a former FBI agent to conduct an investigation, [80] and the investigation quickly began generating results. [81]

79 *See* Glover Tr. 68, 71, 77, 92; Lance Dep. 187–88; JX 819.

80 *See* JX 831; JX 940; JX 945; Douglas Tr. 9–10.

81 *See, e.g.*, JX 969; JX 1095; JX 1096; JX 1289.

Between August 16 and September 10, 2019, when Buyer and Seller signed the Sale Agreement, Gibson Dunn and Greenberg Traurig had at least eight conversations about the Fraudulent Deeds. Greenberg Traurig consistently asked for any information about who was behind the deeds and their motives. Ivanhoe Tr. 524–26. Gibson Dunn stuck to the story about a "twenty-something Uber driver," never mentioning Hai Bin Zhou, the years of trademark litigation, or the DRAA Chancery Action. [82] Glover, the lead deal lawyer at Gibson Dunn, admitted that Anbang and Gibson Dunn made a conscious "decision not to disclose" the DRAA Chancery Action. Glover Tr. 75, 78, 82, 94. Anbang's and Gibson Dunn's communications during this period were misleadingly incomplete.

82 Glover Tr. 81–82; *see* Ivanhoe Tr. 525–28. Even as Gibson Dunn attorneys gathered more information about Hai Bin Zhou, they did not share it with Greenberg Traurig. *Compare* JX 5143, *with* Ivanhoe Tr. 525–28. On August 21, 2019, Lance represented explicitly to Greenberg Traurig that his side had "posted everything we have, which is a single fraudulent deed at each affected property other than the one property where we have a cover sheet but no deed." JX 848 at 3. That was not true.

Demonstrating its true assessment of the situation, Gibson Dunn described the fraud in far more serious terms to law enforcement. In a letter dated August 23, 2019, a Gibson Dunn partner asked the Deputy District Attorney for San Francisco to investigate "an apparently sophisticated fraud scheme" that involved "multiple high-value hotel properties that my client owns, including one in San Francisco." JX 873 at 2.

3. The Lenders And Title Insurer Balk.

Based on Anbang and Gibson Dunn's misleading description of the scope of the problem, Greenberg Traurig began working with Gibson Dunn on a potential solution. Lance had contacted Chicago Title on August 16, 2019, and gave them the same story about the deeds being "a nuisance."

See JX 786 at 2. Over the next several days, Gibson Dunn and Greenberg Traurig tried to convince Chicago Title to provide insurance. [83] The Chicago Title team elevated the issue to their chief underwriting counsel, who deemed the risk uninsurable. [84]

83 *See* JX 864; JX 906.

84 *See* Ivanhoe Tr. 530–31; JX 902 at 1; JX 924; JX 932.

Based on what he knew at the time, Ivanhoe thought that Chicago Title was being too conservative. He asked Marty Kravet, a leading title insurance agent, to find replacement title insurance. [85] Kravet sought information from Gibson Dunn about the situation, and Lance gave him the same story about a lone twenty-something Uber drive. [86] Kravet succeeded in brokering an arrangement with a group of title insurers (the "Title Insurers") led by First American Financial Corporation, who indicated that they would provide insurance if Anbang obtained judgments expunging the Fraudulent Deeds and quieting title to the California Hotels. [87]

85 See JX 907; JX 913; JX 921.

86 *See* JX 958; JX 975; JX 1092.

87 *See* Ivanhoe Tr. 541–42, 545; *see also* JX 984; JX 1014; JX 2488 at 2.

***19** Greenberg Traurig made the Lenders aware of the situation, and they asked for all available information about the Fraudulent Deeds. [88] Greenberg Traurig relayed what Gibson Dunn had represented, namely that the "perpetrator is a 26 year old Uber driver from California with a criminal record" and that Anbang and Gibson Dunn had no other information. [89] The Lenders suspected "that Anbang knew about the deeds and deliberately concealed them," but Gibson Dunn represented that they had brought the issue to Mirae's attention "as soon as they learned about it." JX 1048. That was not true. [90]

88 Wheeler Dep. 33–34; Towbin Dep. 43–48.

89 JX 1979; JX 1085 at 1–2; *see* Wheeler Dep. 33–34, 151–52; Li Tr. 298–99; Ivanhoe Tr. 533.

90 The Lenders believed that Anbang had learned about the Fraudulent Deeds by running a title report before starting the sale process. Gibson Dunn claimed that it had not run a title report. *See* JX 1048. That was technically true but affirmatively misleading. Gibson Dunn received the December 2018 Title Commitments from a title insurer who ran them on its own initiative. *See* Part I.G, *supra*.

After investigating the issue, the Lenders refused to provide financing, taking "a very hardline position that they cannot fund into a deal with a cloud on title." JX 1017. Greenberg Traurig and Gibson Dunn proposed having the Title Insurers insure the risk with Anbang providing additional indemnification. The Lenders made clear that even with title insurance, they would not provide financing, because the title insurance industry as a whole did not have sufficient net worth or liquidity to pay the claim. They also were not willing to rely on Anbang for indemnification, given Anbang's status as a Chinese entity.

The Lenders proposed that Anbang solve the problem through a cash holdback, by pledging additional assets in the United States as collateral, or by providing a letter of credit from a bank domiciled in the United States. [91] Anbang rejected the cash holdback because it wanted to repatriate the sale proceeds. [92] Anbang also would not post additional collateral; it would only offer a guarantee from a sister entity. [93] Anbang also would not provide a letter of credit from a domestic bank. [94] The parties tried various other permutations, but they could not find an acceptable arrangement. [95]

91 JX 1017; *see* JX 1048; Li Tr. 286; Ivanhoe Tr. 537–38; Glover Tr. 111.

92 *See* JX 1051; Li Tr. 287–89; Ivanhoe Tr. 538.

93 *See* JX 1053 at 1–2; JX 1058 at 1–2.

94 *See* Li Tr. 289–90; Glover Tr. 111; JX 1079 at 1.

95 *See, e.g.*, JX 1100; JX 1102; 1103; JX 1157.

The only remaining solution was to quiet title to the California Hotels, but that process could not be completed under the existing timetable for closing. JX 842. Because of the belated disclosure of the Fraudulent Deeds, committed financing for the deal was not available. Ivanhoe Tr. 587–88.

4. The Restructured Sale Agreement

Due to the absence of committed debt financing, the parties restructured the Sale Agreement:

• They pushed out the closing to provide the time needed to quiet title. Ivanhoe Tr. 538–39.

• They eliminated Buyer's representation that it already had obtained financing. [96]

• They made Seller's representation that it had sufficient financing to close "subject to obtaining financing from third party lenders at the Closing ... in amounts sufficient to pay the Purchase Price at Closing when combined with the proceeds of the [equity commitment letters]." [97]

• Both sides committed to use commercially reasonable efforts to take any actions required to "satisfy the contingencies and conditions established by any Lender in connection with the Buyer's financing of the transactions contemplated hereby." JX 1126 § 5.5(i).

***20** • They added the Title Insurance Condition, which made it a condition to Buyer's obligation to close that the title insurer issue owner's and lender's policies that did not contain an exception to coverage for the Fraudulent Deeds. *Id.* § 7.3(c).

Buyer made clear that "Mirae MUST have .... [i]nsurance from the Title Insurance Companies" and that "[a]nything less ... is not acceptable." JX 1155 at 2 (emphasis omitted). Buyer consistently maintained that it would not take any risk on the title issue. [98]

96 *Compare* JX 808 at 93–94, *with* JX 1126 § 4.4.

97 JX 1126 § 4.4; *see* Li Tr. 293–94; Glover Tr. 114–16.

98 *See* JX 1088 at 2 ("We just need clean title as any prudent investor would require."); *id.* at 3 ("we just want clean title before closing"); JX 1155 at 2 ("the record must be cleared"); JX 1173 at 1–2 ("Mirae was very clear with [Anbang] last week .... They want the deeds cleared.... They are not willing to take any risk on this issue.").

One feature of the restructured Sale Agreement was a "Litigation Plan" to address the issues posed by the Fraudulent Deeds. Gibson Dunn proposed the Litigation Plan on August 31, 2020, as part of the discussions with First American and the Lenders. *See* JX 1031. When proposing the plan, Gibson Dunn again represented that "the individual who signed the deeds is a 20-something year old who has a record of criminal behavior" and that "the fraudulent deeds are the unfortunate, unauthorized and criminal act of a malfeasor rather than a legitimate issue affecting title." JX 1031 at 2. Gibson Dunn did not mention Hai Bin Zhou, the years of trademark litigation with Hai Bin Zhou and his affiliates, the fact that Belitskiy had filed declarations in the trademark litigation in Hong Kong, the DRAA Chancery Action, or the overlap between the DRAA Counterparties and the entities named in the Fraudulent Deeds.

The Litigation Plan was a straw man that only addressed the narrow version of the problem as Gibson Dunn had described it. Glover Tr. 87–88. It was carefully tailored to address the Fraudulent Deeds. *Id.* at 91. It did not anticipate or address problems that might arise from the DRAA Chancery Action or the broader disputes with Hai Bin Zhou. Based on their understanding of the scope of the problem, Greenberg Traurig and the Title Insurers signed off on the Litigation Plan.

On September 5, 2019, Li emailed Needham and told her that Anbang wanted Strategic to "jointly engage Gibson as our legal adviser in clearing title for the six hotels asap." JX 1229 at 5. Li explained that "clearing these deeds is extremely vital to our transaction." *Id.*

On September 10, 2019, Buyer executed the Sale Agreement. PTO ¶ 31. As contemplated by the Sale Agreement, Buyer placed a deposit of $581,728,733 in escrow to secure the purchase of Strategic and the Hotels. PTO ¶¶ 31–32.

5. The Quiet Title Actions

Between September 6 and 11, 2019, Gibson Dunn filed actions seeking to quiet title to the six California Hotels (the "Quiet Title Actions"). [99] From that point on, Gibson Dunn and Greenberg Traurig held calls roughly every two weeks in which Gibson Dunn provided updates about the Quiet Title Actions and the Fraudulent Deeds. [100] Gibson Dunn never mentioned the years of trademark litigation. *See* Li Tr. 364–66.

99 *See* JX 1158; JX 1159; JX 1160; JX 1161; JX 1171; JX 1221.

100 Ivanhoe Tr. 566–67, 578; *see* JX 1445; JX 1506.

***21** In each of the Quiet Title Actions, Gibson Dunn filed an application for a temporary restraining order ("TRO"). In support of each application, Gibson Dunn filed a declaration from Needham in which she averred that she first learned of the pertinent deeds in August 2019, three months later than she actually did. She averred that “[n]either I nor, to my knowledge, anyone else at Strategic had ever heard of Daniil Belitskiy.” [101] That statement was narrowly true but in a misleading way, because Anbang knew about Belitskiy from the affidavits he filed in the trademark litigation in Hong Kong, and Anbang signed off on the filings. [102]

101 JX 5040 at 3, 50, 63, 92.

102 *See* JX 1309; JX 1310.

While pursuing the Quiet Title Actions, Gibson Dunn attorneys exchanged emails internally about the DRAA Chancery Action. Anbang withheld the substance of those emails on grounds of privilege. The Gibson Dunn attorneys working on the Quiet Title Actions also looked into Hai Bin Zhou's stay at the Montage Laguna Beach in November 2018. [103]

103 *See* JX 1449; JX 1466; JX 1507; *see also* JX 1458; JX 5042.

While pursuing the Quiet Title Actions, Gibson Dunn continued to receive and discuss reports from the investigators, who explained that the situation “looks like it is more complicated than at first.” [104] Summarizing the results, a Gibson Dunn attorney wrote,

> The investigators have been busy, and have learned quite a bit about Haibin Zhou aka Andy Bang. He has many aliases, and is associated with many different entities, some associated with these false deeds, many not. I have a large number of reports on the various entities associated with the false deeds, the Delaware court filing, and some similar-sounding entities.

JX 1463 at 1. Gibson Dunn shared and discussed the reports with Anbang. [105] Gibson Dunn also obtained the reports on the investigations that Anbang previously had conducted into Hai Bin Zhou and his affiliates in connection with the trademark litigation. [106]

104 JX 1098 at 1; *see*, *e.g.*, JX 1095; JX 1096; JX 1450; JX 1460; JX 1474; JX 1475. The investigators looked into Hai Bin Zhou and his network. *See, e.g.*, JX 1388; JX 1395; JX 1423; JX 1424; JX 1425; JX 1448; JX 1465; JX 1503; JX 5143. They also looked into the DRAA Counterparties, the entities associated with the Fraudulent Deeds, and other entities associated with Hai Bin Zhou. *See*, *e.g.*, JX 1385; JX 1386; JX 1387; JX 1389; JX 1390; JX 1391; JX 1392; JX 1393; JX 1394; JX 1421; JX 1422; JX 5143; *see also* JX 1464; JX 1818.

105 *See* JX 1461; JX 1462; JX 4766.

106 *See* JX 1484; JX 1499; JX 1500; JX 1501.

Gibson Dunn did not share any of this information with Mirae, Greenberg Traurig, the Title Insurers, or the Lenders. Gibson Dunn only provided anodyne reports about the Quiet Title Actions. [107] Given what Gibson Dunn knew, those reports were materially incomplete and misleading.

107 *See, e.g.*, JX 1468; JX 1541; JX 1639; JX 1668.

L. The Unfolding Of The DRAA Chancery Action

Hai Bin Zhou's efforts to extract consideration from Anbang started with its trademarks. They progressed to the DRAA Agreement and the Fraudulent Deeds. The next step was to use the DRAA Chancery Action to manufacture fraudulent judgments.

1. The Origins Of The DRAA Chancery Action

Delaware attorney Evan Williford filed the petition in the DRAA Chancery Action. Stephen Nielsen, a California attorney, informed Williford on July 31, 2019, that the client “MUST file August 1, 2019” because the client had received “respondent's service of the answer on July 30, 2019, and we must file notice of arbitrators [sic] within three days.” [108] Those statements were false. Later that day, Nielsen followed up with a call and then a text message stating, “[T]he client insists that I ask you the following question. Is there an amount of money that the client could pay to get a case number tomorrow?” *Id.* at 1533.

108 JX 5181 at 1530–31. Nielsen previously tried to file an action in Delaware by himself. On July 19, 2019, he attempted to file a "Verified Petition for Appointment of Arbitrator" in the Delaware Court of Common Pleas. *Id.* at 1524–26. The petition bore a Chancery caption, referenced an arbitration agreement "dated March 5, 2019," and was signed by Nielsen as "Attorney for Petitioners." *Id.* at 1525–26. After the filing was rejected, Nielsen contacted Williford on July 26, 2019, stating that he was "interested in hiring local counsel in a DRAA filing" and that he had "docs ready to file." *Id.* at 1528.

***22** To his credit, Williford would not be rushed. He insisted on receiving information that would give him a good faith basis to file the petition, a signed engagement letter, and a retainer. *Id.* at 1535–41. During his discussions about these matters, he engaged with Nielsen, an individual claiming to be "Andy Bang Zhou," an individual claiming to be "Mike Martin," and an individual claiming to be "David Traub." *Id.* Andy Bang tried to excite Williford with the prospect of additional work, saying in one email that "[w]e may have another two big cases for you in near future.' *Id.* at 1537. Martin tried the same gambit, telling Williford "[w]e have three big cases for you in these three months." *Id.* at 1535.

Before filing the DRAA Chancery Action, Williford met with Traub and an individual claiming to be "Joe Martin." *See id.* at 1535–39. The pair flew to Delaware to hand-deliver to Williford "notarized copies of the 8 documents that comprise[d] [Andy Bang's] case." *Id.* at 1538–39. The documents included what appeared to be three arbitration awards—denominated Awards I, II, and III. *Id.* at 1445–50. They also included what appeared to be a single page excerpt from the DRAA Agreement. [109]

109 *See id.* at 1546. The excerpt is not the same as the equivalent pages in the DRAA Agreement later produced to Anbang. The differences include the following: (i) the top of the excerpt starts on the third line of paragraph 85, whereas the corresponding page in the DRAA Agreement (page 15) starts at the top line of that paragraph, (ii) in the excerpt the paragraphs within paragraph 87 are not separated by hard returns, (iii) paragraph 89 of the excerpt refers to "DPOA" in English but there is no such reference on the corresponding page in the DRAA Agreement, (iv) punctuation appears in different places, (v) the last line of paragraph 87 of the excerpt contains five Chinese characters

(“存款以及其执照等其它所有权益”)

that are not present on the corresponding line in the DRAA Agreement, and (vi) the bottom of the excerpt has a stamp from California notary Spencer John Chase. These differences provide yet more reasons to conclude that the DRAA Agreement is fraudulent.

Williford's clients told him not to serve the complaint. *See id.* at 1563. Instead, the DRAA Petitioners pushed Williford to obtain "court stamps" on the three purported arbitration awards. *Id.* at 1535. On August 9, 2019, Williford pointed out an obvious issue with the arbitral awards. He had filed a petition to appoint arbitrators, and yet supposedly the arbitrations had already taken place. *Id.* at 1566 ("There is an obvious issue with proceedings happening before arbitrators that have not even been appointed."). He believed that as a result, "[a]ny supposed prior 'proceedings' under the DRAA ... are likely or certainly invalid." *Id.*

In response, his clients sent him practitioner materials discussing the DRAA and explained that the court did not need to appoint arbitrators. *See id.* at 1579–80. That begged the question about why the petition had been filed in the first place. Williford agreed that the DRAA did not require the court to appoint arbitrators, but he "remain[ed] concerned as to the validity of the awards." *Id.* at 1578. He observed that "they have not yet been confirmed by any court," that they did not include a form of judgment, and that there was "much that [he did] not understand about the awards and other aspects of these proceedings (like the Beijing IP court ruling)." *Id.* He recommended further analysis of the validity of the awards and asked for a fully translated copy of the DRAA Agreement. *Id.*

By August 29, 2019, Williford had not heard back from his clients. He reiterated his recommendation that he be authorized to analyze the validity of the wards. *Id.* at 1577. Mike Martin emailed back on September 3, 2019, telling Williford that they "need court stamps first" and suggesting, "How about you get another 20k right way after got [sic] court stamps?" *Id.* at 1561. Mike Martin also tried to entice Williford with future business: "[G]ood news, we talked about DRAA with Alibaba in DC already, you'll get another one, please get this done ASAP." *Id.* Williford also met with Joe Martin in person, who made the same offer to pay Williford

$20,000 just to obtain court stamps on the awards. *See id.* at 1560.

***23** By this point, Williford was suspicious. In a lengthy email dated September 3, 2019, he pointed out obvious problems with the awards:

> The awards are oddly worded in many respects, create issues with how they will be interpreted, and may give rise to unknown issues. For example (there are other issues):
>
> 1. Each award's award of assets (particularly [Awards] II-III) is vague, such that it could be argued that they only recognize that claimant wanted it, not that it is actually awarded.
>
> a. For example, Award II – "Claimant **requests** court enforcement of following ...."
>
> 2. Each of the awards can be interpreted as being for a sum of money or certain assets or properties, some of which may already have been transferred. How is it to be determined how transfer of the assets or properties reduces the money damages? For example, if half the properties are transferred does the respondent owe half the damages?
>
> 3. Award I awards income from certain properties but does not say whether that is separate from the $9B or in the alternative.
>
> 4. The provision that certain companies be transferred "minus their debt" could trigger challenges from creditors, who for obvious reasons ... might be very angry, and argue that that is unenforceable against them, a third party.
>
> 5. The awards can be interpreted as requiring the transfers of certain assets/companies/banks. This may result in a lot of issues that a lawyers [sic] specializing in M&A work, that negotiate sales and transfers of companies, would be better equipped to recognize.
>
> There is thus the possibility that the Awards might generate a great deal of unanticipated litigation, and/or be not as helpful to you as you wanted. This concern is reinforced by the facts, among other things, that they are for billions of dollars and reference high-profile properties such as the New York Waldorf Astoria.

Id. at 1560. Williford "strongly recommended" that the DRAA Petitioners get a second opinion on the awards. *Id.* Mike Martin told Williford to "just file two sets of final awards and get court stamps. You'll get another 20 k right away." *Id.* Williford reiterated his advice to get a second opinion, and Mike Martin again stressed that they needed "COURT STAMPS." *Id.* at 1559.

The next day, September 4, 2019, Williford proposed to review "the translated DRAA Agreement" and "redraft the awards." *Id.* at 1558. He asked for a $10,000 retainer to begin the analysis. *Id.* Mike Martin wired the money, but labeled it "DRAA AWARDS FILING RETAINER." *Id.* at 1572. Williford wrote back saying that he was not filing the awards, only analyzing them. When Williford would not budge, Mike Martin again offered Williford $20,000 just to obtain court stamps, telling him "Money is not a problem at all." *Id.* at 1571. Williford responded bluntly: "I cannot, and should not, petition the Court to enter the DRAA awards until I have more information, including translations of the DRAA Agreement." *Id.* By this time, Williford had "many questions." *Id.* Mike Martin refused to provide a translated copy, claiming that "[w]e can not [sic] translate the stuff, otherwise we'll pay $180 billion." *Id.*

2. The Notice Of Documents

***24** By September 11, 2019, the DRAA Petitioners had talked with Williford about using the purported arbitration awards to hold up the Transaction. *Id.* at 1583–85. Williford pointed out numerous problems with this strategy and recommended that the DRAA Petitioners take their case to a larger firm. *Id.* Mike Martin pushed him to simply file the awards, and Williford responded with additional concerns. *Id.* 1582. He told Mike Martin:

> I am not willing to simply submit the awards to the Court without a complaint holding that a court clerk will stamp them. The Court would likely rule that this is incorrect procedure under the DRAA 10 *Del. C.* § 5810(b) and Court of Chancery Rule 97(d). It may well also think of this action as an attempt to trick the court.

Id. at 1582.

Having failed to convince Williford to docket the awards, Nielsen took matters into his own hands. Without Williford's knowledge, Nielsen mailed a set of documents to the court (the "Nielsen Documents") and asked that they be "stamped." JX 1345 at 13. The Nielsen Documents included a "Default Judgment," purportedly signed by six arbitrators, that granted relief in favor of the DRAA Petitioners and against Anbang, Great Hua Bang, and the CBIRC. *Id.* at 1–3. The "Default Judgment" indicated that service of the arbitral awards had been completed on August 2, 2019, three days before the filing of the DRAA Chancery Action, which ostensibly sought to appoint arbitrators. *Id.* at 1.

After receiving the Nielsen Documents, the court called Williford to ask what they were. *See* JX 1868 at 26–27. It was readily apparent that Williford knew nothing about them, and he asked for a copy. *See id.* The court informed Williford that it would docket the materials to avoid problems associated with an *ex parte* filing, but would do so under a notice making clear that the docketing had no legal effect. *See id.*

On September 26, 2019, Williford reported to Nielsen and the DRAA Petitioners on the call from the court. He stressed that the court "did not want the docketing of the filing to be interpreted as a docketing of a final award." JX 4205 at 17. He noted that he previously told Nielsen that he "did not think [submitting the Nielsen Documents] was a good idea and/or permissible" and that he "certainly (as you know) did not review, sign off on, have filed, or know such was being filed." *Id.* In a second email that day, he reiterated that he had told Nielsen that submitting the documents was "not a good idea" and stated that he was inclined "to file a motion to withdraw immediately." *Id.* at 15. He warned the DRAA Petitioners that

> [t]here is a significant danger that the Court will view the filing as an attempt to trick it into doing something (or make it look like it had done something) that either could not be done or, at best, could only be done after significant further proceedings and proof that has not been presented.

Id. at 16. That is precisely how the court views the matter.

On October 1, 2019, the court docketed the Nielsen Documents under a cover page titled "Notice of Documents." JX 1505. The notice stated:

> PLEASE TAKE NOTICE that the court has received the following documents. This copy is being filed for informational purposes only. The filing of these materials by the court does not have any implications under Delaware Rapid Arbitration Act.

Id. Later that day, Williford emailed the DRAA Petitioners and Nielsen, noting that the court had stated during the teleconference on September 26 and again in the notice that "the filing has no effect under the DRAA." JX 5181 at 1609–10. He told the DRAA Petitioners that he had decided to withdraw, provided a draft motion to withdraw, and asked for any comments. *Id.*

3. The Delaware Judgments

***25** With Williford planning to withdraw, Nielsen and the DRAA Petitioners looked for another Delaware attorney. On October 17, 2019, they hired Stamatios Stamoulis. *Id.* at 1617–18. They did not have the courtesy to tell Williford. As with Williford, the DRAA Petitioners promised Stamoulis money and future business to induce him to act quickly. In one email, Mike Martin told Stamoulis, "Please try your best FILE NOW TODAY[.] Youll [sic] get a bid [sic] bonus." *Id.* at 1623. In another email, Martin wrote, "PLEASE RUSH TO FILE NOW, just as you did last Friday ...." *Id.* In another, he wrote, "PLEASE FILE NOW TODAY[.] WE PREPARED BIG BONUS for u." *Id.* Stamoulis answered, "Working on this now." *Id.*

On October 24, 2019, without seeing the DRAA Agreement, Stamoulis commenced an enforcement action in the Delaware Superior Court. *See* JX 1559. In support of the action, Stamoulis filed an affidavit in which he averred that the "Default Judgment" docketed as part of the Nielsen Documents was "a judgment deemed confirmed by the Court of Chancery" and an "October 1, 2019 confirmed final judgment." JX 1560. The affidavit did not disclose the "Notice of Documents" or the disclaimer that the docketing had no effect under the DRAA. The affidavit referenced the date of October 1, 2019, the date this court docketed the

"Default Judgment," rather than the date it was purportedly signed by the arbitrators, implying that the court entered the "confirmed final judgment" on that date.

The affidavit attached a copy of Award III, which purported to grant the DRAA Petitioners "compensatory damages in the amount of $9,000,000,000.00 in cash, or twenty properties, including hotels and their full ownerships [sic], and to date, six properties [sic] deeds have already been transferred to claimant." JX 1559 at 3. It purported to grant the DRAA Petitioners "[f]ull ownership of the following 25 companies and 20 properties, including hotels, minus their debt," followed by a list that included the six California Hotels. *Id.* at 3–4. Under the DRAA, because the award was not "solely for money damages," the Court of Chancery would have had to "enter a final judgment in conformity" with the award. 10 *Del. C.* § 5810(b). Yet the DRAA Petitioners had never filed the award in the Court of Chancery. Moreover, the award supposedly was signed in July 2019, yet somehow listed the Civil Action number for the DRAA Chancery Action, which had not been filed until August 2019.

Over the next six weeks, Stamoulis commenced five additional enforcement actions involving additional awards. [110] In each action, Stamoulis filed a similar affidavit that either referenced or attached an "October 1, 2019 confirmed final judgment" from this court or referenced a "judgment deemed confirmed by the Court of Chancery." Each of the supposed underlying arbitration awards differed in terms of the amount of cash and number of properties awarded. The first, second, and third affidavits averred that each accompanying arbitration award was a "true and correct copy of the July 21, 2019 Final Award," yet each attached a different version of the award. [111] The fourth, fifth, and sixth affidavits referred to final awards dated on or after November 22, 2019, even though the last entry on the docket in the DRAA Chancery Action was the Notice of Documents filed on October 1, 2019. [112] The last of the arbitration awards purported to award the DRAA Petitioners at least $369 billion in cash plus "full ownership of ... 26 companies and 20 properties, including hotels, minus their debt." JX 5181 at 662.

110 *See* JX 1585 (filed November 1, 2019); JX 1602 (filed November 8, 2019); JX 1663 (filed December 10, 2019); JX 1682 (filed December 16, 2019); JX 1708 (filed December 16, 2019).

111 *See* JX 5181 at 479–87, 508–15, 537–45.

112 *Id.* at 575, 614, 655.

***26** After filing the last of the six awards on December 16, 2019, Stamoulis congratulated Mike Martin and Nielsen: "You now have six (6) judgments accepted on the docket in Delaware for a total of about 1 Trillion dollars (936,000,000,000 to be exact)." *Id.* at 1628 (collectively, the "Delaware Judgments").

4. The California Judgment

On November 15, 2019, Stamoulis asked the Delaware Superior Court to provide exemplified copies of the judgments he had docketed. [113] He received an exemplified copy of the judgment docket in the third Delaware Superior Court case, as well as a purported arbitration award that supposedly awarded the DRAA Petitioners $180 billion in cash plus "7 banks, 23 branches, assets, and companies," including the six California Hotels. JX 1626 at 5.

113 *See* JX 1621; JX 1622; JX 1623.

On December 6, 2019, a California attorney named Bruce Methven filed these documents in Alameda County, California, and asked for recognition of the sister-state judgment (the "Alameda Action"). [114] Methven claimed that the Delaware Superior Court had entered judgment on November 16, 2019, and that the amount remaining unpaid on the sister-state judgment was $177 billion, citing "six hotels as 3 billion paid already." JX 5181 at 693. A clerk of a California court granted the application and entered a judgment in California (the "California Judgment"). [115]

114 *See* JX 1651; JX 1652; JX 1659

115 *See* JX 5181 at 744; *see also id.* at 56.

Also on December 6, 2019, Stamoulis entered his appearance in the DRAA Chancery Action and filed a document titled "NOTICE OF APPOINTMENT OF ARBITRATORS." [116] It recited that the DRAA Petitioners had named five arbitrators to resolve an alleged dispute under the DRAA Agreement. [117]

116 *See* JX 1649; JX 1650. After seeing the notice. the court contacted Williford to ask if he was still counsel in the case and to remind him that if he was not, then he and Stamoulis submit a stipulation

of substitution of counsel. *See* JX 1868 at 27–33. Before the court's call, Williford did not know that Stamoulis was involved. *Id.*

117 Gibson Dunn investigated the arbitrators. *See, e.g.*, JX 1809 (Marijke Edler); JX 2090 (Adrian Tyson Edler); JX 2091 (Melvin Lee Raby). Their backgrounds were not consistent with a legitimate arbitral proceeding.
While these actions were unfolding, Great Hua Bang filed an appeal in the Intermediate People's Court from the adverse ruling from the Beijing IP Court in its trademark dispute with Anbang. *See* JX 1635. The appellate court rejected the appeal and affirmed the ruling in favor of Anbang. *See* JX 5189. Great Hua Bang appealed to the Beijing Higher People's Court. *See* JX 5242.

M. Anbang Responds To The California Judgment.

On December 11, 2019, Methven called Lance and informed him about the California Judgment. Later that night, Methven provided a Gibson Dunn litigator with the case number for the Alameda Action and a link to the docket. [118]

118 *See* JX 1679 at 1; JX 1680; JX 4566 at 13–14; *see also* JX 1690 at 2.

On December 12, the Gibson Dunn partner who was overseeing the Quiet Title Actions, Ben Wagner, emailed his colleagues about a "phony arbitration award document," explaining that it "was actually filed in Delaware recently" and "purported to take a default judgment against Anbang for billions of dollars." JX 1686 at 2. Wagner forwarded the information to Chan later that day. *Id.* at 1. Wagner concluded that the California Judgment "was intended to help manufacture some sort of claim to the hotels." JX 1690 at 2.

***27** That same day, Wagner emailed Ivanhoe with an update on the status of the Quiet Title Actions. He did not mention the Alameda Action, California Judgment, the DRAA Chancery Litigation, the arbitration awards, or the Delaware Judgments. *See* JX 1688.

On December 13, 2019, Lance sent Li copies of the documents from the case that Methven had filed. *See* JX 4939. He also sent Li a collection of the "arbitration award documents" that had been filed with the Delaware Superior Court. *See* JX 1686 at 1. Li reviewed the documents, understood that they related to claims against the Hotels, and discussed them with Chan and Vice Chairman Luo. Li Tr. 369–70. Li and a group of Gibson Dunn attorneys exchanged privileged emails regarding a set of documents from the DRAA Chancery Action under the subject line "Urgent matter." *See* JX 1689.

Li and Gibson Dunn discussed whether these developments should be disclosed to Buyer, the Lenders, or the Title Insurers. Li Tr. 370–72. Li and Gibson Dunn recognized that the DRAA Chancery Action and the related judgments concerned the Hotels, understood that the same parties were behind the Fraudulent Deeds, and connected the scheme with the long-running trademark dispute with Hai Bin Zhou. [119]

119 *See, e.g.*, JX 1701; JX 1719; JX 4939; JX 4940; JX 4943; JX 4944.

Li and Gibson Dunn decided not to say anything. Li Tr. 370–72. When reporting on the Litigation Plan to Greenberg Traurig, Gibson Dunn pretended as if nothing else was going on that had any bearing on the Hotels or the Transaction. Given what Gibson Dunn knew, its statements to Greenberg Traurig were materially misleading.

1. Anbang Appears In The DRAA Chancery Action And Obtains A TRO.

On December 19, 2019. Anbang appeared in the DRAA Chancery Action and sought a temporary restraining order and sanctions against the DRAA Petitioners. JX 1729. In its supporting brief, Anbang connected the DRAA Chancery Action to the Fraudulent Deeds, explaining:

> [Anbang] brings this motion because it needs this Court's urgent intervention to stop Petitioners' brazen and far-reaching fraud that now spans two states, three courts and eight separate actions—and stems directly from this and other actions Petitioners have filed in Delaware courts. The scheme began in 2018 in a handful of county recording offices in California, when Petitioners, and those acting in concert with them, began recording false grant deeds purporting to transfer six luxury

> hotel properties in California that were owned by [Anbang] subsidiaries.

JX 1730 at 4–5. Anbang explained that the DRAA Chancery Action was "the next chapter of Petitioners' fraud." *Id.* at 5. Anbang linked the TRO application to the Transaction, arguing that "Petitioners' wholesale fraud on the Delaware Courts is a naked attempt to derail [Anbang's] agreement to sell several billion dollars' worth of luxury hotel properties across the United States held by [Anbang's] subsidiaries." *Id.* at 4.

Anbang represented that the fraud "began in the fall of 2018 when a convicted felon named Daniil Belitskiy executed false grant deeds to six luxury hotel properties in California, which were held by Dajia subsidiaries." *Id.* at 8. Anbang further represented that "[i]t is clear that the shell LLCs listed in these false grant deeds and the Petitioners in this case are part and parcel of the same fraud scheme." *Id.* at 9.

***28** In presenting the dispute to the court, Anbang provided a misleadingly incomplete picture of what it knew. Anbang did not disclose the lengthy history of trademark disputes with the DRAA Petitioners and Hai Bin Zhou dating back to 2008. Anbang did not share what it had learned about the DRAA Petitioners and their connections to Hai Bin Zhou. Internally, Anbang and Gibson Dunn had literally connected the dots in the form of a network map of the many interconnections. *See* JX 1807 at 1, 8. In their internal depiction of the key players, Anbang and Gibson Dunn did not even mention Belitskiy, having recognized that he was a low-level patsy and not one of the orchestrators of the scheme. *See id.*

Anbang and Gibson Dun also connected the DRAA Chancery Action with the specific trademark dispute involving Great Hua Bang in the Beijing IP Court, where Great Hua Bang introduced the DRAA Summary. *See* JX 4688 at 4. The arbitration awards cited a hearing in the "BJIPC" on March 5, 2019. TianZhen Fan and YuLin Song had both attended a hearing before the Beijing IP Court on March 5, 2019, during which Great Hua Bang introduced the DRAA Summary, and they had signed an attestation confirming the accuracy of the record from that hearing. But rather than acknowledging this fact and dealing with it candidly, both TianZhen Fan and YuLin Song filed declarations in support of Anbang's application for a TRO which stated, "I did not appear at, nor sign any documents relating to, any arbitration or arbitration award relating to Petitioners on March 5, 2019 or on any other date. In fact, I have not visited the State of California during 2019." [120] That was technically true in an misleading way, because it misdirected the court's attention from the hearing before the Beijing IP Court to a non-existent arbitral hearing in California.

120 JX 1727 at 3; *accord* JX 1728 at 3.

On December 20, 2019, Wagner provided an update to Greenberg Traurig on the states of the Quiet Title Actions. JX 1780 at 1. Wagner did not mention the emergency petition that his team had filed in Delaware. Instead, he expressed optimism that "we should be able to ... clear title" assuming "no further action by the defendants." *Id. That same day*, Gibson Dunn sent Anbang a memorandum that provided an update on *both* "the litigation in Delaware and in California involving the false deeds and false arbitration awards." JX 1776 at 2. Wagner's report to Greenberg Traurig omitted material information and was misleadingly incomplete.

This court scheduled a hearing on Anbang's TRO application for December 23, 2019. JX 1762. On December 20, the day after the application was filed, the DRAA Petitioners stipulated to the entry of a TRO and an expedited schedule in anticipation of a hearing on an application for a preliminary injunction. JX 1765. It stated:

1. Upon the Court's entry of this Temporary Restraining Order, Petitioners ... and each of Petitioners' respective officers, managers, agents, servants, employees, attorneys, and persons in active concert or participation with Petitioners, are enjoined and restrained, pending further Order of this Court, from:

    a. Purporting to arbitrate any dispute against [Anbang];

    b. Representing to any other court that they have obtained a judgment from this Court or the Delaware Superior Court;

    c. Prosecuting or seeking any action or relief in any of the [enforcement] actions pending in the Delaware Superior Court ... ; and

    d. Making any further filings in any court relating to any purported arbitration with [Anbang].

2. [Anbang's] Motion to Expedite is granted, and the parties will engage in expedited discovery, including document production and depositions, with discovery to

> commence immediately upon entry of this Order and with discovery to conclude on January 31, 2020 ....

***29** *Id.*

One day after Anbang obtained the TRO, Wagner provided a litigation update to Ivanhoe. He reported on the Quiet Title Actions in California. He did not mention the DRAA Chancery Action. *See* JX 1782. Wagner's report was misleadingly incomplete.

2. The DRAA January Judgment

On December 20, 2019, thirty minutes after the stipulated TRO was entered, Williford formally moved to withdraw. JX 1763. Anbang opposed the motion, contending that the DRAA Petitioners had engaged in a

> brazen and far-reaching real estate fraud scheme that now spans two states, three courts and eight separate actions .... [which] followed on the heels of a fraudulent deed transfer scheme whereby Petitioners (or affiliates) had initially tried to transfer luxury hotel properties to entities they (or their agents and affiliates) control, in an effort to derail [Anbang's] multibillion dollar deal to sell those hotels.

JX 1785 ¶¶ 1–2. Anbang thus again linked the DRAA Chancery Action to the Fraudulent Deeds and the Transaction, despite not having mentioned the DRAA Chancery Action to Buyer or Greenberg Traurig.

Days later, Anbang moved for a TRO in the Alameda Action to block the DRAA Petitioners from taking any action to enforce the California Judgment. On December 23, 2019, the court granted the TRO. JX 1787. Methven moved to withdraw, and his motion was later granted. [121]

[121] *See* JX 1756; JX 1759; JX 1768; JX 1954; JX 1955.

On December 31, 2019. Stamoulis asked the court to "hold a status conference as soon as practicable so that we may develop a plan to transition this matter to other counsel." JX 1815 at 4. Anbang opposed his withdrawal, relying again on the connection between the Delaware Litigation and the Transaction. JX 1821. Stamoulis formally moved to withdraw on January 6, 2020. JX 1834. The court scheduled a status conference for January 8, 2020. JX 1833.

During the status conference, Gibson Dunn again linked the DRAA Chancery Action to the Transaction. A Gibson Dunn attorney explained:

> The problem is that we can't proceed to closing with these six judgments in the Superior Court outstanding and this judgment in California. So I think in the very immediate term, in order for us to get to closing – and we have a deal. We are waiting to clear title and clear the overhang of the litigation on this deal to get it done – we need the six judgments in Superior Court vacated, possibly an order from this Court to help us get that done, and then something we can take to California to show the California court in Alameda County that the judgment did not really exist and ought to be vacated there.

JX 1868 at 4–5. The attorney represented that closing was "contingent upon clearing title and clearing up this litigation overhang," that "the closing would have already occurred but for this fraudulent scheme," and that "as soon as we can clear up what's happening now, we can get the deal done." *Id.* at 5. The court asked counsel to confirm that "this is the last condition to closing" and that "[a]s soon as this happens, you-call can close?" *Id.* Counsel twice confirmed that this was the case. *Id.* Counsel later reiterated, "We want to make sure that we get these judgments vacated as quickly as we can so that this deal can proceed to closing.... [W]e've got a deal for multiple billions of dollars, and we need to get it done." [122] Yet Gibson Dunn had not told Buyer or Greenberg Traurig anything about the DRAA Chancery Action.

[122] *Id.* at 10; *accord id.* at 11 ("we've got to get this stuff out of the way so we can get the deal done"); *id.* at 22 (representing that a four- or six-month delay

in vacating the judgments would "risk derailing the deal").

***30** Sadly, the Gibson Dunn attorney misled the court about the state of Anbang and Gibson Dunn's knowledge about the DRAA Petitioners. The following exchange took place:

THE COURT: And so do you believe that, other than these lawyers, there are any human beings associated with the plaintiffs who are in this country?

COUNSEL: We believe there is one in California.

THE COURT: Who is that?

COUNSEL: According to the incorporation papers, theres's a fellow named Hai Bin Chou. It's H-a-i, B-i-n, C-h-o-u. He signed incorporation papers for a number of the LLCs. He sometimes signs those papers as Andy Bang, H.B. Chou. So we believe that he is the natural person behind these LLCs. But without discovery, we don't know.

JX 1868 at 20–22. In reality, Anbang and Gibson Dunn knew quite a bit more. Anbang had known about Hai Bin Zhou for years, and not only because his name appeared on incorporation papers. Anbang had been litigating against Hai Bin Zhou since 2008 and had investigated him repeatedly. Gibson Dunn had been embarked on a massive investigation in August 2019, and it had uncovered considerable information. [123] Anbang and Gibson Dunn had also connected the DRAA Chancery Action with the DRAA Summary. [124]

123 *See, e.g.*, JX 1794; JX 1795; JX 1799; JX 1800; JX 1802; JX 1803; JX 1804; JX 1805; JX 1806; JX 1811; JX 1880; JX 1823; JX 1894; JX 1895.

124 On December 26, 2016, just before a call with Li and Gibson Dunn to discuss the trademark dispute and its connection to the DRAA Chancery Action, TianZhen Fan had the DRAA Summary scanned and emailed to herself. See JX 1794; JX 1800 at 3–21.

After the presentation from Gibson Dunn, Williford and Stamoulis each argued why they should be permitted to withdraw. Stamoulis argued that he had a good faith basis to believe that the DRAA Petitioners had legitimate claims based on the following:

- He had been contacted by Nielsen, who had "prosecuted a fairly extensive patent portfolio for the principals of the petitioners." JX 1868 at 46–47.
- Nielsen advised him that the DRAA Petitioners had been involved in a successful trademark dispute with Anbang before the USPTO, which was publicly docketed, and where the DRAA Petitioners had been represented by Venable. *Id.* at 47–49.
- He understood that the DRAA Petitioners were securing successor counsel and speaking with large, well-known firms. *Id.* at 51–54.
- He had two documents that the court would review *in camera* that would assist the court in evaluating his motion. *Id.* at 54–55.

The court agreed to review the two documents, both of which were in Chinese, and which Stamoulis represented were a copy of the DRAA Agreement and a filing in a Chinese court.

The court granted both motions to withdraw. [125] The court explained that before the hearing, there were many reasons to be skeptical about the DRAA Petitioners and their conduct. *See* JX 1868 at 62–64. The court noted that its suspicions "remain[ed] quite high" and that the "picture, as a whole, gave substantial color to the defendants' assertions that these were likely fraudulent actors and potentially insubstantial shell companies who were using the courts for nefarious purposes." *Id.* at 64. But Stamoulis's representations had presented "something of a different cast." *Id.*

> ***31** First, in the sense that World Award Foundation may indeed be an entity with some assets, be they patents or otherwise. He has also indicated that the plaintiffs are seeking successor counsel. And without describing or identifying the two documents that I reviewed *in camera*, I will say that they, in theory, if they are what they purport to be, provide some support for the plaintiffs' position.

Id.

125 *See* JX 1869 (Williford); JX 1873 (Stamoulis). Because the court was concerned that the DRAA Petitioners had "gone dark" and that Anbang would not have any means of communicating with them, the court required Stamoulis to remain in the case solely for the purpose of relaying communications to his former clients. *See* JX 1868 at 67–68. The court later relieved Stamoulis of that obligation. *See* DRAA Chancery Action Dkt. 72.

In light of the expedited schedule, which contemplated discovery closing on January 31, 2020, the court required the DRAA Petitioners to retain successor counsel by close of business on Friday, January 10. The DRAA Petitioners had known about Stamoulis' desire to withdraw since December 31, 2019, and they had terminated his representation on January 4. Although they had received sufficient time to obtain successor counsel, the court gave the DRAA Petitioners

> a final chance to get their act together, obtain counsel, and defend this expedited proceeding. If they don't do that, then I think they have effectively opted, at least in the short term, to accept some form of default judgment vacating the default judgments that they obtained. They may then subsequently come in, and we can have a grand fight on an appropriate schedule about what, if anything, should be done beyond that. Maybe they would be able to show that the judgments, in fact, are valid and should be put back in place. Maybe the defendants will be able to show that this is, in fact, a fraudulent or criminal scheme, and consequences will flow from that likely here and elsewhere.

Id. at 70–71. The court ruled that if successor counsel did not appear, then Anbang could move for a default judgment. [126]

126 JX 1868 at 68–69; *see* JX 1873 ¶ 10.

The DRAA Petitioners failed to retain successor counsel by the deadline, and Anbang moved for entry of a default judgment. JX 1889. Anbang submitted a proposed form of order that effectively tracked the earlier TRO. On January 15, 2020, the court granted the motion and entered the proposed form of order. Among other things, it stated:

> a. No arbitration award or judgment involving any of Petitioners has been entered, confirmed or deemed confirmed by this Court;
>
> b. The purported "Default Judgment" document filed in this action (Trans ID 64258346) is of no legal force or effect; and
>
> c. Petitioners are estopped and enjoined from challenging the vacatur of any and all purported judgments in the [enforcement] actions in the Delaware Superior Court ....

JX 1925 ¶ 3 (the "DRAA January Judgment"). Anbang retained the right "to seek any further relief or sanctions," and the order provided that "this action shall remain open and pending until such applications are resolved or [Anbang] notifies the Court that it does not intend to seek any further relief or sanctions in this matter." *Id.* ¶ 9.

With the entry of the DRAA January Judgment, except for a potential application for sanctions, the DRAA Chancery Action appeared to have reached a conclusion. The court viewed the case as resolved and turned to other matters.

***32** On January 17, 2020, Anbang asked the Delaware Superior Court to vacate the Delaware Judgments. Again connecting the Delaware proceedings to the Transaction, Anbang represented that the Delaware Judgments "appear[ed] calculated to try to derail the sale of several billion dollars' worth of luxury hotel properties across the United States." JX 1949 at 2. By order dated January 21, 2020, the Delaware Superior Court vacated all of the Delaware Judgments. JX 1974.

Meanwhile, in the Quiet Title Actions, Seller's counsel participated in "prove-up" hearings to establish Strategic's ownership. At each hearing, a Gibson Dunn attorney led Needham through questions designed to create the impression that Seller had no prior involvement with or knowledge about Belitskiy and the entities that executed the Fraudulent Deeds. [127] Gibson Dunn claimed explicitly that "[t]hese entities and Mr. Blitzky [sic] are completely unknown to the true title holders of these properties." JX 1640 at 25. That was not true. Anbang and Gibson Dunn had extensive information about the individuals who filed the Fraudulent

Deeds, including their involvement in multiyear trademark disputes against Anbang. [128]

127 *See* JX 1640 at 12; JX 4945 at 15, 23–24; JX 4948 at 13–14.

128 It appears that Anbang and Gibson Dunn intentionally kept Needham in the dark about the DRAA Chancery Action, the trademark disputes between Anbang and the DRAA Petitioners, and the Delaware Judgments. Even though Gibson Dunn represented Strategic for purposes of the Quiet Title Actions, Needham was not told about the details of the Delaware proceedings until late January or February 2020. Needham Dep. 270–74. Needham did not learn until this litigation about the history of trademark litigation with the DRAA Counterparties or Belitskiy's involvement in those disputes. *Id.* at 269–70, 281–82.

Throughout this period, Gibson Dunn communicated with Greenberg Traurig about the Quiet Title Actions. Gibson Dunn never mentioned the DRAA Chancery Action, the Delaware Judgments, the Alameda Action, or the California Judgment. Instead, Gibson Dunn reported that they had obtained default judgments in the Quiet Title Actions that resolved the difficulties involving the California Hotels.

Gibson Dunn took the same approach when communicating with the Title Insurers. Gibson Dunn provided responses to the Title Insurers that only addressed the Quiet Title Actions and did not disclose any information about the California Judgment, the Alameda Action, the Delaware Judgments, or the DRAA Chancery Action. On January 14, 2020, the Title Insurers asked for "[a]ny information about communicat[ions] with the defendants (if any)." JX 2488 at 12. Gibson Dunn responded,

> With respect to communications with the defendants, we have not had any. Although attorneys from the LA law firm of Larson O'Brien LLP appeared at three of the default judgment hearings (OC, SF, and SM), they knew nothing about the case and were only there to request a continuance. Importantly, nobody showed up on behalf of the defendants at today's LA default judgment hearing.

Id. at 11. Gibson Dunn thus answered as if the defendants in the Quiet Title Actions were wholly separate from the DRAA Petitioners, when Anbang and Gibson Dunn knew they were interrelated. Gibson Dunn's response was materially misleading.

By email dated January 22, 2020, the Title Insurers stated that based on what they knew, they were "prepared to remove the exceptions to title for the wild deeds against the California properties" if two conditions were met. JX 1994 at 1. First, the time for appeal from the default judgments had to expire, and second, the Title Insurers needed "written confirmation by [S]eller, or [S]eller's counsel on behalf of [S]eller, that no additional communication from any of the defendants, or any counsel for the defendants has been received." *Id.* Gibson Dunn again limited its response to the Quiet Title Actions, stating: "The defendants still have not filed anything in any of these cases. We also have not heard anything from any of the defendants or any counsel representing any of the defendants in these cases about potentially filing anything." JX 2488 at 2. Gibson Dunn again answered as if the defendants in the Quiet Title Actions were wholly separate from the DRAA Petitioners, when Gibson Dunn knew they were interrelated. Gibson Dunn's answer was materially misleading.

***33** Based on what Greenberg Traurig and the Title Insurers knew, there would not be any issues with title once the appeal period elapsed in the Quiet Title Actions. *See* JX 1981. Based on that understanding, the parties planned for a closing at the end of March 2020. *See* JX 1991.

N. The Lenders Uncover The DRAA Chancery Action

In December 2020, Buyer informed Seller that it was reinitiating the bidding process for debt financing. Kim Tr. 1026. Because Buyer had negotiated the necessary documents with the Lenders in August 2019, before the discovery of the Fraudulent Deeds, the process was "smooth and seamless." *Id.* at 1027. The financial markets had improved for borrowers, and Ivanhoe expected the effort to be "very successful." Ivanhoe Tr. 581.

By mid-February 2020, Buyer was close to executing the documentation for financing. Kim Tr. 1027–28. All of the Lenders were "working toward issuing a commitment as soon as possible." JX 2139 at 1. The plan was to execute commitment letters during the week of February 17. Ivanhoe Tr. 582–83. Consistent with that expectation, Gibson Dunn told Greenberg Traurig on February 17, 2020, that it expected all of the conditions to closing to be met by March 15, 2020, so that the parties could close promptly thereafter. JX 2157. Greenberg Traurig agreed and suggested targeting April 1 as a closing date. *Id.*

On February 18, 2020, Buyer received final versions of the term sheets, commitment letter, flex letter, and rate lock agreement from Goldman.[129] But that same day, Goldman's counsel notified Gibson Dunn that "Goldman has become aware of a series of Delaware cases filed against Anbang that seem to relate to the Strategic portfolio" and sent Gibson Dunn the TRO application that Gibson Dunn had prepared. JX 2162. Goldman's counsel asked for a call that evening to understand the background on this and the current status of the cases. *See* JX 2164.

129 *See* JX 2240 at 2–3; Kim Dep. 92–95; Davis Dep. 199–202.

The Gibson Dunn lawyers claimed they could not put together a call that quickly.[130] Instead, Seller formally gave notice to Buyer that all conditions to closing would be satisfied on March 15 and that the parties should prepare "to close the transaction shortly after March 15." JX 2174. Still unaware of the DRAA Chancery Action, the Delaware Judgments, the Alameda Action, and the California Judgment, both Mirae and the Title Insurers expressed support for that schedule.[131] Mirae proposed a closing date of April 6. JX 2219.

130 JX 2165; *see* JX 2241.

131 *See* JX 2216; JX 2219.

On February 20, 2020, committed financing was just a signature away. Mirae had asked for the final wiring information and fee amounts from Goldman. *See* JX 2260. Mirae had wired the money to Buyer's bank account in the U.S. "so that upon signing the financing commitment letters and term sheets and et cetera, [it] would be able to quickly transfer necessary expense, deposits, and fees to Goldman instantly." Kim Tr. 1032–33. With everyone poised to sign, Goldman informed Jones Lang about the DRAA Chancery Action. *See* JX 2244. Jones Lang then notified Mirae, explaining that no one had determined "if these claims run to the seller, the assets or both," and although "it appear[ed] that the claims have been set aside by the courts," this was "all new information which Goldman [was] reviewing." JX 2266 at 1.

***34** Goldman's discovery brought the financing process to a halt. The commitment letters did not get signed on February 19, and the signing was tentatively pushed until February 24 so that Mirae and the Lenders could investigate further.[132]

132 Wheeler Dep. 181; *see* JX 2312 at 2 (Wheeler telling Jones Lang, "We'll need to figure out the new litigation issue before we can execute.").

For both Mirae and the Lenders, the Delaware filings represented a second major hit to the credibility of Anbang and Gibson Dunn. When Gibson Dunn first disclosed the Fraudulent Deeds, the Lenders had expressed "concern ... that Anbang knew about the deeds and deliberately concealed them from the bidders and their lenders." JX 1048 at 1. The revelation of the DRAA Chancery Action reinforced those concerns.[133]

133 *See* JX 2245 (Jones Lang expressing hope that the latest disclosure "doesn't turn into another fiasco"); JX 2272 (Ivanhoe telling Anbang and Gibson Dunn that he was "surprised, to say the least, that these new series of legal actions have been ongoing for over one month and no one brought this to our attention until after it was raised by Goldman a couple days ago").

Goldman sent the litigation documents to Greenberg Traurig, who began studying them.[134] Kim asked Li to explain, telling him "**We also need to know ASAP if this is about the Strategic Portfolio.**"[135] Li responded evasively, saying "We don't think there's anything that your side should be concern[ed] with." JX 2289 at 2. Kim followed up: "[C]an we take it that, whatever it is, it is NOT about the Strategic Portfolio?" *Id.* at 1. Li responded that the DRAA Chancery Action involved a "fraudulent arbitration judgment falsified by some criminals regarding Anbang's use of the Anbang trademark in the US" and that Gibson Dunn would provide the "necessary details." *Id.* The Lenders had already concluded that DRAA Chancery Action related to the Strategic portfolio. Glover Tr. 173.

134 *See* JX 2246; JX 2268.

135 JX 2289 at 3; *see* Kim Tr. 1028–29.

On February 21, 2020, during a call with Greenberg Traurig and the Lender's counsel, Gibson Dunn downplayed the claims. The Gibson Dunn lawyers claimed that the DRAA Chancery Action was a fraud based on a "bizarre trademark dispute" that would "not be of much interest." JX 5086 at 1. They characterized the Delaware proceedings as "insignificant" and "not a big deal."[136] Those representations conflicted with what Gibson Dunn had told this court about the significance of the DRAA Chancery Action. The Gibson Dunn lawyers also said they had first learned about the DRAA Chancery Action in mid-December 2019.[137] That was not true. Gibson Dunn had learned about the DRAA Chancery Action four months earlier, in August 2019. Gibson Dunn said nothing about the connections among Belitskiy, Hai Bin Zhou, and the DRAA Petitioners. Gibson Dunn said nothing about Anbang's multi-year litigation history with Hai Bin Zhou over trademark issues. *See* Ivanhoe Tr. 588–89.

136 Davis Dep. 219; *see* JX 2305 at 1; JX 2273 at 1.

137 Ivanhoe Tr. 595–96; *see* JX 2301.

Based on Gibson Dunn's representations and the events up to that point in the DRAA Chancery Action, including the entry of the DRAA January Judgment, Greenberg Traurig and Mirae concluded that the DRAA Chancery Action, the Delaware Judgments, and the California Judgment posted "little to no risk" to the Transaction.[138] Internally, Mirae remained sufficiently concerned for Kim to ask Li specifically for any additional information that Anbang had about the parties involved:

> ***35** [I]f you have information or any idea about these fraudsters, please share with us ASAP ....
>
> It just does not make sense that the deed issue was caused by a [single U]ber driver who seemingly has nothing against Anbang.
>
> Also it is hard for us to understand that some companies (petitioners in the Delaware litigation) have committed such actions just as a simple vendetta.
>
> We need to understand the motives and also want to have absolute comfort that these fraudsters will walk away from our transaction/portfolio from now on for good.
>
> As you may imagine, we are getting tons of questions internally asking us if this is really it about the fraudster and if there are any other circumstances that we are not aware of.

JX 2353 at 2. Li represented that Anbang was not attempting to hide anything from Mirae. *Id.* at 1. Kim's boss wrote back, noting the overlap between the DRAA Petitioners and the names of the entities on the Fraudulent Deeds. JX 2366 at 2. Li responded with another brief email that provided a few snippets about the trademark disputes. *Id.* at 1–2.

138 JX 2304; *see* JX 2305.

As these exchanges were taking place, Goldman continued to evaluate the issues posed by the DRAA Chancery Action.[139] The delay in securing financing could not have come at a worse moment. Over those critical days, the financial markets began gyrating as concern spread about COVID-19. Mirae pushed Goldman to finalize a financing package,[140] and Goldman assured Mirae that it was working as expeditiously as possible.[141]

139 *See* JX 2309; JX 2311; JX 2313; JX 2324.

140 *See* JX 2311 at 1; JX 2312 at 1–2; JX 2321; JX 2322; JX 2323.

141 *See* Wheeler Dep. 188–190; *see also* JX 2316.

On Monday, February 24, 2020, Goldman was still not prepared to commit to a financing.[142] With the market upheaval deepening, Goldman informed Mirae on February 26, 2020, that a committed CMBS financing was "off the table."[143] Goldman made a series of proposals, but all were far more expensive and would require additional negotiation. Mirae and Jones Lang reached out to the members of the lending syndicate directly and approached other funding sources.[144]

142 *See* Wheeler Dep. 182–83, 187.

143 JX 2358 at 1; *accord* Wheeler Dep. 194.

144 *See* JX 2370; JX 2404; JX 2408.

As February entered its final days, concern about the novel coronavirus increased exponentially.[145] Strategic's hotels began to receive COVID-related cancellations.[146]

145 *See* JX 2353; JX 2359; JX 2362; JX 2404 at 2–3.

146 *See, e.g.,* JX 2376; JX 2378; JX 2380; JX 2381; JX 2382; JX 2383; JX 2384; JX 2385; JX 2386; JX 2387; JX 2388; JX 2389; JX 2390; JX 2391; JX 2392; JX 2393; JX 2394; JX 2395; JX 2396; JX 2397; JX 2398; JX 2399; JX 2433; JX 2542; JX 2543; JX 2544; JX 2545; JX 2546.

O. The DLA Letter

For Mirae, the risk posed by the DRAA Chancery Action increased on February 28, 2020, when Greenberg Traurig located a letter that Stamoulis had filed on February 25. [147] Stamoulis reported that DLA Piper LLP was considering whether to enter an appearance and attached a detailed, six-page, single-spaced letter from John Reed, a leading Delaware attorney and partner with DLA Piper (the "DLA Letter"). [148]

147 *See* JX 2435; JX 2448; JX 5243.

148 *See* JX 2347; JX 5056.

***36** The DLA Letter stated that DLA Piper had been retained by the DRAA Petitioners "in connection with their rights under a [DRAA Agreement] (written in Chinese)." JX 2347 at 2. The letter explained:

> We have learned a lot in a short period of time, and many things do not add up if all of this is supposed to be some outright fraud. For example, the Amer Group is no stranger to AnBang Insurance. The parties have been adverse to each other for many years with regard to trademark disputes in the United States and China. From what we have been able to find through the United States Patent and Trademark Office ("USPTO"), Amer Group has thus far prevailed against AnBang Insurance with regard to the "AnBang" trademarks and other matters (*see* http://ttabvue.uspto.gov/ttabvue/v?gs=78653636), so it does not appear that the Amer Group is some gang of unknown con-artists who suddenly targeted AnBang Insurance.

Id. at 3.

The DLA Letter next described the DRAA Agreement.

> We understand it was executed in Beijing, China, on May 15, 2017, by AnBang Insurance's then-Chairman, Wu Xiaohui. It is our understanding, and the [DRAA Agreement] expressly states, that the Agreement itself was a concept proposed by AnBang Insurance's founder, Xiaolu Chen. Paragraph 88 of the [DRAA Agreement] states, that ... it is governed by the "Delaware Rapid Arbitration Act (DRAA)" per the requirement of 10 *Del. C.* § 5803(a)(5).... The signature on the [DRAA Agreement] on behalf of AnBang Insurance appears to match the signatures on AnBang Insurance's trademark applications filed with the USPTO. We also note that the signature is not identical to the other ones we reviewed so as to be a cut-and-paste copy.

Id.

The DLA Letter also posited (correctly) that Anbang had misrepresented the extent of its knowledge about the DRAA Agreement.

> AnBang Insurance's Motion for a TRO filed with the Court of Chancery states that " '[t]he Agreement' does not exist" (TRO Mot., p. 6), but the two Declarations from TianZhen Fan and YuLin Song of [Dajia] do not (at least as we read them) squarely deny the existence or validity of the [DRAA Agreement] and simply say that [Dajia] "does not have any agreement to arbitrate disputes with" the Amer Group. (Decls., ¶ 9.) Of course, [Dajia] is the new name of AnBang Insurance following the seizure of the company by Chinese regulators and it did not exist

> with that name, or in its current state, when the [DRAA Agreement] was executed, so it is not clear whether the contention that *it* "does not have an agreement" with the Amer Group is based on a legal argument as opposed to a dispute of fact (we have reason to believe it is the former as explained later herein). In any event, we have also obtained and translated documents from a dispute in the Beijing Intellectual Property Court involving the "AnBang" trademarks, where AnBang Insurance was a third party and the [DRAA Agreement] was a subject of proceedings back on March 5, 2019. We are in the process of doing much more due diligence on this and obtaining more filings from that proceeding through our China-based offices to determine whether AnBang Insurance ever challenged the validity of the [DRAA Agreement] before the Beijing Court.

***37** *Id.* at 3–4.

The DLA Letter also discussed the Fraudulent Deeds:

> As to the history of the recorded deeds, that situation is tied to the longstanding trademark disputes and it appears the [DRAA Agreement] was specifically created to deal with the remedies to be implemented from the outcome of those disputes. For many years, AnBang Insurance did business in violation of the "AnBang" trademark and, at one point, AnBang Insurance had (and may still have) assets valued in excess of $300 billion (US), so the wildly large numbers identified in the [DRAA Agreement] and arbitration awards need to be understood in that context. While there have been actions to quiet title for the deeds that are alleged to have been fraudulently recorded (actions that were not vigorously defended for reasons we are still exploring). Paragraph 80 of the [DRAA Agreement] expressly states that if AnBang Insurance fails to cancel the Amer Group's trademarks within one year of the date of the Agreement (May 15, 2018), a certain large sum of funds specified in the Agreement is to be deposited and, in the event of a failure to do so by June 15, 2018, the Amer Group "may appropriate the deposit directly without petitioning any arbitration commission or court, and the person designated by [the Amer Group] may with the DPOA (Durable Power of Attorney) granted by this Clause, directly sign a Grant Deed before any notary public in order to transfer the assets directly." Not coincidentally. AnBang Insurance's former Chairman executed and authorized a filing with the USPTO on June 7, 2017 (three weeks after the [DRAA Agreement] is claimed to have been executed), in furtherance of the effort to cancel the Amer Group's trademarks as contemplated by Paragraph 88 of the [DRAA Agreement]. The assets to secure the required deposit are sixteen hotels and four properties specifically listed in Paragraph 79. Paragraph 80 further states that AnBang Insurance "shall guarantee that the aforesaid assets are free of liabilities." The [DRAA Agreement] also provides for specified monetary penalties and multipliers for a breach of the various terms, obligations and conditions in the Agreement, which also explains the large figures in the arbitration awards.

*Id.*at 3–4.

The DLA Letter explained that DLA Piper was still investigating these matters and that, given the serious allegations of fraud, the lawyers were proceeding "with as little client involvement as possible." *Id.* at 6. The DLA Letter stressed,

> *[W]e will not be entering our appearance and will not be making any representations to any Court until our investigation is complete*; however, we wanted you to know what we have uncovered thus far for purposes of your own situation.... We can tell you that we are taking this situation very seriously, especially in light of the allegations of fraud, and we are deploying the necessary resources to get to the bottom of everything.

Id. at 6.

Anbang learned about DLA Letter the same day it was filed. Li immediately informed his superior, Vice Chairman Luo. *See* JX 2351.

***38** For Mirae and Greenberg Traurig, the DLA Letter was extremely concerning, because "all the substance [was] in direct contradict[ion] to what the seller was telling us." Kim Tr. 1038. Ivanhoe viewed it as a game changer. He contacted the firm's senior litigation partner and the head of its litigation practice and told them that they had "a very serious problem on a very large transaction." Ivanhoe Tr. 599–600. Making a generational reference, Ivanhoe viewed it as the equivalent of, "Houston, there's a problem." *Id.* at 601.

Anbang filed a response to the DLA Letter. *See* JX 2414. For the first time, Anbang began to share some of what it knew about Hai Bin Zhou and his associates in the form of an affidavit from the former FBI agent who had investigated the individuals who had purported to serve as arbitrators for the awards. *See* JX 2403. According to Anbang's investigation,

> [S]ix of the eleven total purported arbitrators appear to have been named as defendants in criminal cases; one appears to have pled guilty to a felony assault weapons charge and two misdemeanors; another appears to have pled guilty to at least four misdemeanors; another appears to have spent 40 years with a company called A-1 Pool & Spa Services; three arbitrators appear to have lived in the same R.V. Park in San Rafael, California (a fourth arbitrator is the mother of one of those three residents); and one of the arbitrators, who is a Chinese restaurant worker, affirmatively told Agent Douglas that he did not participate in any arbitration but signed the arbitration awards as a "favor" to a loyal customer. He also confirmed that he showed his driver's license to the notary but was unaccompanied by the other "arbitrators" when he did so. We respectfully submit that these findings should be of interest in connection with the investigation new counsel claims to be conducting.

JX 2414 at 3–4. Anbang also noted that "the person that purportedly notarized Petitioners' verification in this action—Spencer John Chase—had his notary license revoked by the California Secretary of State pursuant to a stipulated decision entered weeks before Mr. Chase's notary stamp was placed on the verification in this action." *Id.* at 4 (emphasis omitted).

After seeing the DLA Letter, Mirae and Greenberg Traurig concluded that they could not evaluate the risk posed by the DRAA Chancery Litigation without seeing the DRAA Agreement. Over the ensuing weeks, they consistently and repeatedly asked Anbang to provide a copy of the DRAA Agreement. [149]

149 *See, e.g.*, JX 2353 at 2; JX 2359 at 1; JX 2375 at 2; JX 2718 at 2; JX 2737 at 1; JX 2797 at 2; JX 3376 at 5, 8, 11.

P. COVID-19 Causes The Debt Markets To Close.

As the calendar turned to March 2020, COVID-19 was causing "major headaches everywhere." JX 2507 at 1. By March 4, "[t]he CMBS market [was] shut down for large hotel deals," and debt funds were not entertaining any new hotel deals. JX 2508 at 1. A bridge loan was the only remaining option for the Transaction, and it was unclear whether that option could be executed successfully. [150] Goldman circulated a term sheet, and several lenders declined to bid. *See* JX 2553.

150 *See* JX 2516; JX 2508 at 6; JX 2546.

Buyer tried to convey the consequences of the market turmoil to Seller. *See* JX 2559. Anbang, however, refused to acknowledge that its decision to conceal the DRAA Chancery Action had delayed the financing process at a critical point. In an effort to get everyone on the same page, Jones Lang hosted a call on March 7, 2019, with Buyer, Seller, BAML, and Goldman. Kim Tr. 1048–51. The lead banker from Goldman explained that CMBS financing was not available and that putting together bridge financing was challenging. [151] Not only was it difficult for Goldman to propose terms for a loan, but the markets were changing dramatically every day, so by the time the lenders in the syndicate obtained internal committee approvals, the terms were outdated. [152]

151 Kim Tr. 1050–51; *see* JX 2564 at 1; JX 2566 at 1; JX 2676 at 1; JX 2577 at 1; JX 5053 at 1.

152 JX 2643; *see* Kim Tr. 1045–46; JX 2407 at 1–3; JX 2411; Kim Dep. 225–28.

***39** With the pandemic worsening, Strategic's financial performance deteriorated at an accelerating rate. [153] It became unclear whether Strategic could refinance its debt in the ordinary course of business, and management and Strategic's outside auditors discussed whether the Company's financial statements needed to be a going-concern qualification. [154]

153 *See* JX 2569; JX 2570; JX 2571; JX 2572; JX 2573; JX 2574; JX 2588; JX 2617; JX 2618; JX 2644.

154 *See* JX 2645; *see also* JX 3575.

Given the worsening financial markets and the need to fully understand the issues raised by the DRAA Chancery Action, Buyer proposed to extend closing by three months. [155] Li presented his supervisor, Vice Chairman Luo, with "potential options" that included strategies to "get control of the US $581m" deposit through litigation. JX 2590 at 1. Li did not regard specific performance as an option. *See* Li Dep. 472–73.

155 *See* JX 2663 at 1; Ivanhoe Tr. 615–16; Kim Tr. 1047–48, 1051, 1055–56, 1212–13.

On March 12, 2020, Anbang insisted on closing before April 8, 2020, unless Mirae agreed to Anbang's counterproposal. *See* JX 2797 at 6–7. In exchange for the three-month extension, Anbang asked Mirae to (i) double its deposit, (ii) agree that all closing conditions had been satisfied or waived, (iii) agree that no purchase price adjustments were required, (iv) freeze the balance sheet date for calculating the estimated purchase price, and (iv) compensate Anbang approximately $400 million in purported funding costs. *Id.* Anbang threatened litigation, stating that if Mirae did not agree to Seller's terms, "then we must close by April 8" and that "[i]f Mirae refuses to proceed to closing as contractually agreement, we will have no choice but to exercise all remedies available to us under the [Sale Agreement], including without limitation seeking specific performance compelling Mirae to close." *Id.* Gibson Dunn separately told Greenberg Traurig that Anbang was prepared to litigate. JX 5131.

Anbang's terms were so extreme that Mirae viewed them as a flat rejection of its extension request. [156] Mirae's response, sent later that day, adopted a noticeably more formal tone. *See* JX 2718. Mirae noted that the closing date under the terms of the Sale Agreement was April 17, 2020, not April 8. *Id.* at 1. Mirae rejected Anbang's terms as unrealistic. And Mirae noted that Seller's failure to disclose the DRAA Chancery Action could affect the Title Insurers' willingness to provide title insurance, resulting in a failure of a closing condition. *Id.* at 2. Mirae asked for a copy of the DRAA Agreement so that it could evaluate the issues raised by the DRAA Chancery Action. *Id.*

156 Kim Tr. 1057–60; Ivanhoe Tr. 618; *see* JX 2942.

In its response, Anbang claimed that it had "complied with all of our disclosure obligations under the Agreement." JX 2727 at 1. Anbang represented that it did not have the DRAA Agreement and therefore could not provide it. *Id.* Anbang reiterated its threat of litigation, stating that it was "fully prepared to enforce our rights in court if it comes to that." *Id.*

On March 16, 2020, Mirae notified Anbang that "Buyer does not believe that the conditions obligating Buyer to close have been satisfied." JX 2777 at 1. Buyer nevertheless exercised its right under the Sale Agreement to extend the closing date to April 17, 2020. [157] Anbang disputed the April 17 date and contended that the closing date was April 8. Mirae sent an email disputing Anbang's response. After a call between Gibson Dunn and Greenberg Traurig, the parties agreed to use April 17 as the closing date. [158]

157 *Id.*; *see also* JX 2797 at 1–2.

158 *See* JX 2846; JX 2907 at 2, 5–6; JX 2992 at 1.

***40** Throughout March and early April 2020, Seller continued to seek financing. [159] With the expanding COVID-19 pandemic, it was not available. [160] During the same period, Strategic's business performance continued to plummet. [161] On March 24, Strategic temporarily closed the Four Seasons Palo Alto and the Four Seasons Jackson Hole "in response to very low demand as well as governmental orders." JX 3105 at 1. The closing of the Four Seasons Jackson Hole advanced its normal seasonal closure by approximately two weeks. JX 3107 at 3. Other hotels began operating in state where they were "closed but open." *See* JX 3159.

159 *See, e.g.*, JX 2596; JX 2600; JX 2623; JX 2713; JX 2730; JX 2738; JX 2739; JX 2760; JX 2855; JX 2859; JX 2862; JX 2864; JX 2895; JX 2896; at 1; JX 3212; JX 3951; Kim Tr. 1055, 1062; Wheeler Dep. 194–95; Davis Dep. 270.

160 *See* JX 3468; JX 3937; JX 4546 at 8, 25; Kim Tr. 1045–46; Hattem Dep. 121–22; *see also* Wheeler Dep. 84–85, 197; Cookke Dep. 155.

161 *See, e.g.*, JX 2750; JX 2763; JX 2764; JX 2767; JX 2768; JX 2769; JX 2770; JX 2771; JX 2772; JX 2773; JX 2778; JX 2839; JX 2905; JX 2988; JX

2989; JX 2990; JX 2991; JX 3041; JX 3044; JX 3236; JX 3282.

Q. The Title Insurers' Concerns About The DRAA Chancery Action.

While these events were unfolding, Ivanhoe kept the Title Insurers informed about deal-related developments. [162] As a matter of personal and professional ethics, Ivanhoe wanted to be candid with the Title Insurers. He also knew that a failure to disclose information about the DRAA Chancery Action the Delaware Judgments, and the California Judgment could jeopardize Buyer's coverage under a standard exclusion in title insurance policies for matters that were within the "knowledge of the insured" but were withheld from the Title Insurers. [163] Lance and a colleague similarly engaged in regular communications with the Title Insurers throughout March and April. [164]

162 *See* JX 2647; JX 2648; JX 2657; JX 2658; JX 2659; JX 2660; JX 2693; JX 3006.

163 *See* Ivanhoe Tr. 604–06; JX 2649.

164 *See* JX 2911; JX 2914; JX 2998; JX 3000.

The Title Insurers were concerned about the DRAA Chancery Action, the DLA Letter, and the possibility that the DRAA Petitioners and their affiliates could reopen the various default judgments that Anbang and its affiliates had obtained. *See* JX 2791. On March 20, 2020, in response to Buyer's request for an update on the status of the title insurance, the Title Insurers advised the parties that they were continuing to review "what is generally referred to as the Delaware litigation, and its impact on our underwriting of the title insurance." JX 2997. Based on his conversations with the Title Insurers, Ivanhoe had expected the letter to take a stronger position. *See* JX 3006.

Mirae immediately asked Anbang to provide the Title Insurers with whatever addition they needed, including a copy of the DRAA Agreement. JX 3064. Mirae argued,

> If the Delaware Litigation is 100% based on fraud by Amer Group, as Seller insists, then it seems like the DRAA Agreement is the single most important document that Amer Group's perpetration is based on. And if the DRAA Agmt does NOT exist as you say, then your assertion must be that it was fabricated by Amer Group. If so, have you, as defendant, tried to obtain a copy of it from the Delaware Court? The point is that if, as Amer Group insists, the DRAA Agreement is with Anbang (whether the agmt is authentic or not), then it would seem that Anbang must be able to obtain a copy of it from the court, without violating [the] confidentiality clause the document contains. If Seller can provide more information regarding the legitimacy of the DRAA Agreement to the title insurers, we believe that this would greatly help expediting their review of the Delaware Litigation.

***41** JX 3077 at 2 (formatting added). Anbang disputed that there was any reason for concern. JX 3157.

To try to address the Title Insurers' concerns, Gibson Dunn engaged with DLA Piper and provided additional evidence that the DRAA Petitioners were engaged in fraud. *See* JX 2995. Gibson Dunn leveled accusations at DLA Piper and asked DLA Piper to withdraw the DLA Letter. DLA Piper sent a strongly worded response that rejected any suggestion of wrongdoing. *See* JX 3066. Gibson Dunn provided the exchange to the Title Insurers and Buyer. Gibson Dunn also sent Ivanhoe a letter arguing that there was no basis on which anyone could set aside the default judgments in the Quiet Title Actions. [165]

165 *See* JX 3118; JX 3119; JX 3121.

On March 25, 2020, Anbang asked the Beijing Municipal Public Security Bureau to investigate Hai Bin Zhou and his activities. [166] In its report, Anbang connected the Fraudulent Deeds with the DRAA Chancery Action and the years of trademark disputes, stating:

> In this case, the involved parties are significantly related, such as Great Hua Bang, Amer Group, and World Award Foundation, etc.; there is a

> high degree of overlap of these entities in the trademark dispute, document forgery, and fraudulent arbitration cases. Moreover, all the cases are related to a person named ZHOU Haibin (the Chinese name was transliterated; the English name was Hai Bin Zhou), who is likely to be the alleged suspect in this case.

JX 3160 at 7.

166 *See* JX 3160; JX 3162; JX 3416.

R. The Failed Closing

The beginning of April 2020 saw activity on multiple fronts as the clock wound down toward the scheduled closing date on April 17, 2020. Anbang and Gibson Dunn continued to push for an immediate closing. Mirae and Greenberg Traurig identified problems and requested more time. As the parties' relationship became more adversarial, they exchanged dispute letters and took the positions that they would assert in litigation.

On April 3, 2020, Anbang notified Mirae that Strategic had responded to the COVID-19 pandemic by taking a number of actions involving the Hotels, including (i) closing the Four Seasons Palo Alto, (ii) closing the Four Seasons Jackson Hole in advance of its normal between-season closing, (iii) operating Strategic's other hotels at reduced levels with reduced staffing and with many restaurants closed, and (iv) pausing all non-essential capital spending JX 3444 at 2–3. Mirae asserted that it had the right to approve in advance any actions that Strategic might take that were outside the ordinary course of business and reserved its rights to challenge the actions that Strategic had taken. *Id.* at 1–2.

On April 7, 2020, the Title Insurers informed Gibson Dunn that they were having difficulty assessing the level of risk posed by the DRAA Agreement, which none of the Title Insurers had seen:

> [W]e are having a difficult time determining if the [DRAA Agreement] has any provisions in it that would have pledged, as collateral / security, or otherwise, the U.S. hotel properties. Or perhaps required Anbang not to sell any of these assets. We recognize your firm's and your client's position on the whole matter. We just do not know how to properly underwrite the risk without a copy of the DRAA Blanket Agreement, which we understand is not able to be provided us, apparently pursuant to its terms. Again, we understand that Anbang's position is that this is a massive fraud being perpetrated against it.

***42** JX 3525 at 5. Anbang and Gibson Dunn possessed the DRAA Summary, which contained information pertinent to the Title Insurers' questions and would have helped the Title Insurers perceive the illegitimacy of the DRAA Agreement.[167] But Anbang and Gibson Dunn did not share the DRAA Summary with the Title Insurers, Mirae, or Greenberg Traurig.

167 *See* JX 2785; JX 4748.

On April 9, 2020, Gibson Dunn had a lengthy call with the Title Insurers in an effort to convince them to issue clean title insurance. *See* JX 3584. The next day, the principal decision makers for the Title Insurers convened “to reach a conclusion about the state of title they would be willing to insure.” Ivanhoe Tr. 621. The decision makers were the “deans of the insurance industry” and “a veritable who's who of the most senior title insurance professionals in America.”[168] Approximately one hour into the call, one of the representatives emailed Ivanhoe and asked him to join the call. *See* JX 3645. When the Title Insurers asked Ivanhoe what he would do in their position, Ivanhoe said he would continue to take an exception for the Fraudulent Deeds until “the seller ... undertook proper action to have them removed of record.” Ivanhoe Tr. 632. The Title Insurers would then decide whether to provide affirmative coverage for the exception through an endorsement.[169]

168 Ivanhoe Tr. 621; Kravet Dep. 206–07.

169 *See id.*; Mertens Dep. 262; Chernin Dep. 104–06.

On April 10, 2020, Gibson Dunn sent Greenberg Traurig an estimated closing statement for a closing on April

17, drafts of various closing deliverables, and a proposed closing checklist. JX 3607. Anbang was already planning for litigation, and on April 13, Gibson Dunn circulated a litigation strategy memo. *See* JX 3656. On August 14, Anbang circulated a litigation hold memo. *See* JX 3738.

On April 13, 2020, Gibson Dunn wrote to the Title Insurers asking them to issue policies without taking exception for the Fraudulent Deeds. [170] In the letter, Gibson Dunn offered to have Seller and one of its affiliates indemnify the Title Insurers for any losses they incurred and to assume the defense of any claims relating to the DRAA Agreement. JX 3670 at 5. That offer resembled the proposal that Anbang had made in August and September 2019, when Anbang first revealed the existence of the Fraudulent Deeds and the Lenders and Title Insurers balked. Anbang did not receive a more welcoming reception the second time around.

170 JX 3670 at 2–6; *see also* JX 3639; JX 3642.

After receiving the letter from Gibson Dunn, the Title Insurers issued title commitments for the Hotels that added the DRAA Exception. Under this broad exception, no coverage exists for

> [a]ny defect, lien, encumbrance, adverse claim, or other matter resulting from, arising out of, or disclosed by, any of the following: (i) that certain "[DRAA Agreement]," dated on or about May 15, 2017, to which AnBang Insurance Group Co., Ltd., Beijing Dahuabang Investment Group Co., Ltd., Amer Group LLC, World Award Foundation Inc., An Bang Group LLC, and AB Stable Group LLC are purportedly parties and/or also interested, and the rights, facts, and circumstances disclosed therein; (ii) that certain action styled World Award Foundation, et al. v. AnBang Insurance Group Co, Ltd, et al., in the Court of Chancery of the State of Delaware, as DRAA C.A. No. 2019-0605-JTL and the rights, facts, and circumstances alleged therein; (iii) those certain actions, each styled World Award Foundation, et al. v. AnBang Insurance Group Co Ltd, et al., in the Superior Court of the State of Delaware, as Nos. C.A. N19J-05055, C.A. N19J-05253, C.A. N19J-05458, C.A. N19J-05868, C.A. N19J-06026, and C.A. N19J-06027 and the rights, facts, and circumstances alleged therein; and (iv) that certain action styled World Award Foundation, et al., v. AnBang Insurance Group Co., Ltd., in the Superior Court of State of California for the County of Alameda, as Case No. RG19046027 and the rights, facts, and circumstances alleged therein.

***43** JX 3676 at 11. Both Buyer and Seller retained experts on title insurance who agreed that the language of the DRAA Exception was so broad as to eliminate coverage for the Fraudulent Deeds. [171]

171 Chernin Tr. 1263; Nielsen Tr. 1441–43; *accord* Ivanhoe Tr. 633, 767.

It was only after the Title Insurers issued the commitments with the DRAA Exception that Anbang returned to this court in the DRAA Chancery Action in an effort to obtain a copy of the DRAA Agreement. [172] On April 14, 2020, Anbang filed an emergency motion to compel production of the DRAA Agreement, representing that

> based on statements characterizing the content of this document made [in the DLA Letter], the title insurers involved in the [Transaction] have expressed reservations about their ability, without having the opportunity to review the document, to write "clean" title insurance policies before the closing date .... Mirae too has expressed serious reservations about closing this transaction because of the existence of this so called "DRAA Blanket Agreement" and related issues. [Anbang] believes that the purported DRAA Blanket Agreement has been fabricated and is part of Petitioner's scheme to defraud [Anbang]. Thus, the DRAA Blanket

> Agreement should be irrelevant to the closing of the Mirae Transaction. Despite this, Mirae continues to attempt to hide behind the DRAA Blanket Agreement to delay the Mirae Transaction, which is why this motion is so urgent.

JX 3763 at 2. The court granted the motion that same day. JX 3765.

172 Three months earlier, on January 6, 2020, Anbang had filed a motion to compel in connection with its TRO application, but that motion did not specifically seek production of the DRAA Agreement. *See* DRAA Chancery Action Dkt. 32. Anbang had also served subpoenas on the DRAA Petitioners' former counsel, which the lawyers had moved to quash. With the entry of the default judgment embodied in the DRAA January Order, the court had viewed the DRAA Chancery Action as effectively over, mooting the discovery sought in connection with the TRO.

On April 15, 2020, Stamoulis provided Anbang with the version of the DRAA Agreement that he possessed, which was missing a page. [173] Also on April 15, Buyer provided formal notice that the Seller had failed to satisfy its representation that Seller and its Subsidiaries had good and marketable title to all owned real property. JX 3770 at 2. Buyer contended that because this representation was inaccurate, Seller had not satisfied a condition to closing. *Id.* Buyer further asserted that if Seller did not cure the breach, then Buyer would have the right to terminate the Sale Agreement. *Id.*

173 *See* JX 3775; JX 3796; JX 4968.

On April 16, 2020, after obtaining the missing page of the DRAA Agreement from Nielsen, Stamoulis sent the page to Anbang. [174] Seller provided it to Buyer and the Title Insurers. [175] This was the first time that Buyer and the Title Insurers had seen the DRAA Agreement, which was written in Chinese. That evening, Greenberg Traurig obtained an English translation. [176]

174 JX 3797; *see* JX 3843.

175 JX 3794; JX 3798.

176 *See* JX 3871; JX 3873.

On April 17, 2020, Buyer issued a formal notice of default based on the inaccuracy of Seller's representation that Seller and its Subsidiaries had good and marketable title to all owned real property. Buyer also claimed that five other representations were inaccurate and that Seller had failed to operate the Company and its subsidiaries in the ordinary course of business. Buyer asserted that Seller therefore had failed to satisfy the conditions to closing and that Buyer was not obligated to close. Seller informed Buyer that if the breaches were not cured on or before May 2, 2020, then Buyer would be entitled to terminate the Sale Agreement. *See* JX 3829.

***44** In response, Seller delivered a certificate affirming that its representations were correct and that all conditions to closing were satisfied. Seller maintained that Buyer was obligated to close and that by failing to do so, Seller was in willful breach of the Sale Agreement. *See* JX 3848.

S. Post-Closing, Pre-Litigation Developments

On April 22, 2020, Gibson Dunn sent a copy of the DRAA Agreement to the Title Insurers. Gibson Dunn pointed out a series of issues with the DRAA Agreement that were indicative of fraud, including:

- Temporal anomalies, such as references to events that had not yet occurred when the DRAA Agreement was purportedly signed.
- Factual inaccuracies, such as references to a property that Strategic had sold two years before the DRAA Agreement was purportedly signed.
- Legal impediments, such as the inability of the purported signatories to the DRAA Agreement to bind Anbang without first obtaining shareholder approval.
- Patently unfair terms, such as a supposed arbitration provision that permitted Anbang to select one arbitrator and its counterparties to select five arbitrators.

See JX 3957 at 1–3. Gibson Dunn sent a similar letter to Greenberg Traurig. *See* JX 3955.

Greenberg Traurig asked Gibson Dunn for more information about the DRAA Agreement and its origins. JX 3891.

Greenberg Traurig noted that at least of its face, the DRAA Agreement appeared to implicate the properties covered by the Sale Agreement and seemed to be "sealed by Anbang's corporate seal and signed by (ex) Chairman Wu." *Id.* at 1. Greenberg Traurig also asked why the underlying trademark dispute was not identified when the Fraudulent Deeds first appeared in August 2019. *Id.* at 2.

To clarify matters further, Greenberg Traurig asked Gibson Dunn to address the following questions:

• Why does Seller contend that the [DRAA Agreement] is fraudulent or invalid and, if so, on what basis?

• Is AnBang Insurance Group Co. Ltd. an affiliate of AnBang Insurance Group LLC?

• What steps did AnBang take to locate a copy of this agreement within its organization since it became aware of its purported existence?

• Did AnBang Insurance Group Co Ltd or any related entity engage patent application counsel (including Fross, Zelnick, Lehrman & Zissou PC or another) and make or cause[ ] to be made patent applications in[ ] U.S. numbered 87088221, 87088208, 87088196, 87088201, 87088186, 86945225; or 86945267 (and the last number may be an incorrect reference but please identify any other patent application it filed in [the] U.S.)

• The [DRAA Agreement] states that there is an original English version of the document. May we obtain a copy of that version?

• Even if the [DRAA Agreement] is invalid, was there an agreement between AnBang Insurance Group, Amer Group Inc. and others to abandon and/or transfer the AnBang trademark(s)?

• Did AnBang Insurance Group Co. Ltd., Anbang Insurance Group LLC, or other AnBang-related entity transfer funds to any or all of the other parties listed in the [DRAA Agreement] per paragraph 79 of the [DRAA Agreement]?

Id. at 2–3. Anbang never provided answers.

On April 24, 2020, this court granted Anbang's motion to compel production of documents from counsel in the DRAA Chancery Action. In granting the motion, the court noted that there was "ample evidence to believe that Petitioners committed a fraud on [Anbang] and on the court" and there was "also reason to believe that Petitioners may have engaged in criminal conduct." [177]

[177] JX 4033 ¶ 5. The court addressed the motions after holding a status conference on April 17, 2020, and learning that Anbang did not regard the DRAA Chancery Action as over or the pending discovery motions as moot, largely because of the problems that the DRAA Agreement had created for the Transaction. The Gibson Dunn partner who handled the conference stated that "there may need be at some point a decision or judgment made about the DRAA agreement, potentially something along the lines of it being inoperative." DRAA Chancery Action Dkt. 70 at 8.

***45** On April 24, 2020, Greenberg Traurig sent Gibson Dunn another set of questions about the DRAA Agreement and the DRAA Chancery Action. JX 4037 at 1. Greenberg Traurig explained that answers to these questions would help Mirae evaluate Anbang's position that the DRAA Agreement was not authentic and assist Mirae in evaluating any claim to title. *Id.* Anbang never answered these questions.

T. This Litigation

On April 27, 2020, Seller filed this litigation, seeking a decree of specific performance compelling Buyer to perform its obligations under the Sale Agreement. In its complaint, Seller claimed that Buyer could have locked in its financing before signing the Sale Agreement, but that "[o]n information and belief, [Buyer] believed it could obtain preferential rates and terms if it waited to lock in terms, and thus did not attempt to seek financing until February 2020." Dkt. 1 ¶ 81. That allegation was not truthful. Seller and its counsel knew that Buyer had planned to lock in debt financing before signing but that the belated disclosure of the Fraudulent Deeds caused the lenders to balk.

On May 3, 2020, Buyer gave notice that it was terminating the Sale Agreement based on Seller's failure to cure the breaches of contract that Buyer had identified on April 17. JX 4101. Buyer noted that the equity commitment letters automatically terminated as well and accordingly were no longer in effect. *Id.* at 1.

On May 8, 2020, the court heard argument on Seller's motion to expedite. During the hearing, Gibson Dunn doubled down on its story about Buyer taking a business risk by delaying financing. *See* Dkt. 57 at 5–6 ("The defendants bet big. They bet that they could get better terms if they waited and waited and negotiated and negotiated. And, lo and behold, they bet big and they lost big."). That was not true. Buyer wanted to lock in debt financing in August 2019. It was Anbang and Gibson Dunn who prevented Buyer from doing so by withholding information about the Fraudulent Deeds until the eleventh hour, and then making partial and misleading disclosures about the extent of the fraud.

The court granted the motion to expedite and scheduled a trial for August 2020. Buyer answered and filed counterclaims.

Discovery unfolded, with the parties engaging in Herculean efforts to collect and produce documents and conduct depositions in multiple languages and across multiple continents, primarily by remote means, during the COVID-19 pandemic. In response to a subpoena, DLA Piper represented that it had disengaged from representing the DRAA Petitioners and would not be appearing on their behalf in any action. JX 5061.

During discovery, Anbang and Gibson Dunn sought to avoid revealing what they knew about Hai Bin Zhou and the years of trademark litigation, the DRAA Agreement, and the discovery of the Fraudulent Deeds. [178] Buyer was forced to file four motions to compel to fight through Anbang and Gibson Dunn's objections, and Seller put additional objections at issue through a motion for protective order. [179] The court addressed the parties' competing arguments in a series of rulings that granted the motions in part. [180]

178 *See, e.g.*, Dkt. 4 at 3 ("The issues presented by this case are largely legal in nature, and resolution of AB Stable's claims will require limited discovery."); Dkt. 36 at 5 ("Defendants contend [their] counterclaims will require international discovery into 'who knew what, when,' and 'other parties'—presumably the fraudsters—'who have asserted interests in the Hotels.' This is nonsense." (citation omitted)); Dkt. 144 at 2 ("None of the sweeping discovery Defendants seek—regarding a decade's worth of trademark disputes, ... further information regarding the false deeds ... , and communications with a Chinese regulator—has anything to do with Defendants' ill-conceived claims."); *id.* at 5 ("when Plaintiff became aware of the fact that deeds had been falsely recorded for two of the Hotels ... is irrelevant" (emphasis omitted)); *id.* at 20 ("What Defendants are really asking is to open up wide-ranging discovery into 'all claims or disputes' with the DRAA Petitioners 'since January 2, 2011, related to the use of the Anbang name and/or the trademarks referenced in the DRAA Agreement' This is a fishing expedition: the requested information is irrelevant." (citation omitted) (emphasis omitted)); Dkt. 297 at 25–26 (Gibson Dunn arguing against any internal production from Anbang's counsel).

179 *See* Dkt. 129; Dkt. 303; Dkt. 373; Dkt. 391; Dkt. 408.

180 The discovery difficulties were not one-sided. Buyer took aggressive positions in discovery as well, most notably by delaying the production of documents from Greenberg Traurig. Seller was forced to file motions to compel of its own to challenge certain positions. *See* Dkt. 367; Dkt. 393. As with Buyer's motions, the court granted the motions in part.
The court appointed a discovery facilitator who provided invaluable assistance by promoting transparency, acting as an honest broker, and reducing the overall number of disputes. In addition, the court acknowledges the role of Delaware counsel, who fulfilled their obligations as officers of the court by working cooperatively, communicating regularly, and restraining the adversarial instincts of their forwarding counsel.

***46** On June 20, 2020, Anbang moved for entry of final judgment in the DRAA Chancery Action. [181] Anbang sought an order that would have made permanent the expansive relief granted in the DRAA January Order. By this point, both as a result of the contents of the DLA Letter and the course of discovery in this litigation, the court had become sufficiently concerned about Anbang and Gibson Dunn's lack of candor that the court was not willing to enter the broad relief requested. [182] The court entered a final order that provided narrower relief limited to the matters raised in the DRAA Chancery Action. *See* JX 4519 (the "DRAA Final Order"). [183]

181 JX 4403; *see* JX 4404.

182 *Compare* JX 4406 *with* JX 4521.

183 The DRAA Petitioners attempted to notice a series of appeals from the final judgment. Those appeals were all procedurally defective, and the Delaware Supreme Court rejected them. The DRAA Final Order has therefore become final.

Despite the court's concerns that Anbang and Gibson Dunn were not telling the whole truth, the court continued to believe there was a significant likelihood that the DRAA Petitioners had engaged in fraud. On July 21, 2020, the court and the judge who presided over the Delaware Superior Court actions referred the DRAA Petitioners to the Delaware Attorney General based on concerns that "crimes may have been committed in the State of Delaware." JX 4588 at 1. The court and the judge who presided over the Delaware Superior Court actions made clear that they "defer[red] completely" to the prosecutorial discretion of the Attorney General as to "what action, if any," to take. *Id.*

184 Although this decision does not reach Buyer's other arguments, some of them could have merit given my factual findings. Most notably, there is reason to think it would be inequitable to award specific performance, given that the root cause of the parties' difficulties is traceable to the initial decision by Anbang and Gibson Dunn not to disclose the Fraudulent Deeds earlier in the sale process, followed by misleading partial disclosures that fatally undermined their credibility. *See Turchi v. Salaman*, 1990 WL 27531, at *8 (Del. Ch. Mar. 14, 1990) (explaining that a request for a decree of specific performance "will always be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, by taking undue advantage of [its] position, or by any other means which are unconscientious." (quoting 2 John Norton Pomeroy, *Equity Jurisprudence* § 400, at 100–01 (5th ed. 1941))).

II. AN OVERVIEW OF THE LEGAL ANALYSIS

The briefs contain a deluge of legal arguments. Each side's goals, however, are straightforward. Seller seeks to force Buyer to close or, in the alternative, to keep Buyer's deposit plus interest and receive an award of attorneys' fees and expenses. Buyer seeks declarations that it was not required to close and that it validly terminated the Sale Agreement. Buyer seeks the return of its deposit plus interest, to recover transaction-related expenses as damages, and an award of attorneys' fees and expenses. As between Buyer and Seller, Buyer is generally the party seeking to establish propositions of fact or law, so this decision focuses primarily on Buyer's arguments.

Buyer's manifold legal theories can be grouped into three general categories: (i) contractual theories that rely on express provisions, (ii) contractual theories that rely on the implied covenant of good faith and fair dealing, and (iii) tort theories based on fraudulent inducement and post-signing fraud. Buyer also contends that the Sale Agreement should be rescinded based on unilateral mistake and that specific performance should not be ordered. The contractual theories that rely on express provisions are dispositive, so this decision does not delve into the other categories. [184]

***47** The express contractual theories remain diverse and plentiful. They too can be grouped into three board categories: (i) theories that relieved Buyer of its obligation to close, (ii) theories that allowed Buyer to terminate, and (iii) theories that enable Buyer to recover the deposit, its transaction costs, and its attorneys' fees and expenses. This decision addresses Buyer's theories in that order.

Because all of the issues addressed in this decision turn on express contractual provisions, the legal analysis relies on principles of contract interpretation. The elements of a claim for breach of contract are (i) a contractual obligation, (ii) a breach of that obligation by the defendant, and (iii) a causally related injury that warrants a remedy, such as damages or in an appropriate case, specific performance. *See WaveDivision Hldgs. v. Millennium Digit. Media Sys., L.L.C.*, 2010 WL 3706624, at *13 (Del. Ch. Sept. 17, 2010). When determining the scope of a contractual obligation, "the role of a court is to effectuate the parties' intent." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). Absent ambiguity, the court "will give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions." *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016) (internal quotation marks omitted). "Unless there is ambiguity, Delaware courts interpret contract terms according to their plain, ordinary meaning." *Alta Berkeley VI C.V. v. Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

III. BUYER'S OBLIGATION TO CLOSE

The first category of issues involves whether Buyer was obligated to perform at closing. Buyer offers a series of reasons why it was not obligated to perform, and those reasons fall into two groups. The first group implicates what this decision refers to as the DRAA Issues, which relate to the DRAA Agreement, the Fraudulent Deeds, the DRAA Chancery Action, the Delaware Judgments, the Alameda Action, and the California Judgment. The second group implicates what this decision refers to as the COVID Issues, which relate to the effects of the COVID-19 pandemic.

To excuse its failure to close, Buyer relies on the Title Insurance Condition, the Bring-Down Condition, and the Covenant Compliance Condition. For the Title Insurance Condition, Buyer only advances arguments based on DRAA Issues. For the Bring-Down Condition and the Covenant Compliance Condition, Buyer advances arguments based on both COVID Issues and DRAA Issues.

The Title Insurance Condition conditioned Buyer's obligation to close on Seller having obtained documentation sufficient to enable the Title Insurers to issue a policy of title insurance to Buyer in its capacity as the owner of the Hotels that either (i) did not contain an exception for the Fraudulent Deeds or (ii) contained an exception for the Fraudulent Deeds but expressly provided coverage through an endorsement. The Title Insurers have not issued title commitments that satisfy the Title Insurance Condition. The Title Insurers only have issued title commitments that contain the DRAA Exception, which is broad enough to exclude coverage for the Fraudulent Deeds. The Title Insurance Condition therefore failed, and Buyer was not obligated to close.

As noted, the outcome of the analysis of the Title Insurance Condition turns solely on the DRAA Issues. Having concluded that the DRAA Issues caused the Title Insurance Condition to fail, this decision does not reach Buyer's other arguments based on the DRAA Issues. [185]

185 Some of Buyer's other DRAA-related arguments have merit given my factual findings. Most notably, Buyer relies on covenants which required Seller to provide Buyer with notice of communications from governmental authorities, to use commercially reasonable efforts to eliminate impediments to closing, to keep Buyer reasonably informed about the Fraudulent Deeds, and to operate in the ordinary course of business. *See* SA §§ 5.1, 5.5(a), 5.5(d), 5.5(i), 5.10(a). Buyer has strong arguments that Seller did not fulfill these covenants in connection with the DRAA Issues, causing the Covenant Compliance Condition to fail. By contrast, Buyer's arguments about Seller's breaches of its representations are weaker, as those representations are highly technical, would have to be construed broadly to extend to the DRAA Issues, and require a variance from the as-represented condition that would be sufficient to qualify as a Material Adverse Effect. It is therefore less likely that the DRAA Issues caused a failure of the Bring-Down Condition. To reiterate, this decision has not reached these issues.

***48** For purposes of the COVID Issues, Buyer makes two arguments. Under the Bring-Down Condition, Buyer was not obligated to close if Seller's representations were not true and correct as of the closing date, unless "the failure to be so true and correct ... would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect." [186] The covered representations included the No-MAE Representation, in which Seller's represented that since July 31, 2019, the business of Strategic and its subsidiaries had not suffered a contractually defined "Material Adverse Effect." SA § 3.8.

186 SA § 7.3(a). This description simplifies the Bring-Down Condition, which contemplates that when the Sale Agreement provides that a representation by Seller must be true and correct as of a specific date, then for purposes of the Bring-Down Condition, "such representations and warranties shall be true and correct as of such specified date." SA § 7.3(a). This detail is not relevant to the representations analyzed in this case, so for simplicity, this decision refers to the representations being true and correct as of the closing date.

Buyer argues that the COVID-19 pandemic and its effects caused the No-MAE Representation to become inaccurate and the Bring-Down Condition to fail. The contractual definition of a Material Adverse Effect (the "MAE Definition") follows standard form, consisting of an initial definition followed by a series of exceptions. Assuming for purposes of analysis that the business of Strategic and its subsidiaries suffered an effect that was material and adverse, Seller proved that the cause of the effect fell within an exception to the MAE Definition for "natural disasters and calamities." Consequently, the effect could not constitute a Material Adverse Effect under the MAE Definition. The Bring-Down Condition therefore did not fail because of the effects of the COVID-19 pandemic.

Buyer also relies on the Covenant Compliance Condition, which makes it a condition to Buyer's obligation to close that "Seller shall have performed in [all] material respects all obligations and agreements and complied in all material respects with all covenants and conditions required by this Agreement." SA § 7.3(a). Seller's covenants included the Ordinary Course Covenant, which was a commitment that "the business of the Company and its Subsidiaries shall be conducted only in the ordinary course of business consistent with past practice in all material respects." SA § 5.1.

Buyer proved that Seller failed to comply with the Ordinary Course Covenant because the effects of the COVID-19 pandemic led to massive changes in the business of Strategic and its subsidiaries. As a result, the business of Strategic and its subsidiaries was not operated only in the ordinary course of business consistent with past practice in all material respects. The Covenant Compliance Condition therefore failed, and Buyer was not obligated to close.

A. The Allocation Of The Burden Of Proof For Purposes Of The Conditions

Under Delaware law, parties can allocate the burden of proof contractually.[187] In this case, the Sale Agreement did not do so explicitly, and its imprecise language did not do so implicitly. This decision therefore relies on common law principles to allocate the burden of proof.

187 *See, e.g.*, *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 739 n.60 (Del. Ch. 2008) ("Of course, the easiest way that the parties could evidence their intent as to the burden of proof would be to contract explicitly on the subject."); *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at *34 (Del. Ch. Apr. 29, 2005) ("The parties could have expressly allocated the burdens as a matter of contract, but they did not do so.").

***49** In disputes over contractual conditions, the *Restatement (Second) of Contracts* instructs courts to look to the nature of the condition at issue. If a condition must be satisfied before a duty of performance arises (formerly known as a condition precedent), then the burden of proof rests with the party seeking to enforce the obligation. If a condition would extinguish a party's duty of performance (formerly known as a condition subsequent), then the burden of proof rests with the party seeking to avoid the obligation.[188]

188 *See* *Restatement (Second) of Contracts* § 224 cmt. e (Am. L. Inst. 1981). The principles that govern the allocation of the burden of proving the non-occurrence of a condition may differ from the principles that apply in other contractual settings. For example, when a party seeks to exercise a termination right, this court has held that the party invoking the termination right bears the burden of establishing that the requirements for its exercise have been met. *Channel Medsystems, Inc. v. Bos. Sci. Corp.*, 2019 WL 6896462, at *37 (Del. Ch. Dec. 18, 2019).

When interpreting conditions in transaction agreements, Delaware decisions generally have not looked to the *Restatement* and the nature of the condition at issue.[189] They instead have jumped over the *Restatement* inquiry by treating the transaction agreement as an existing contractual obligation, then allocating the burden of proof to the party seeking to invoke the condition. The Delaware cases fall into two broad categories. The first involves conditions that ordinarily would be satisfied absent a departure from the status quo that existed at signing. The second involves conditions where non-satisfaction depends on proof of contractual non-compliance. Both categories involve conditions that are best understood as extinguishing a duty of performance.

189 The principal exception is *Shareholder Representative Services LLC v. Shire US Holdings, Inc.*, which explained the difference between the *Restatement*'s approach and Delaware precedent and grappled with the resulting tension. 2020 WL 6018738, at *17–19 (Del. Ch. Oct. 12, 2020) (considering whether the "Fundamental Circumstance Clause" was a condition precedent or condition subsequent and using *Restatement* framework). The other exception is *Hexion*, where the parties argued about whether a no-MAE condition was a condition precedent or a condition subsequent, and the court sidestepped the issue by characterizing MAE conditions as "strange

animals, *sui generis* among their contract clause brethren." *Hexion*, 965 A.2d at 739. The court ultimately allocated the burden of proof to the buyer. *Id.* at 739–40. That result "effectively treated the clause as a condition subsequent." Eric L. Talley, *On Uncertainty, Ambiguity, and Contractual Conditions*, 34 Del. J. Corp. L. 755, 800 (2009).

The representative example for the first category involves a buyer citing an MAE as a basis for non-performance. [190] Upon signing the transaction agreement, the buyer assumes an obligation to perform unless the seller suffers an MAE. If the status quo that existed at signing had continued, then the seller would be obligated to close. It is therefore logical to treat a no-MAE condition as one in which the existence of an MAE extinguishes the buyer's obligation to perform, such that the burden of proof rests with the buyer. Placing the burden on the buyer also requires the buyer to prove an affirmative fact, rather than forcing the seller to prove a negative. [191]

190 *See Akorn v. Fresenius Kabi AG*, 2018 WL 4719347, at *47 (Del. Ch. Oct. 1, 2018) ("Because Fresenius seeks to establish a General MAE to excuse its performance under the Merger Agreement, Fresenius bore the burden of proving that a General MAE had occurred."); *Hexion*, 965 A.2d at 739 ("[I]t seems the preferable view, and the one the court adopts, that absent clear language to the contrary, the burden of proof with respect to a material adverse effect rests on the party seeking to excuse its performance under the contract.").

191 *See, e.g.*, *Quantum Tech. P'rs IV, L.P. v. Ploom, Inc.*, 2014 WL 2156622, at *19 (Del. Ch. May 14, 2014) (allocating burden to prove public disclosure of information to the party relying on that exception to a confidentiality order, rather than requiring opposing party to prove that the information was not publicly disclosed); *Behrman v. Rowan Coll.*, 1997 WL 719080, at *2 (Del. Super. Ct. Aug. 29, 1997) (reallocating burden of proof to avoid requiring a party to prove a negative); *Wilm. Tr. Co. v. Culhane*, 129 A.2d 770, 773 (Del. Ch. 1957) (questioning allocation requiring a party to bear "the burden to prove a negative"). *See generally* 29 Am. Jur. 2d *Evidence* § 173 ("Courts generally do not require litigants to prove a negative, because it cannot be done. Thus, the affirmative of an issue has to be proved, and the party against whom the affirmative defense is asserted is not required to prove a negative." (footnote omitted)).

***50** The second category contains two illustrative examples, one involving a bring-down condition and another involving the interaction of a covenant compliance condition with an ordinary course covenant. This court has held that when a buyer claims that a bring-down condition failed because of the inaccuracy of a representation, then the buyer has asserted a theory analogous to a claim for breach of warranty and therefore bears the burden of proof. [192] This court also has held that when a buyer claims that a covenant compliance condition failed because the seller failed to operate its business in the ordinary course, then the buyer has asserted a theory analogous to a claim for breach of the underlying covenant and bears the burden of proof. [193] In both settings, the baseline assumption is contractual compliance; parties are assumed to make accurate representations and operate in the ordinary course. Unless the buyer can prove that the seller departed from the baseline of contractual compliance, then the buyer is obligated to close. It is therefore logical to treat these conditions as extinguishing the buyer's obligation to perform, such that the burden of proof rests on the seller. Allocating the burden in that fashion also requires the buyer to prove an affirmative fact rather than forcing the seller to prove a negative.

192 *See Akorn*, 2018 WL 4719347, at *62 (holding that where buyer claimed that bring-down condition failed because of a representation about regulatory compliance had become inaccurate, the buyer bore the burden of proof). The operation of burden for proving the failure of a bring-down condition parallels the assignment of the burden of proof in a case where, without such a condition, the buyer seeks to avoid performance by proving that one of the seller's representation was inaccurate. *See Frontier Oil*, 2005 WL 1039027, at *34 (assigning burden to party claiming that warranty was inaccurate; observing that "[t]o obtain relief for a breach of warranty, one would expect to be required to demonstrate an entitlement to that relief."); *id.* at *38 n.233 (same); *In re IBP Inc. v. Tyson Foods Inc.*, 789 A.2d 14, 53 (Del. Ch. 2011) (assigning burden of proof to party seeking to establish that representation was inaccurate because "a defendant seeking to avoid performance of a contract because of the plaintiff's breach of

warranty must assert that breach as an affirmative defense").

193 *See Akorn*, 2018 WL 4719347, at *82–83 (assigning burden of proof to buyer to show failure of condition that required seller to comply with all covenants where buyer asserted that seller had not complied with ordinary course covenant).

In the future, parties and courts can promote clarity by starting with the *Restatement* approach and asking explicitly whether the condition is one that must be satisfied before an obligation to perform arises or whether the condition extinguishes an existing obligation to perform. Because existing precedent has assigned the burden consistent with the outcome that the *Restatement* would suggest, future decisions can rely on those cases when assigning the burden for similar conditions. For conditions that Delaware courts have not yet addressed, relevant factors would include (i) whether the condition turns on a specific and easily verified fact, such as the receipt of regulatory clearance or a favorable stockholder approval, [194] (ii) whether the condition turns on a departure from what normally would occur between signing and closing, and (iii) which party would have to prove a negative. [195]

194 *See Hexion*, 955 A.2d at 739 ("Typically, conditions precedent are easily ascertainable objective facts, generally that a party performed some particular act or that some independent event has occurred.").

195 The principal interpretive difficulty is usually linguistic. Drafters of transaction agreements typically frame no-MAE conditions, bring-down conditions, and covenant compliance conditions as conditions that must be satisfied for closing to occur. That framing opens the door to the argument that satisfying the condition is necessary before the buyer's obligation to perform arises. But the use of conditional language is often not dispositive. "Conditions subsequent are often expressed using conditional language. For this reason, the difference between a condition precedent and a condition subsequent 'is one of substance and not merely of the form in which the provision is stated.' " *Shire*, 2020 WL 6018738, at *18 (quoting *Restatement*, *supra*, § 230 cmt. a). Drafters could nevertheless assist courts by framing conditions to use the language of extinguishment when they intend that outcome. It should be possible, for example, to frame the core bring-down condition to say something like, "If Seller's representations are not true and correct at the time of measurement, and the extent of the inaccuracy (individually or in the aggregate) is sufficient to make it reasonably likely that Seller has suffered or would suffer a Material Adverse Effect, then Buyer's obligation to perform at closing is extinguished."

***51** As noted, the issues in this case involve the Bring-Down Condition, the Covenant Compliance Condition, and the Title Insurance Condition. Consistent with precedent, Buyer bore the burden to prove that the Bring-Down Condition failed because it is a condition that would extinguish Buyer's obligation to perform. By signing the Sale Agreement, Buyer undertook an obligation to perform unless Seller's representations became so inaccurate that they would result in a Material Adverse Effect. Seller did not have to take any action to satisfy the Bring-Down Condition, and the baseline expectation was for Seller's representations to be accurate. Buyer therefore bore the burden of proving that a representation became sufficiently inaccurate to relieve Buyer of its obligation to perform.

One nuance flows from the structure of the MAE Definition, which generally requires an effect that is material and adverse, but which is subject to a series of exceptions. As a matter of hornbook law, "[a] party seeking to take advantage of an exception to a contract is charged with the burden of proving facts necessary to come within the exception." 29 Am. Jur. 2d *Evidence* § 173. Delaware decisions follow this rule. [196] Accordingly, Buyer had the burden to prove that Seller suffered an effect that was material and adverse. After that, Seller had the burden to prove that the source of the effect fell within an exception. *See Akorn*, 2018 WL 4719347, at *59 n.619.

196 *See, e.g.*, *Akorn*, 2018 WL 4719347, at *91 ("Akorn contends that Fresenius could not terminate the Merger Agreement because it breached both the Reasonable Best Efforts Covenant and the Hell-or-High-Water Covenant. Akorn bore the burden of proof on these issues because Akorn sought to invoke an exception to Fresenius's termination right."); *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022, 1070 (Del. Ch. 2004) ("Black bears the burden to establish that this contractual exception applies."); *see also, e.g.*,

> *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 1996 WL 111133, at *1 (Del. Super. Feb. 22, 1996) ("The undisputed application of Delaware law in an insurance coverage suit requires the insured ... to prove initially ... that the loss is within a policy's coverage provisions. Once the insured meets that burden, the burden shifts to the insurer to establish a policy exclusion applies."); *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 711 A.2d 45, 53–54 (Del. Super. 1995) (placing burden of proof on insured to prove exception to exclusion from coverage; noting that the insured had better access to information about whether the exception to the exclusion applied and was better positioned to prevent events that might trigger coverage).

The substance of the Covenant Compliance Condition reveals it also to be a condition where non-satisfaction extinguishes Buyer's obligation to perform. By signing the Sale Agreement, Buyer undertook an obligation to perform unless Seller failed to comply with its own contractual obligations. Unlike the Bring-Down Condition, the existence of contractual covenants meant that Seller was required to take action to comply with the Covenant Compliance Condition. Some of the underlying contractual covenants could operate as conditions that had to be satisfied to give rise to Buyer's obligation to perform; others could operate as conditions where non-fulfillment extinguished Buyer's obligation to perform. The analysis must extend to the underlying covenant.

In this case, Buyer contends that Seller failed to fulfill the Ordinary Course Covenant. Consistent with prior precedent, Buyer bore the burden of proving that Seller breached this covenant and caused the Covenant Compliance Condition to fail. The baseline contractual expectation was for Seller to operate in the ordinary course of business. By asserting a departure from the ordinary course, Buyer sought to prove the fact of a deviation. It is logical to require Buyer to bear the burden of proving that assertion. For purposes of the Ordinary Course Covenant, the Covenant Compliance Condition operates as a condition under which non-satisfaction extinguishes Buyer's obligation to close.

***52** Here, too, a nuance arises. Seller claims that to the extent it operated outside of the ordinary course, it was contractually obligated to do so to comply with other contractual requirements and legal obligations. As the party asserting that its actions fell within an exception to the Ordinary Course Covenant, Seller bore the burden of proving its position regarding compliance with competing contractual obligations.

The last condition is the Title Insurance Condition, which obligates Buyer to obtain documentation sufficient to enable the Title Insurers to provide insurance in a form that satisfied the condition. This provision fits the model of a condition that must be satisfied before a duty of performance arises, as it identifies specific items that Seller must obtain. Under the *Restatement* approach, Seller should have had to carry the burden of proving that it satisfied the Title Insurance Condition. The parties, however, approached the burden of proof as if it rested with Buyer, based on the proposition that Buyer relied on the failure of the condition to avoid its obligation to perform. This decision adopts that allocation, which does not affect the outcome in this case. Whether the issuance of title insurance containing the DRAA Exception satisfied the Title Insurance Condition is a question of law to be resolved based (i) on the plain language of the title commitments and (ii) undisputed facts about the DRAA Chancery Action, the Alameda Action, and the DRAA Agreement.

Notwithstanding the initial allocation of the burden of proof to Buyer, Seller bore the burden of proving its contention that Buyer took action that caused the Title Insurance Condition to fail. Under the *Restatement* framework, which Delaware has adopted, [197] "[w]here a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the nonoccurrence is excused." *Restatement, supra*, § 245. *See generally In re Anthem-Cigna Merger Litig.*, 2020 WL 5106556, at *90–91 (Del. Ch. Aug. 31, 2020) (discussing applicable principles). As the party seeking to show that Buyer caused the Title Insurance Condition to fail by breaching a contractual obligation, Seller bore the burden of proving both the breach of a contractual obligation and the requisite causal contribution.

197 *See Williams Cos. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 273 (Del. 2017); *WaveDivision*, 2010 WL 3706624, at *14–15.

The "contributed materially" standard is a common law rule, and parties "can by agreement vary the rules" as long as the replacement "is not invalid for unconscionability or on other grounds." *Restatement*, *supra*, § 346 cmt. a (citation omitted). Here, the parties agreed contractually to modify the "contributed materially" rule by substituting a requirement of causation. The Sale Agreement states,

> Frustration of Closing Conditions. No party may rely on the failure of any condition set forth in this Article VII to be satisfied if such failure was caused by such party's failure to use efforts to cause the Closing to occur as required [by] the terms hereof.

SA § 7.4. Under Section 7.4, Seller bore the burden of proving that Buyer's breach caused the Title Insurance Condition to fail.

B. The Bring-Down Condition

The Bring-Down Condition extinguished Buyer's obligation to close if Seller's representations were not true and correct as of the closing date, except "where the failure to be so true and correct ... would not, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect." SA § 7.3(a). This section considers whether the Bring-Down Condition failed due to the inaccuracy of the No-MAE Representation, in which Seller represented that since July 31, 2019, "there have not been any changes, events, state of facts or developments, whether or not in the ordinary course of business that, individually or in the aggregate, have had or would reasonably be expected to have a Material Adverse Effect." SA § 3.8(b).

***53** The combination of the No-MAE Representation and the Bring-Down Condition creates a double-materiality problem, which here takes the form of a double-MAE problem. The No-MAE Representation already incorporates the concept of a Material Adverse Effect. The Bring-Down Condition then measures deviation from the as-represented condition using the concept of a Material Adverse Effect. To solve this problem, the Bring-Down Condition contains a clause known as a "materiality scrape,"[198] which provides that compliance with the Bring-Down Condition is measured "without giving effect to any limitation of qualification as to 'materiality' (including the word 'material'[ ] or 'Material Adverse Effect' set forth therein." SA § 7.3(a).

198 *See* Lou R. Kling & Eileen T. Nugent, *Negotiated Acquisitions of Companies, Subsidiaries and Divisions* § 14.02[3], at 14-12 to -13 (2020 ed.) (discussing materiality scrape as a solution to the double materiality problem).

For purposes of evaluating whether the Bring-Down Condition failed, the materiality scrape eliminates the phrase "would reasonably be expected to have a Material Adverse Effect" from Section 3.8(b), resulting in a flat representation that since July 31, 2019, "there have not been any changes, events, state of facts or developments, whether or not in the ordinary course of business." The Bring-Down Condition then reintroduces the concept of a Material Adverse Effect by providing that any deviations from Seller's as-represented condition are acceptable so long as they "would not ... reasonably be expected to have a Material Adverse Effect." The end result is a condition that turns on whether there have been "any changes, events, state of facts or developments, whether or not in the ordinary course of business that, individually or in the aggregate, have had or would reasonably be expected to have a Material Adverse Effect." Such is the verbal jujitsu of transaction agreements.

The MAE Definition defines "Material Adverse Effect" as follows:

> "Material Adverse Effect" means any event, change, occurrence, fact or effect that would have a material adverse effect on the business, financial condition, or results of operations of the Company and its Subsidiaries, taken as a whole,
>
> other than any event, change, occurrence or effect arising out of, attributable to or resulting from
>
> (i) general changes or developments in any of the industries in which the Company or its Subsidiaries operate,
>
> (ii) changes in regional, national or international political conditions (including any outbreak or escalation of hostilities, any acts of war or terrorism or any other national or international calamity, crisis or emergency) or in general economic, business, regulatory, political or market conditions or in national or international financial markets,
>
> (iii) natural disasters or calamities,
>
> (iv) any actions required under this Agreement to obtain any approval or authorization under applicable antitrust or competition Laws for the consummation of the transactions contemplated hereby,

(v) changes in any applicable Laws or applicable accounting regulations or principles or interpretations thereof,

(vi) the announcement or pendency of this Agreement and the consummation of the transactions contemplated hereby, including the initiation of litigation by any Person with respect to this Agreement or the transactions contemplated hereby, and including any termination of, reduction in or similar negative impact on relationships, contractual or otherwise, with any customers, suppliers, distributors, partners or employees of the Company and its Subsidiaries due to the announcement and performance of this Agreement or the identity of the parties to this Agreement, or the performance of this Agreement and the transactions contemplated hereby, including compliance with the covenants set forth herein,

***54** (vii) any action taken by the Company, or which the company causes to be taken by any of its Subsidiaries, in each case which is required or permitted by or resulting from or arising in connection with this Agreement,

(viii) any actions taken (or omitted to be taken) by or at the request of the Buyer, or

(ix) any existing event, occurrence or circumstance of which the Buyer has knowledge as of the date hereof.

For the avoidance of doubt, a Material Adverse Effect shall be measured only against past performance of the Company and its Subsidiaries, and not against any forward-looking statements, financial projections or forecasts of the Company and its Subsidiaries.

SA § 1.1 (formatting added). [199]

199 The MAE Definition is obviously wordy and full of synonyms. For simplicity, except where the additional terminology advances the analysis, this decision abbreviates the multi-word phrases that appear in the definition. Thus, this decision substitutes "effect" for the lengthier phrase "event, change, occurrence or effect." It substitutes "Strategic" or "the business of Strategic" or for the "business, financial condition, or results of the operations of the Company and its Subsidiaries, taken as a whole." And it substitutes "resulting from" for "arising out of, attributable to or resulting from." No change in meaning is intended, and readers may refer back to the longer phrases for comfort.

The MAE Definition adheres to the general practice of defining a "Material Adverse Effect" self-referentially as "a material adverse effect." [200] Also consistent with general practice, the definition follows the basic statement of what constitutes an MAE with a list of exceptions. [201] Because of these exceptions, if an effect occurs that is both material and adverse and yet results from a cause falling within one of the exceptions, then that effect—despite being material and adverse—is not a contractually defined "Material Adverse Effect."

200 *See Akorn*, 2018 WL 4719347, at *52 ("[T]he MAE definition adheres to the general practice and defines 'Material Adverse Effect' self-referentially as something that 'has a material adverse effect.' "); *Frontier Oil*, 2005 WL 1039027, at *33 ("It would be neither original nor perceptive to observe that defining a 'Material Adverse Effect' as a 'material adverse effect' is not especially helpful."); Y. Carson Zhou, Essay, *Material Adverse Effects as Buyer-Friendly Standard*, 91 N.Y.U. L. Rev. Online 171, 173 (2016), http:// www.nyulawreview.org/sites/default/files/NYULawReviewOnline-91-Zhou.pdf (noting that in the typical MAE provision, the core concept of materiality is "left undefined"); Steven M. Davidoff & Kristen Baiardi, *Accredited Home Lenders v. Lone Star Funds: A MAC Case Study* 17 (Wayne State Univ. L. Sch. Legal Stud. Rsch. Paper Series, Paper No. 08-16, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1092115 ("MAC clauses are typically defined in qualitative terms and do not describe a MAC in quantitative terms."); Albert Choi & George Triantis, *Strategic Vagueness in Contract Design: The Case of Corporate Acquisitions*, 119 Yale L.J. 848, 854 (2010) ("[T]he typical MAC provision is not quantitative and remains remarkably vague."); Andrew A. Schwartz, *A "Standard Clause Analysis" of the Frustration Doctrine and the Material Adverse Change Clause*, 57 UCLA L. Rev. 789, 826 (2010) ("A few MAC clauses include a quantitative definition of materiality, but the overwhelming majority offer no definition for the key term 'material.' " (footnote omitted)); Kenneth A.

Adams, *A Manual of Style for Contract Drafting* 229 (4th ed. 2017) [hereinafter *Contract Drafting*] ("[Q]uantitative guidelines are little used."). One commentator sees no reason to criticize the MAE definition for its self-referential quality. *See* Kenneth A. Adams, *A Legal-Usage Analysis of "Material Adverse Change" Provisions*, 10 Fordham J. Corp. & Fin. L. 9, 22 ("It has been suggested that there is some circularity or tautology involved in using the phrase material adverse change in the definition of MAC.... [I]n contracts it is routine, and entirely appropriate, for a definition to include the term being defined." (footnotes omitted)); Adams, *Contract Drafting*, *supra*, at 169 ("Dictionaries shouldn't use in a definition the term being defined, as that constitutes a form of circular definition.... In a contract, a defined term simply serves as a convenient substitute for the definition, and only for that contract. So repeating a contract defined term in the definition is unobjectionable."). Professor Robert Miller has provided a helpful set of terminology for analyzing MAE definitions. *See* Robert T. Miller, *Material Adverse Effect Clauses and the COVID-19 Pandemic* 30–31 (Univ. Iowa Coll. L. Legal Stud. Rsch. Paper, No. 2020-21, 2020) [hereinafter Miller, *COVID-19*].

201 *See* Miller, *COVID-19*, *supra*, at 4 ("After [the] Base Definition, there typically follows a list of exceptions ... that remove from the definition adverse changes or events arising from the materialization of particular kinds of risks."); Robert T. Miller, *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements*, 50 Wm. & Mary L. Rev. 2007, 2047 (2009) [hereinafter *Deal Risk*] ("From this definition [of a Material Adverse Effect], one or more exceptions ... are then usually made ...."); Kling & Nugent, *supra*, § 11.04[9], at 11-61 ("Sellers often seek to negotiate certain generic exceptions to the no material adverse change representation, in addition to any specific issues they might be aware of."); John C. Coates IV, *M&A Contracts: Purposes, Types, Regulation and Patterns of Practice*, *in* Research Handbook on Mergers and Acquisitions 29, 48 (Claire A. Hill & Steven Davidoff Solomon, eds., 2015) (describing the "many and increasing exceptions to MACs"); JX 4549 ¶ 59 [hereinafter Coates Report] ("Generally speaking, MAE clauses have two or three components – (1) the basic definition and (2) exclusions, and in many agreements, (3) exceptions to the exclusions.").

***55** Buyer asserts that Strategic suffered a Material Adverse Effect due to the consequences of the COVID-19 pandemic. The parties debated at length whether the effect was material and adverse. To that end, both sides amassed factual evidence, expert analyses, and arguments in favor of their positions. They also debated at length whether the effect fell within an exception.

Ordinarily, this court would determine first whether Strategic suffered an effect that was sufficiently material and adverse to meet the strictures of Delaware case law. *See Hexion*, 965 A.2d at 736–38. At times, however, it is more straightforward to determine whether the effect was attributable to a cause that fell within one of the exceptions. *See Genesco, Inc. v. The Finish Line, Inc.*, 2007 WL 4698244 (Tenn. Ch. Dec. 27, 2007) ("Having concluded that [the seller] fits within one of the MAE carve-outs, it is not necessary for the Court to decide whether an MAE has occurred."). This is one of those cases.

This decision assumes for purposes of analysis that Strategic suffered an effect due to the COVID-19 pandemic that was sufficiently material and adverse to satisfy the requirements of Delaware case law. Based on that assumption, the burden rested with Seller to prove that the effect fell within at least one exception. *See* Part III.A, *supra*. For the reasons that follow, Seller carried its burden of proof.

1. The Potential Exceptions

To argue that the effects of the COVID-19 pandemic did not constitute a contractually defined Material Adverse Effect, Seller relies on four exceptions:

- exception (i) for "general changes or developments in any of the industries in which the Company or its Subsidiaries operate,"
- exception (ii) for "changes in regional, national or international political conditions (including any outbreak or escalation of hostilities, any acts of war or terrorism or any other national or international calamity, crisis or emergency) or in general economic, business, regulatory, political or market conditions or in national or international financial markets,"
- exception (iii) for "natural disasters or calamities," and

• exception (v) for "changes in any applicable Laws."

Dkt. 467 at 73–74 (quoting SA § 1.1).

Notably, none of these exceptions uses the word "pandemic." None of the other exceptions in the MAE Definition use the term "pandemic" either. Buyer fixates on this omission and argues that without an explicit reference to "pandemic," the risk of a pandemic remained with Seller. [202]

202 The same is true for close synonyms of "pandemic," such as "epidemic," "disease," or "health crisis." When referring to "pandemics," this decision uses that term broadly to incorporate its close synonyms as well.

Seller initially responds that exceptions (i), (ii), and (v) apply even without an express reference to "pandemic." Seller argues, for example, that exception (i) applies because Strategic's business suffered due to a general change in the hotel industry, namely a significant drop-off in demand. In response, Buyer returns to the absence of an explicit exception for "pandemic." According to Buyer, the court must determine the root cause of the MAE. Buyer argues that if an exception does not explicitly refer to the root cause, then it is not implicated. [203] Translated for purposes of exception (i), Buyer argues that the root cause of the drop-off in demand was not a general change in the hotel industry, such as a newfangled type of hotel, but rather the COVID-19 pandemic. As Buyer sees it, exception (i) therefore does not apply, and the question remains whether any exception specifically refers to a pandemic. [204]

203 *See* Dkt. 470 at 51 ("Seller wrongly relies on exclusions (i), (ii) and (v) for general changes or developments in [Strategic's industry], changes in 'general economic, business, regulatory, political or market conditions,' and changes in applicable Laws.... Seller cannot meet its burden by arguing ... that the dramatic decline in demand that affected the Company's results *did* result from such changes." (citation and internal quotation marks omitted)).

204 *See* Dkt. 463 at 93–94 ("The COVID-19 pandemic indisputably did not arise out of, is not attributable to, and did not result from general changes or developments in any of the industries in which the Company or its Subsidiaries operate." (alterations and internal quotation marks omitted)). Professor Miller has suggested that courts may need to parse causes when applying MAE exceptions. *See* Miller, *COVID-19*, *supra*, at 22 ("[I]n evaluating the adverse effects suffered by a company in the current pandemic, it may be important to attempt to separate adverse effects arising (a) proximately from the COVID-19 pandemic itself, from (b) effects arising proximately from governmental orders suspending or curtailing the company's operations and only remotely from COVID-19, and from (c) effects arising proximately from actions taken by the company itself in response to COVID-19 or governmental lockdown orders or both."). Professor Miller also anticipated and argued against a root-cause argument similar to Buyer's. *See id.* at 25 ("Conceivably, if a company is adversely affected by a governmental lockdown, an acquirer could argue that the materializing risk is not really a change in law but the underlying COVID-19 pandemic, and thus if pandemic risks are not shifted to the acquirer by the agreement, then all of the risk remains with the seller. In my opinion, that argument should fail.").

***56** Buyer's argument runs contrary to the plain language of the MAE Definition. The definition does not require a determination of the root cause of the effect. The definition lists nine categories of effects, which are separated by the word "or." Section 9.5 of the Sale Agreement, titled "Interpretation," provides that "[t]he term 'or' is not exclusive." The use of "or" in its non-exclusive sense means that each exception applies on its face, not based on its relationship to any other exception or some other root cause.

Buyer's interpretation of these exceptions also contradicts the plain language of the MAE Definition because it amounts to an implicit exclusion. In substance, Buyer's interpretation is the equivalent of language stating, "provided, however, that exceptions (i), (ii), and (v) shall not apply unless the cause of any event that otherwise would fall within those exceptions is itself subject to an exception." Parties can contract for exclusions from the exceptions. In fact, parties typically agree to an exclusion for any event that otherwise would fall within an exception but has a disproportionate effect on the seller—an exclusion that is absent from the definition in this case. [205] Here, the parties did not agree to any exclusions. [206]

205 *See* ABA Mergers & Acqs. Comm., *Model Merger Agreement for the Acquisition of a Public Company* 238, 242 (2011) [hereinafter *Model Merger Agreement*] (explaining that a standard exclusion from the buyer's acceptance of general market or industry risk returns the risk to the seller when the seller's business is uniquely affected, which is accomplished by having the relevant exceptions "qualified by a concept of disproportionate effect."); Kling & Nugent, *supra*, § 11.04[9], at 11-61 n.106 ("Often there is an exception to the exception, requiring that the impact not be disproportionate to the company relative to other participants in the industry or to other participants in the industry in the geographical areas where the company operates."); Miller, *COVID*-19, *supra*, at 5–6 ("MAE Exceptions related to systematic risks are typically further qualified by language that excludes from the exception, and thus shifts back to the company, systematic risks to the extent that they adversely affect the company disproportionately relative to some control group of companies, generally other companies operating in the same industries ...."); Miller, *Deal Risk*, *supra*, at 2047–48 ("In some agreements, exceptions ... are then further qualified so that events otherwise falling within the exception ... will nevertheless count as MACs after all if they affect the company disproportionately relative to some control group, such as companies operating in the same industry ...."); *see also* Choi & Triantis, *supra*, at 867 ("The most common carve outs remove from the MAC definition changes in the general economic, legal, or political environment, and conditions in the target's industry, except to the extent that they have 'disproportionate' effects on the target.").

206 Buyer's root-cause argument also effectively treats the other potentially applicable exceptions as indicator risks. *See* Miller, *COVID-19*, *supra*, at 25 (noting that "the distinction involved in the suggested argument .... is exactly the distinction that appears in MAE Exceptions related to indicator risks"). An indicator risk is an event that signals that an MAE may have occurred, such as a drop in the seller's stock price, a credit rating downgrade, or a failure to meet a financial projection. *See* Miller, *Deal Risk*, *supra*, at 2071–72. MAE definitions often contain exceptions for indicator risks, and those exceptions are typically qualified by exclusionary language, which makes clear that the exceptions do not foreclose the underlying cause of the negative events from being used to establish an MAE, unless it otherwise falls within a different carve-out. *See* *Akorn*, 2018 WL 4719347, at *49–51 (describing indicator risks and analyzing their use in the MAE definition at issue); Miller, *Deal Risk*, *supra*, at 2072, 2082–83 (discussing indicator risks). The fact that parties typically call out indicator risks implies that if the parties intended an exception to be read as an indicator risk, then the exception would say so explicitly. *See* Miller, *COVID-19*, *supra*, at 25 ("MAE Exceptions related to indicator risks ... almost always expressly distinguish between, for example, a downgrade of the company's debt securities and the underlying causes for such a downgrade. This strongly suggests that if an MAE exception for changes in law was to be read as involving a distinction between the event itself and the underlying cause of the event, then the agreement would be explicit on this point." (footnote omitted)). This rationale provides yet another reason to reject the root-cause argument.

***57** Although the plain language of the MAE Definition forecloses Buyer's argument, Buyer's reasoning helpfully concentrates on a single exception. According to Buyer, under its root-cause approach, the only exception that could encompass the COVID-19 pandemic is exception (iii), which applies to "natural disasters or calamities." *See* Dkt. 463 at 95–98; Dkt. 470 at 53–54. Buyer maintains that the COVID-19 pandemic is not a natural disaster or calamity, but Buyer agrees that if it were, then that exception would apply. It would not be necessary, as with the other exceptions, to look for some other root cause. This decision therefore examines exception (iii) to determine whether it covers the effects of the COVID-19 pandemic.

2. "Natural Disasters Or Calamities"

As noted, exception (iii) provides that if Strategic suffers an effect that is material and adverse but resulted from a "natural disaster" or a "calamity," then the resulting effect does not qualify as a contractually defined "Material Adverse Effect." Under a plain reading of the MAE Definition, the exception for "calamities" encompasses the effects that resulted from the COVID-19 pandemic, excluding the pandemic's effects from the MAE Definition.

a. The Plain Meaning Of "Natural Disasters Or Calamities"

When assessing plain meaning, Delaware courts look to dictionaries.[207] The dictionary meaning of "calamity" encompasses the COVID-19 pandemic.

207 *In re Solera Ins. Coverage Appeals*, 2020 WL 6280593, at *9 (Del. Oct. 23, 2020) ("This Court often looks to dictionaries to ascertain a term's plain meaning."); *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) ("Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract.").

Black's Law Dictionary defines "calamity" as

> A state of extreme distress or misfortune, produced by some adverse circumstance or event. Any great misfortune or cause of loss or misery, often caused by natural forces (*e.g.*, hurricane, flood, or the like). *See* Act of God; Disaster.

Calamity, Black's Law Dictionary (6th ed. 1990). A vernacular definition of "calamity" is "a serious accident or bad event causing damage or suffering."[208] The following example illustrates the proper vernacular use of calamity: "A series of calamities ruined them—floods, a failed harvest, and the death of a son."[209]

208 *Calamity*, Cambridge English Dictionary, https://dictionary.cambridge.org/dictionary/english/calamity (last visited Nov. 21, 2020); *accord Calamity*, Merriam-Webster, https://www.merriamwebster.com/dictionary/calamity (last visited Nov. 21, 2020) ("a disastrous event marked by great loss and lasting distress and suffering" or "a state of deep distress or misery caused by major misfortune or loss"); *Calamity, Oxford English Dictionary Online* (2020) ("1. The state or condition of grievous affliction or adversity; deep distress, trouble, or misery, arising from some adverse circumstance or event. 2. A grievous disaster, an event or circumstance causing loss or misery; a distressing misfortune.").

209 *Calamity*, *Cambridge English Dictionary*, https://dictionary.cambridge.org/dictionary/english/calamity (last visited Nov. 21, 2020).

The COVID-19 pandemic fits within the plain meaning of the term "calamity." Millions have endured economic disruptions, become sick, or died from the pandemic.[210] COVID-19 has caused human suffering and loss on a global scale, in the hospitality industry,[211] and for Strategic's business.[212] The COVID-19 outbreak has caused lasting suffering and loss throughout the world.

210 *See* JX 3132 at 3 ("The global economy is now in recession, and we forecast a 1.1% [year-over-year] decline in global GDP this year, the sharpest decline since [World War II]."); JX 4535 (timeline of the COVID-19 pandemic including unemployment, infections and deaths); JX 4826 at 3 (reporting 1.5 million cases and 92,000 deaths in the United States as of May 20, 2020); JX 5261 at 1 ("COVID-19's unprecedented adverse shock to the economy brought an end to the longest economic expansion in U.S. history.").

211 *See, e.g.*, JX 3443 at 1 ("In the wake of the coronavirus pandemic, few industries have fallen as far and as fast as tourism.").; JX 4271 at 1 ("We have never seen this level of illiquidity in the hotel market. It is effectively a frozen marketplace."); JX 4600 at 5–10 (detailing the impacts of COVID-19 on various hotel operators); JX 4853 ¶ 55 ("COVID-19 has affected every sector across the globe, and the hotel industry is among the hardest hit." (internal quotation marks omitted)); JX 5116 at 1 ("[W]e have not as an industry experienced anything like this before."); Fischel Tr. 1361 (agreeing that COVID-19 caused "a dramatic decline in the demand for hotel rooms"); Tantleff Dep. 41 (stating that COVID-19 "has had a widespread impact on the hotel industry in general").

212 *See* JX 4480 (financial statements showing sharp decline in Strategic's operating profit); JX 4730 at 12 [hereinafter Lesser Report] (comparing Strategic's post-COVID-19 performance with that of its competitors); Lesser Tr. 1283–84 (stating that Strategic's operations "were dramatically negatively impacted by the pandemic").

***58** Buyer's argument against the scope of the term "calamity" does not turn on its meaning, but rather on the meaning of "natural disasters." Buyer invokes the canon of *noscitur a sociis*, which means that "a word in a contract is to be read in light of the words around it." Dkt. 463 at 96 (quoting *Smartmatic Int'l Corp. v. Dominion Voting Sys. Int'l Corp.*, 2013 WL 1821608, at *10 (Del. Ch. May 1, 2013)). Buyer asserts that because the word "calamity" appears in the phrase "natural disasters or calamities," it must be read as referring to phenomena that have features similar to natural disasters.

Black's Law Dictionary does not define "natural disaster." A vernacular definition is a "a sudden and terrible event in nature (such as a hurricane, tornado, or flood) that usually results in serious damage and many deaths."[213]

213 *Natural disaster*, Merriam-Webster, https://www.merriamwebster.com/dictionary/natural%20disaster (last visited Nov. 21, 2020); *accord Natural disaster*, Cambridge English Dictionary, https://dictionary.cambridge.org/dictionary/english/natural-disaster (last visited Nov. 21, 2020) ("a natural event such as a flood, earthquake, or tsunami that kills or injures a lot of people").

The COVID-19 pandemic arguably fits this definition as well. It is a terrible event that emerged naturally in December 2019, grew exponentially, and resulted in serious economic damage and many deaths.[214]

214 Some individuals, concerned about conspiracies, have suggested that humans created COVID-19 as a bioweapon. If true, that could undermine its status as a *natural* disaster. The record in this case does not support a finding that the virus was anything other than a natural product of germ evolution.

Buyer's contrary interpretation depends on a narrower interpretation of "natural disaster." According to Buyer, natural disasters share some or all of three features: (i) they are generally sudden, singular events; (ii) they are usually attributable to the four classical elements of nature (earth, water, fire, and air), as in the cases of earthquakes, floods, wildfires, and tornados; and (iii) they generally cause direct damage to physical property. Dkt. 463 at 96. Buyer invokes *noscitur a sociis* to contend that the term "calamities" should be understood as having similar limitations. *Id.* It therefore should encompass only sudden, single events that threaten direct damage to physical property, such as "an oil-well blowout or the collapse of a building due to structural defects." Dkt. 463 at 97. According to Buyer, the COVID-19 pandemic does not qualify as a calamity under this definition because it spread over time, was not attributable to the classical elements of nature, and harmed humans rather than property.

Buyer's argument is creative but unconvincing. Buyer has identified three characteristics that describe some natural disasters, but not all. A natural disaster need not be sudden—drought conditions develop and persist over years, and the ultimate natural disaster of climate change has developed over decades. And although many natural disasters result from the four earthly elements, others do not. The harm from a meteor strike or massive solar flare could qualify as a natural disaster, but would not have an earthly source. There is also no reason to prioritize property damage over the suffering of living beings.

Buyer's argument also depends on using *noscitur a sociis* to yoke "calamities" to "natural disasters," but that interpretative canon only applies when a contractual term is ambiguous. *Zimmerman v. Crothall*, 2012 WL 707238, at *7 (Del. Ch. Mar. 5, 2012). The term "calamities" is not ambiguous. And when the doctrine applies, its principal function is to imbue a collective term with the content of other terms in a list. *Del. Bd. of Nursing v. Gillespie*, 41 A.3d 423, 427 (Del. 2012). Thus, if an agreement gave a broker the exclusive right to sell a farm's "oranges, lemons, grapefruit, and other fruit," a court might rely on the doctrine to interpret "other fruit" to mean familiar types of citrus fruit and exclude melons, pineapples, and durians.[215] The phrase "natural disasters and calamities" does not fit this model. And ultimately, a canon of interpretation like *noscitur a sociis* serves as aid to interpretation; it does not mandate a particular outcome.

215 *See, e.g.*, *id.* (interpreting "any other person" in light of "specifically enumerated professionals" in

the preceding list); *cf.* Adams, *Contract Drafting*, *supra*, at 360 (providing citrus fruit example).

***59** The plain language of the term "calamities" therefore controls. It encompasses the COVID-19 pandemic and its effects.

b. The Structure Of The Definition Of "Material Adverse Effect"

In addition to the dictionary meaning of "calamities," the structure and content of the MAE Definition point in favor of a plain-language interpretation that encompasses the COVID-19 pandemic. From a structural standpoint, MAE definitions allocate risk through exceptions and exclusions from exceptions.[216] The typical MAE clause allocates general market or industry risk to the buyer and company-specific risk to the seller.[217] The standard MAE provision achieves this result by placing the general risk of an MAE on the seller, and then using exceptions to reallocate specific categories of risk to the buyer.[218] Exclusions from the exceptions return risks to the seller. As noted previously, one standard exclusion applies when a particular event has a disproportionate effect on the seller's business.[219] Both MAE exceptions and disproportionality exclusions have become increasingly prevalent.[220]

216 *See* Miller, *Deal Risk*, *supra*, at 2013 n.7 ("There is virtually universal agreement, among both practitioners and academics, that MAC clauses allocate risk between the parties."); Gilson & Schwartz, *supra*, at 339–54 (analyzing how MAE clauses allocate risk).

217 Zhou, *supra*, at 173; *accord* Choi & Triantis, *supra*, at 867 ("The principal purpose of carve outs from the definition of material adverse events or changes seems to be to remove systemic or industry risk from the MAC condition, as well as risks that are known by both parties at the time of the agreement."). "A possible rationale" for this allocation "is that the seller should not have to bear general and possibly undiversifiable risk that it cannot control and the buyer would likely be subject to no matter its investment." Davidoff & Baiardi, *supra*, at 15; *see also* Gilson & Schwartz, *supra*, at 339 (arguing that "an efficient acquisition agreement will impose endogenous risk on the seller and exogenous risk on the buyer"). Another likely explanation is that when a business risk is "preventable at a cost less than the expected cost of the loss if the risk materializes[,] ... the efficient solution is to take precautions to forestall the risk," and the seller ordinarily "will have a clear cost advantage over the [buyer] to forestall this risk." Robert T. Miller, *Canceling the Deal: Two Models of Material Adverse Change Clauses in Business Combination Agreements*, 31 Cardozo L. Rev. 99, 160–61 (2009). As with any general statement, exceptions exist, and "different agreements will select different exogenous risks to shift to the counterparty, and in stock-for-stock and cash-and-stock deals, parties may shift different exogenous risks to each other." Miller, *Deal Risk*, *supra*, at 2070.

218 *See* Miller, *Deal Risk*, *supra*, at 2073 ("Because of the drafting conventions used in MAC Definitions—all the risks are on the [seller] except for those shifted to the [buyer] by the MAC Exceptions—this class of risks would, strictly speaking, probably be best defined negatively."); Schwartz, *supra*, at 822 ("[T]he risk of a target MAC resulting from a carved-out cause is allocated to the acquirer, while the risk of a target MAC resulting from any other cause is allocated to the target."). *See generally* *Hexion*, 965 A.2d at 737 ("The plain meaning of the carve-outs found in the [MAE clause's] proviso is to prevent certain occurrences which would *otherwise* be MAE's being found to be so."); ABA Mergers & Acqs. Comm., *Model Stock Purchase Agreement with Commentary* 33–34 (2d ed. 2010) [hereinafter *Model Stock Purchase Agreement*] (discussing exceptions as a way for sellers to narrow MAE provisions).

219 *Model Merger Agreement*, *supra*, at 242; *see* Kling & Nugent, *supra*, § 11.04[9], at 11-61 n.106; Miller, *COVID-19*, *supra*, at 5. "For example, a buyer might revise the carve-out relating to industry conditions to exclude changes that disproportionately affect the target as compared to other companies in the industries in which such target operates." *Model Merger Agreement*, *supra*, at 242; *accord* Miller, *Deal Risk*, *supra*, at 2048; *see* Choi & Triantis, *supra*, at 867 ("The most common carve outs remove from the MAC

definition changes in the general economic, legal, or political environment, and conditions in the target's industry, except to the extent that they have 'disproportionate' effects on the target.").

220 *See* Nixon Peabody LLP, *MAC Survey NP 2019 Report*, at 2 (2019) [hereinafter *2019 MAC Survey*], https://www.nixonpeabody.com/ideas/articles/2019/11/19/2019-macsurvey (reporting an "increase in MAC exceptions in the years since the [Global Financial Crisis]). *Compare* Gilson & Schwartz, *supra*, at 351 (0% of deals in 1993, 0% of deals in 1995, and 17% of deals in 2000 had disproportionality exclusions), *with* Nixon Peabody LLP, *2019 MAC Survey*, *supra*, at 7 (87% of agreements had disproportionality exclusions).

***60** For purposes of finer-grained analysis, the risks that parties address through exceptions can be divided into four categories: systematic risks, indicator risks, agreement risks, and business risks. *See generally* Miller, *Deal Risk*, *supra*, at 2071–91.

- Systematic risks are "beyond the control of all parties (even though one or both parties may be able to take steps to cushion the effects of such risks) and ... will generally affect firms beyond the parties to the transaction." [221]

- Indicator risks signal that an MAE may have occurred. For example, a drop in the seller's stock price, a credit rating downgrade, or a failure to meet a financial projection would not be considered adverse changes, but would evidence such a change. [222]

- "Agreement risks include all risks arising from the public announcement of the merger agreement and the taking of actions contemplated thereunder by the parties," such as potential employee departures, *Id.* at 2087.

- Business risks are those "arising from the ordinary operations of the party's business (other than systematic risks), and over such risks the party itself usually has significant control." *Id.* at 2073. "The most obvious" business risks are those "associated with the ordinary business operations of the party—the kinds of negative events that, in the ordinary course of operating the business, can be expected to occur from time to time, including those that, although known, are remote." *Id.* at 2089.

Generally speaking, the seller retains the business risk. The buyer assumes the other risks. [223]

221 Miller, *Deal Risk*, *supra*, at 2071; *see* Richard A. Brealey & Stewart C. Myers, *Principles of Corporate Finance* 168 & n.22 (7th ed. 2003) (explaining that market risk, also known as systematic risk, "stems from the fact that there are ... economywide perils that threaten all businesses").

222 Miller, *Deal Risk*, *supra*, at 2072, 2082–83.

223 *See, e.g.*, *id.* at 2073 (explaining that "(a) systematic risks and agreement risks are usually, but not always, shifted to the [buyer], (b) indicator risks are so shifted in a significant minority of cases, and (c) business risks are virtually always assigned to the party itself"); *accord* Coates Report ¶ 11(f) ("MAE clauses customarily ... exclude 'systematic' risks (such as economic recessions) and ... include non-systematic risks ...."); JX 4602 ¶ 6 [hereinafter Davidoff-Solomon Report] (transaction agreements ordinarily allocate "idiosyncratic risk (or risk that is specific to a firm) to the seller and systemic risk to the buyer"); *id.* at 45 ("[T]he focus in negotiating MAE exclusions is with systemic issues, typically allocating the risk of such issues with the buyer.").

The MAE Definition in the Sale Agreement follows the typical structure. Most notably, it broadly shifts systematic risk to Buyer through exceptions (i), (ii), and (v). *See* SA § 1.1. The risk from a global pandemic is a systematic risk, so it makes sense to read the term "calamity" as shifting that risk to Buyer. The structural risk allocation in the definition thus points in the same direction as the plain-language interpretation.

The content of the MAE Definition also supports allocating the risk from the COVID-19 pandemic to Buyer. The MAE Definition contains additional, Seller-friendly features that under which Buyer assumed a greater-than-normal range of risks. [224] For example, exception (ix) eliminates any effect from "any existing event, occurrence or circumstance of which the Buyer has knowledge as of the date hereof." SA § 1.1. That broad language dramatically favors Seller by contemplating that any subject covered in due diligence, in the data room, or that otherwise is within Buyer's knowledge cannot give rise to a "Material Adverse Effect." In *Akorn*, this court refused to imply a knowledge-based exception of this type, precisely because of its breadth and the sweeping implications it would have for the parties' allocation of risk through representations. *See Akorn*, 2018 WL 4719347 at *79–80. The *Akorn* decision noted that "[i]f parties wish to carve out anything disclosed in due diligence from the scope of a representation, then they can do so." *Id.* at *80. Here, Seller obtained that expansive carve-out.

224 *See* Davidoff-Solomon Report ¶ 73 ("The industry carve-out .... is significantly more seller-friendly because its net effect is to allocate all adverse effects related to the 'industry' of the target to the buyer.").

***61** As this decision already noted, the MAE Definition does not contain an exclusion for events that have a disproportionate effect on Strategic. A disproportionate-effect exclusion favors the seller by shifting risk back to the buyer. *See Akorn*, 2018 WL 4719347, at *52. The overwhelming majority of contemporary deals include disproportionality exclusions, so the omission of a disproportionality exclusion signals a seller-friendly MAE clause. [225]

225 *See* Nixon Peabody LLP, *2019 MAC Survey*, *supra*, at 7 (87% of agreements in 2019 annual transaction agreement survey contained disproportionality exclusions); Miller, *COVID-19*, *supra*, at 5, 26 ("MAE Exceptions related to systematic risks are typically further qualified by a Disproportionality Exclusion which shifts the applicable systematic risks back to the seller to the extent their materialization adversely affects the seller disproportionately ...."); *see also* Davidoff-Solomon Report ¶ 6 (the Sale Agreement lacks "customary and usual" disproportionality language); *id.* at 49 ("The lack of [a disproportionality exclusion] makes the MAE significantly more seller-friendly because its net effect is to allocate all adverse effects related to 'economic,' 'business,' or 'regulatory' reasons, among others, to the buyer."); Coates Report ¶ 11(f) (MAE clauses usually "include non-systematic risks ... such as disproportionate impacts of recessions on a target"). Buyer's expert on transaction agreements analyzed 144 agreements containing MAE clauses. *See* Coates Report App'x D. Seller's expert on transaction agreements pointed out that the overwhelming majority of MAE clauses in the sample which contained MAE exclusions for economic and industry developments in Buyer's expert's sample also contained disproportionality exclusions. Davidoff-Solomon Report ¶¶ 97–98.

Yet another seller-friendly aspect of the MAE Definition consists of two features designed to limit the forward-looking nature of the definition. The concept of a material adverse effect is inherently forward looking, and necessarily so because of "the basic proposition of corporate finance that the value of a company is determined by the present value of its future cash flows." *Hexion*, 965 A.2d at 743 n.75. The forward-looking nature of the concept also flows from the language of a standard MAE provision, which asks whether an effect "has had *or is reasonably expected to have*" a material adverse effect. [226] And it flows from *IBP*'s gloss on the concept of a material adverse effect, which requires a "durationally-significant" change that is "material when viewed from the long-term perspective of a reasonable acquirer." [227] Nevertheless, deal lawyers negotiate vigorously over language that is designed to make an MAE definition relatively more or relatively less forward-looking with the goal of limiting a buyer's ability to assert an MAE based on deviations from the seller's projected performance. A more explicitly forward-looking definition is more favorable to the buyer, who can more easily claim that the seller suffered a material adverse effect if the seller fell short of its projected results. A less explicitly forward-looking definition is more favorable to the seller, because the seller can argue for comparing its results to a historical trend,

226 *See id.*; *accord Frontier*, 2005 WL 1039027, at *33 (explaining that "the definition chosen by the parties emphasizes the need for forward looking analysis" by using the phrase "would not reasonably be expected to have" an MAE).

227 *IBP, Inc. v. Tyson Foods, Inc.*, 789 A.2d 14, 68 (Del. Ch. 2001); *see Hexion*, 965 A.2d at 738 (holding that to qualify as an MAE, "poor earnings must be expected to persist into the future").

***62** The MAE Definition uses the standard framing of the conditional future tense—"*would have* a material adverse effect." So does the No-MAE Representation, which represents that there have not been any changes, events, state of facts, or developments that "have had *or would reasonably be expected to have* a Material Adverse Effect." But the MAE Definition itself contains two aspects designed to limit its forward-looking nature.

First, the term "prospects" does not appear in the list of dimensions of "the business of the Company and its Subsidiaries" that could suffer a material and adverse effect. [228] The MAE Definition refers to "the business, financial condition, or results of operations of the Company and its Subsidiaries, taken as a whole," but it does not refer to their "prospects." A lively debate exists about whether omitting "prospects" matters, with those who favor its omission claiming that it limits the forward-looking nature of an MAE. [229] Because an MAE is inherently forward-looking, there is reason to doubt whether that is true, but the absence of a reference to "prospects" is generally regarded as favorable to the seller. [230]

228 Professor Miller helpfully defines this list as the "MAE Objects," which is a useful term. *See* Miller, *COVID-19*, *supra*, at 2 ("[T]he typical MAE clause begins with a base definition ... that defines "Material Adverse Effect" for purposes of the agreement to be any event ... that has had ... a material adverse effect ... on the company or various aspects of it, such as its business, financial condition, or results of operations (the 'MAE Objects')."); Miller, *Deal Risk*, *supra*, at 2045 ("Generally speaking, a MAC is defined as being any event ... that ... would reasonably be expected ... to have a material adverse effect ... on various items (MAC Objects) ....").

229 *See* Miller, *COVID-19*, *supra*, at 3 n.12 (collecting authorities); Miller, *Canceling the Deal*, supra, at 137 n.122 (same).

230 *See, e.g.*, Michelle Shenker Garrett, *Efficiency and Certainty in Uncertain Times: The Material Adverse Change Clause Revisited*, 43 Colum. J.L. & Soc. Probs. 333, 36 (2010) ("Sellers generally want to exclude 'prospects ....' "); Jonathon M. Grech, *"Opting Out": Defining the Material Adverse Change Clause in a Volatile Economy*, 52 Emory L.J. 1483, 1488–89 (2003) ("[T]he seller will not want to be responsible for sustaining the buyer's vision of the future and will seek to exclude its prospects from the definition of a MAC."); Sherri L. Toub, Note, *"Buyer's Regret" No Longer: Drafting Effective MAC Clauses in a Post-IBP Environment*, 24 Cardozo L. Rev. 849, 868 (2003) ("Typically, one focus of Seller's efforts will be to delete any reference in the MAC definition to 'prospects' or to other forward-looking concepts"). *Compare* Choi & Triantis, *supra*, at 881 n.95 (citing practitioner study which referenced "sellers' desire for increased deal certainty" by eliminating forward-looking language), *with* Daniel Gottschalk, *Weaseling Out of the Deal: Why Buyers Should Be Able to Invoke Material Adverse Change Clauses in the Wake of a Credit Crunch*, 47 Hous. L. Rev. 1051, 1078 (2010) ("The buyer should draft the MAC clause with forward-looking language.").

The second and more striking feature is a proviso which states that "a Material Adverse Effect shall be measured only against past performance of the Company and its Subsidiaries, and not against any forward-looking statements, financial projections or forecasts of the Company and its Subsidiaries." SA § 1.1. Ostensibly included "[f]or the avoidance of doubt," the proviso can only inject doubt into an inherently forward-looking inquiry. But from the standpoint of evaluating whether the MAE Definition is favorable to the seller or the buyer, this feature goes beyond the omission of "prospects" by attempting to make the MAE Definition exclusively backwards looking. All else equal, that is highly favorable to Seller.

***63** Consistent with the allocation of systematic risk to Buyer, the generally seller-friendly nature of the MAE Definition supports interpreting the exception for "calamities" as including pandemic risk. To interpret the term narrowly would cut against the flow of the definition. Buyer has not offered any explanation why the parties would have excluded pandemic risk from their overarching risk allocation despite assigning all similar risks to Buyer. Absent a persuasive (or at least rational) explanation, there is no reason to think that the term "calamities" should be construed narrowly to achieve that result.

c. Evidence Of Deal Studies

Finally, studies of transaction agreements support reading the term "calamities" as encompassing pandemics. These studies rebut Buyer's argument that the MAE Definition does not encompass the COVID-19 pandemic because it does not expressly use the term "pandemic."

According to Buyer, the failure to include the term "pandemic" must have been intentional, and its omission therefore should be dispositive. *See* Dkt. 463 at 97. To support this argument, Buyer observes that because Anbang is based in China, it must have been aware of the risk of an epidemic or pandemic, given China's experience with the avian flu in 1997, SARS in 2002, H1N1 swine flu in 2009, and MERS in 2012. *Id.* Buyer also points out that during its life as a public company, between 2009 and 2014, Strategic consistently identified the outbreak of a pandemic as a material risk to its business. [231] As further support for its argument that Seller intentionally omitted the term "pandemic," Buyer cites precedent transaction agreements. Buyer observes that Anbang acquired a company in 2015 under a transaction agreement that contained an explicit carve-out for pandemics. [232] Buyer also observes that Seller's counsel included explicit references to "epidemics" or similar language in the exceptions from the MAE definitions in other transaction agreements that they prepared contemporaneously with the Sale Agreement. [233]

231 Dkt. 463 at 97–98; *see* JX 26 at 15; JX 32 at 17; JX 35 at 18; JX 37 at 16; JX 46 at 16; JX 61 at 15. In its disclosures, Strategic identified "natural disasters such as earthquakes, hurricanes, floods or fires" as a separate risk to its business model. JX 26 at 19; JX 32 at 17; JX 35 at 18; JX 37 at 16; JX 46 at 16–17; JX 61 at 15.

232 Dkt. 463 at 97; *see* JX 71 at 9 (exception for "the outbreak or escalation of war, military action, sabotage or acts of terrorism, or changes due to any pandemic, natural disaster or other act of nature, in each case involving or impacting the United States and arising or occurring after the date of this Agreement").

233 JX 389 at 11 (exception for "any acts of war (whether or not declared), sabotage, terrorism or any epidemics, or any escalation or worsening of any such acts of war (whether or not declared, sabotage or terrorism, or any epidemics"); JX 558 at 8 (exception for "earthquakes, volcanic activity, hurricanes, tsunamis, tornadoes, floods, mudslides, wild fires or other natural disasters, weather conditions, pandemics and other force majeure events").

Broader studies of transaction agreements help put this anecdotal evidence in perspective. Both sides retained legal experts who conducted studies of the prevalence of pandemic-specific exceptions. Professor John Coates of Harvard Law School provided expert analysis for Buyer. Professor Steven Davidoff-Solomon of the University of California, Berkeley School of Law provided expert analysis for Seller.

Coates assembled a sample of 144 publicly available transaction agreements for deals that were announced in the year before Buyer and Seller signed the Sale Agreement and had a deal value greater than $1 billion. *See* Coates Report ¶¶ 42–43. Both experts examined this sample. [234]

234 Davidoff-Solomon also examined a broader sample that included acquisitions with a value greater than $1 billion announced between January 1, 2017, and December 31, 2019. *See* Davidoff-Solomon Report ¶ 79. His general observations on the frequency and use of "pandemics" were comparable to the smaller sample. Davidoff-Solomon also reviewed the broader sample for deals in which Buyer and Seller's counsel were involved. He found only one transaction agreement in which Greenberg Traurig used the word "pandemic" or its synonyms, and it was not used as a subset of "calamity," "natural disaster," or "force majeure." *Id.* ¶ 94. He found nine agreements in which Gibson Dunn used the term "pandemic" or its synonyms. In six of those instances, the term was a subset of "calamity," "natural disaster," or "force majeure." *Id.*

***64** Based on the sample, Coates made the following observations:

- All MAE definitions in the sample contained one or more specific exclusions for general economic, political, or industry changes.
- Nearly all (99%) contained specific exclusions for changes in laws and regulations.
- A supermajority (87%) contained exclusions for natural disasters, crises, or calamities.
- A large minority (33%) specifically excluded one or more of pandemics, epidemics, public health crises, or influenzas.

Coates Report ¶ 72.

Coates noted that in agreements that contained a specific exclusion for "pandemics," there was no consistent pattern of treatment:

- Some agreements distinguished “pandemics” from “natural disasters” or “calamities” by including them in separately enumerated exceptions.

- Some agreements included “pandemics” and “natural disasters” in the same exception, but treated them as separate concepts.

- Some agreements included “pandemics” as a co-equal but distinct item in a list with “acts of war” and “natural disasters.”

- Some agreements included “pandemics” as an example of an “Act of God” within the same class as “natural disasters.”

- Some agreements included “pandemics” as an example of an “Act of God” within the category of “natural or man-made disaster.”

Id. ¶ 74.

After examining Coates' sample, Davidoff-Solomon made the following additional observations:

- The term “pandemic” appeared in twenty-nine agreements.

  - Seventeen agreements (59%) used the term “pandemic” as a subtype of “natural disaster,” calamity,” or “force majeure.” *See* Davidoff-Solomon Report ¶ 84.

  - The words “pandemic” and “calamity” appeared together in only four agreements. In two of those four agreements, the terms appeared in separate exceptions. In a third agreement, they appeared in the same exception, with pandemic being treated as a type of calamity. In the fourth agreement, both appeared as examples of force majeure events. *Id.* ¶ 80.

- The term “calamity” appeared in twenty-one agreements.

  - Six agreements used “calamity” and “force majeure” interchangeably. *Id.* ¶ 81.

  - Nine agreements used “calamity” as a catchall for other events. *Id.*

- The term “natural disaster” appeared in 114 agreements.

  - Seventy-seven agreements used the term as a catchall for other types of misfortunes, sometimes including epidemics and pandemics. *Id.* ¶ 82.

  - In twenty-nine agreements, the words “pandemic” and “natural disaster” appeared together. *Id.*

  - Only one agreement included “pandemic” and “natural disaster” in separate exceptions. *Id.*

  - In eight agreements, “pandemic” appeared as a subtype of “natural disaster.” *Id.*

It is difficult to reach strong conclusions based on these data, but it is possible to reject the proposition that general terms like “calamity,” “natural disaster,” “Act of God,” or “*force majeure*” never can encompass pandemic risk because a meaningful number of agreements make explicit connections among these terms.[235] The fact that the Sale Agreement omitted an express reference to “pandemics” is therefore not dispositive, providing an additional reason to reject Buyer's argument.[236]

235 The authors of a working paper cited by both experts drew the same inference from a study of 1,702 MAE provisions for deals from 2003 until the end of 2020. *See* Matthew Jennejohn et al., *COVID-19 as a* Force Majeure *in Corporate Transactions* 7, (Columbia L. Econ. Working Paper, Paper No. 625, 2020), https://ssrn.com/abstract=3577701. That study found that over the full sample, less than 12% of MAE provisions identified pandemics explicitly, another 36.2% used broad terms like force majeure, Act of God, or calamities, and 52.8% did not contain either specific language referencing pandemics or broader language referencing calamities or force majeure concepts. *Id.* at 4. Over time, however, the percentages of deals that included these concepts increased, with general force majeure language becoming more common after the 2008 financial crisis, and pandemic-related language starting to appear during the same period, perhaps as a byproduct of the H1N1 crisis. *See id.* at 5. The authors note that by 2019, approximately 23% of deals specifically referenced pandemics. *Id.*

236 Except for excluding the possibility that the term “calamity” can never include the concept of “pandemics,” the data from the deal studies are inconclusive. The deal studies do not reveal a consistent pattern in how drafters of transaction

> agreements treat pandemics. *See* Coates Report ¶ 74. They provide some support for the proposition that drafters view a "pandemic" as a subtype of "calamity," "natural disaster," or "force majeure" event, consistent with the plain meaning of the term "pandemic." *See* Davidoff-Solomon Report Ex. B. But a minority of agreements treat pandemics differently, implying that not all drafters view the broader terms (i.e., "calamity," "natural disaster," or "force majeure" event) as sufficient. Of course, that may be the result of lawyerly belt-and-suspenders drafting.

***65** Policy considerations also counsel against adopting Buyer's proposed narrow interpretation of the broader term "calamities." Drafters of MAE definitions must contemplate the three Rumsfeldian categories of risk: known knowns, known unknowns, and unknown unknowns. [237] Drafters can use specific terms to address known knowns and known unknowns, but only broad terms can encompass unknown unknowns. To read a term like "calamities" narrowly would interfere with drafters' ability to allocate systematic risk for as-yet-unknown and as-yet-unimaginable calamities. By contrast, reading a term like calamities broadly allows drafters to carve out known knowns and known unknowns through exclusions. For instance, if parties believe that the seller is better suited to shoulder the risk of a pandemic than the buyer, then the drafters can say "natural disasters and calamities (excluding pandemics)."

237 *See* Donald Rumsfeld, *Known and Unknown: A Memoir* 23 (2011) ("[A]s we know, there are known knowns: there are things we know we know. We also know there are known unknowns: that is to say we know there are some things [we know] we do not know. But there are also unknown unknowns—the ones we don't know we don't know." (alteration in original)).

3. The Finding Regarding The Bring-Down Condition

The Bring-Down Condition did not fail due to the No-MAE Representation becoming inaccurate. Even assuming that Strategic suffered an effect that was both material and adverse, the cause of that effect was the COVID-19 pandemic, which falls within an exception to the MAE Definition for effects resulting from "calamities." Accordingly, a COVID-19-related failure of the Bring-Down Condition did not relieve Buyer of its obligation to close.

C. The Covenant Compliance Condition

The next issue is whether Buyer validly refused to close because the Covenant Compliance Condition failed. Buyer argues that the Covenant Compliance Condition failed because Seller did not comply with the Ordinary Course Covenant. According to Buyer, Strategic made significant changes in its business in response to the COVID-19 pandemic, resulting in a departure from the ordinary course. Buyer established that the Covenant Compliance Condition failed.

1. The Ordinary Course Covenant

The Ordinary Course Covenant appears in the first sentence of Section 5.1 of the Sale Agreement. It states,

> Except as otherwise contemplated by this Agreement or as set forth in Section 5.1 of the Disclosure Schedules, between the date of this Agreement and the Closing Date, unless the Buyer shall otherwise provide its prior written consent (which consent shall not be unreasonably withheld, conditioned or delayed), the business of the Company and its Subsidiaries shall be conducted only in the ordinary course of business consistent with past practice in all material respects, including using commercially reasonable efforts to maintain commercially reasonable levels of Supplies, F&B, Retail Inventory, Liquor Assets and FF&E consistent with past practice, and in accordance with the Company Management Agreements.

SA § 5.1.

The parties have parsed the Ordinary Course Covenant closely. They disagree about the "business" in question, what it means to conduct the business in the "ordinary course of business," what it means to operate "only" in the ordinary course of business "consistent with past practice," whether the Ordinary Course Covenant created a flat or efforts-qualified contractual obligation, and how the covenant relates to the MAE Definition.

a. The "Business" In Question

In its lead argument, Seller maintains that the "business" in question is Strategic's business as an asset management firm, which Seller claims does not involve the day-to-day operation of the Hotels. Seller frames Strategic's business at a high level and claims that it primarily involves deploying capital and overseeing the Hotels' managers, reducing Strategic's role to a supervisory manager of managers. According to Seller, the COVID-19 pandemic did not result in any changes to these high-level tasks, which Strategic continued performing as the pandemic raged and as the hotels radically changed their operations. Seller thus concludes that the Ordinary Course Covenant was not breached. [238]

238 *See* Dkt. 467 at 82 ("Buyer points to certain temporary changes to the affairs of the *Hotels*, but the question is whether the *Company* continued to operate in the ordinary course. It did[.]" (citation omitted)); Dkt. 472 at 47–48 ("The ordinary course of Strategic's business included adapting its asset management strategy to meet prevailing conditions, including industry downturns.... Buyer will receive what it bargained for—a premier portfolio 'managed by an industry leading, best-in-class management team' ....").

***66** The plain language of the Ordinary Course Covenant forecloses this argument. The covenant provides that "the business *of the Company and its Subsidiaries* shall be operated in the ordinary course." This obligation includes the business of Strategic, but it does not end there. It encompasses the business of each of the "Subsidiaries," necessarily including the entities that own the Hotels.

The Ordinary Course Covenant also includes a lengthy, non-restrictive adverbial phrase that appears in the middle of the main clause that constitutes the Ordinary Course Covenant. It confirms that operating the "business" in the ordinary course includes "using commercially reasonable efforts to maintain commercially reasonable levels of Supplies, F&B, Retail Inventory, Liquor Assets and FF&E consistent with past practice." SA § 5.1 (the "Inventory Maintenance Covenant"). The Sale Agreement defines those terms as follows:

- "Supplies" means "all of any Subsidiary's right, title and interest in all china, glassware, silverware, linens, uniforms, engineering, maintenance, cleaning and housekeeping supplies, matches and ashtrays, soap and other toiletries, stationery, menus and other printed materials, and all other similar materials and supplies, which are located at a Company Property and used or to be used in the operation of the Company Property." SA § 1.1.
- "F&B" means "all of any Subsidiary's right, title and interest in all unexpired food and beverages which are located or to be located at a Company Property (whether opened or unopened), but expressly excluding the Liquor Assets." *Id.*
- "Retail Merchandise" means "all of any Subsidiary's right, title and interest in all merchandise located at the Company Property, including any gift shop or newsstand maintained by Seller, that is held or to be held for sale to guests and customers of any Company Property, but expressly excluding the F&B and Liquor Assets." *Id.* [239]
- "Liquor Assets" means "the alcoholic beverage inventory at any Company Property owned by a Subsidiary," but excludes "licenses to sell alcohol." *Id.*
- "FF&E" means "all of any Subsidiary's right, title and interest in all of the furniture, furnishings, fixtures and equipment, machinery, building systems, vehicles, appliances, computer hardware, art work, security systems, key cards (together with all devices for coding and monogramming such key cards) and other items of corporeal (tangible) movable (personal) property which are located or are to be located at a Company Property and used in the operation of the Company Property, but expressly excluding any such items that constitute Supplies, F&B, Liquor Assets or Retail Merchandise." *Id.*

These definitions demonstrate that the "business of the Company and its Subsidiaries" extends to the day-to-day operation of the Hotels themselves, including minutia such as "matches and ashtrays, soap and other toiletries." [240]

239 The Ordinary Course Covenant deploys the term "Retail Inventory," which the Sale Agreement does not define or use elsewhere. In other provisions, the Sale Agreement uses the defined term "Retail Merchandise." It seems likely that the use of "Retail Inventory" rather than "Retail Merchandise" was a scrivener's error.

240 The Inventory Maintenance Covenant notably extends to "any gift shop or newsstand maintained by Seller." Seller is a holding company that owns Strategic. But Seller does not maintain any gift shop or newsstand. The parties' reference to "Seller" thus demonstrates that for purposes of the Ordinary Course Covenant, the parties did not draw bright-line distinctions based on specific corporate entities and the business conducted by any particular entity. Rather, they understood and intended for the provision to encompass the business in its entirety, including the operation of the fifteen Hotels.

***67** The Ordinary Course Covenant thus does not focus narrowly on Strategic, nor does it treat Strategic as simply an asset management firm. The "business of the Company and its Subsidiaries" for purposes of the Ordinary Course Covenant includes the operation of the Hotels. [241] Seller's lead argument is a non-starter.

241 To the extent that the analysis moves beyond the Ordinary Course Covenant to the Sale Agreement as a whole, it is even clearer that the "business" in question involved owning and operating fifteen luxury hotels, rather than merely deploying capital like a private equity fund. The representations and warranties in the Sale Agreement address the business of "the Company and its Subsidiaries," including the Hotels, and encompass matters such as their employees, material contracts, pending litigation, legal compliance, and financial statements. *See, e.g.*, SA §§ 3.7, 3.9–12, 3.18.
If the analysis extended to encompass extrinsic evidence, then mountains of documentation point to the same result, ranging from the language of the teaser document and the contents of the confidential information memorandum, to the materials in the data room. The factual record also establishes that the business of Strategic as an asset manager includes an "INTENSE FOCUS ON HOTEL OPERATIONS." JX 403 at 35 (emphasis in original); *see id.* at 7, 10. And the record demonstrates that Strategic oversaw, approved, and in many cases directed the operational changes that the Hotels made in response to the COVID-19 pandemic, including employee layoffs and furloughs. *See* JX 3282 at 1–2 (memorandum from Strategic management detailing responses to COVID-19); Hogin Dep. 283–85 (discussing "major adjustments" that Strategic made in response to COVID-19); *id.* at 289–91 (discussing changes that Strategic made, including closing amenities).

b. "The Ordinary Course Of Business"

The parties next debate what it means for the business to be "conducted only in the ordinary course of business." Buyer contends that this language means operating in accordance with how the business routinely operates under normal circumstances. *See* Dkt. 463 at 76–77. Buyer argues that the radical changes that management implemented to respond to the COVID-19 pandemic obviously deviated from how the Hotels normally operated and therefore fell outside the ordinary course of business. Seller responds that management must be afforded flexibility to address changing circumstances and unforeseen events, including by engaging in "ordinary responses to extraordinary events." Dkt. 467 at 83 (internal quotation marks omitted). Seller argues that the COVID-19 pandemic necessitated an extraordinary response, such that management operated in the ordinary course of business based on what is ordinary during a pandemic.

Although prior cases have not framed the interpretive question so starkly, the weight of Delaware precedent supports Buyer. In a seminal decision, this court gave meaning to a representation that the company had operated "only in the usual and ordinary course" using the following dictionary definitions:

> Black's Law Dictionary defines "usual" as "1. Ordinary; customary. 2. Expected based on previous experience," defines "ordinary" as "occurring in the regular course of events; normal; usual," and defines "course of business" as "[t]he normal routine in managing a trade of business-Also termed ordinary course of business."

***68** *Ivize of Milwaukee, LLC v. Complex Litig. Support, LLC*, 2009 WL 1111179, at *8 (Del. Ch. Apr. 27, 2009) (emphasis omitted) (footnotes omitted). [242] The court thus treated the ordinary course of business as the customary and normal routine of managing a business in the expected manner.

242 The sell-side management team in *Ivize* made plans to start a competing entity in violation of their non-competition agreements, solicited the

company's key salespeople, diverted company business, stole or destroyed company records, and stole company equipment. Understandably, the court had little difficulty concluding that "[t]he normal and ordinary routine of conducting business does not include destroying business assets and planning to transfer the essence of the business to a competitor." *Id.* at *9. Consistent with *Ivize*, a series of decisions have held that a target company failed to operate in the ordinary course of business when it engaged in fraudulent or deceptive conduct. *See, e.g.*, *Anschutz Corp. v. Brown Robin Cap., LLC*, 2020 WL 3096744, at *12 (Del. Ch. June 11, 2020) (holding that buyer stated claim for breach of ordinary course covenant where buyer alleged that target company "knowingly inserted fanciful sales data" into its pipeline of projects because it was "reasonably conceivable that manipulating pipeline data in May, 2018, as a means to quiet the concerns of an anxious buyer, is not conduct undertaken 'in the ordinary course of business consistent with past practices), *rearg. granted on other grounds*, 2020 WL 4249874 (Del. Ch. July 24, 2020); *Akorn*, 2018 WL 4719347, at *88 (finding after trial that generic pharmaceutical company failed to act in the ordinary course of business by submitting regulatory filings to the FDA based on fabricated data); *ChyronHego Corp. v. Wight*, 2018 WL 3642132, at *8 (Del. Ch. July 31, 2018) (holding that buyer stated a claim for breach of a representation that the company had "conducted its business in all material respects in the ordinary course of business consistent with past practice" based on allegations that the company inappropriately "smoothed" its revenue over monthly periods to mislead the buyer (internal quotation marks omitted)); *Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, at *7–8 (Del. Ch. Nov. 19, 2013) (finding that buyer stated claim for breach of ordinary course covenant based on allegations that target company manipulated its financial information and sales results by billing and shipping excess product without applying proper credits or discounts, delaying the issuance of invoices to customers, and altering the size and nature of its business segments). These cases demonstrate that some categories of conduct are so extreme as to fall outside the ordinary course of business, even if a company theoretically might have engaged in them as part of its normal practice. It is extraordinary in the sense of being beyond the bounds of permissible conduct for a company to deceive regulators, fail to comply with the law, or engage in fraud. Activities of that nature cannot constitute the ordinary course of business under any circumstances.

Relying on *Ivize*, subsequent decisions have interpreted "the contractual term 'ordinary course' to mean '[t]he normal and ordinary routine of conducting business.' "[243] Consistent with this approach, this court has explained that an ordinary course provision is "included to reassure a buyer that the target company has not materially changed its business or business practices during the pendency of the transaction."[244] This court also has observed that "[p]arties include ordinary-course covenants in transaction agreements to ... help ensure that 'the business [the buyer] is paying for at closing is essentially the same as the one it decided to buy at signing.' "[245]

243 *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Hldgs. Pvt. Ltd.*, 2014 WL 5654305, *17 (Del. Ch. Oct. 31, 2014) (alteration in original) (quoting *Ivize*, 2009 WL 1111179, at *9); *accord Project Boat Hldgs., LLC v. Bass Pro Gp., LLC*, 2019 WL 2295684, at *20 (Del. Ch. May 29, 2019); *see Anschutz*, 2020 WL 3096744, at *11 (quoting *Cooper Tire*, 2014 WL 5654305, at *17).
The *Project Boat* decision did not involve an ordinary course covenant, but rather a more specific obligation that a boat manufacturer undertook to disclose warranty claims "made outside of the ordinary course of business" and "not consistent with past practice." *Project Boat*, 2019 WL 2295684, at *20. In a post-trial decision, the court examined the seller's "past practice of receiving and processing warranty claims" and held that the claims at issue were "not claims made within the ordinary course of business" because the claims in question involved "unusual" cracks in the hulls of the boats. *Id.* at *20–21.

244 *Anschutz*, 2020 WL 3096744, at *11. The *Anschutz* case involved two claims by a buyer that the target company failed to operate in the ordinary course of business. One involved a contention that the seller "knowingly inserted fanciful sales

data" into its pipeline of projects, which the court easily found constituted a failure to operate in the ordinary course. *Id.* at *11–12. The other rested on allegations that when a major customer of the target company sought to renegotiate a material contract, the seller resisted, ostensibly to avoid having to disclose the renegotiated contract to the seller. *Id.* at *10. The court held that the second aspect of the buyer's theory did not state a claim on which relief could be granted because it was not reasonably conceivable "that fighting to keep a customer was somehow out of [the seller's] ordinary course of business." *Id.*

245 *Akorn*, 2018 WL 4719347, at *83 (alteration in original) (quoting Kling & Nugent, *supra*, § 13.03, at 13-19).

***69** The *Cooper Tire* decision illustrates how these principles operate on somewhat analogous facts. There, the acquirer contracted to buy a large American tire company (Cooper), largely because it was the majority owner of a joint venture that manufactured and sold tires in China. An individual known as Chairman Che controlled the minority partner in the joint venture. Chairman Che vehemently opposed the merger, and he used his position of authority over the joint venture's workers "to physically seize the [joint venture's] facility, prevent the production of Cooper products there, and deny access of the parties to the facility and to [the joint venture's] financial records." *Cooper Tire*, 2014 WL 5654305, at *1. These events were unprecedented, and in an effort to force Chairman Che and the workers to capitulate by stopping production at the plant, Cooper "adopted a policy of suspending payments to suppliers who continued to ship supplies [to the plant]." *Id.* at *4. When the seller sought to force a closing, the buyer asserted that Cooper had failed to comply with its obligation under the agreement to "conduct its business in the ordinary course of business consistent with past practice." *Id.* at *14.

In the ensuing litigation, this court agreed with the buyer. The court found that Cooper failed to operate in its normal and ordinary routine of conducting business when "[a]s a result of Chairman Che's instigation, Cooper's largest subsidiary ... stopped producing Cooper-branded tires or generating financial statements, and physically prevented Cooper employees from accessing records and facilities." *Id.* at *17. The court did not regard Chairman Che's intervention as an extraordinary external event beyond management's control to which management necessarily had to respond. The unforeseen event itself and its consequences on Cooper's business resulted in a deviation from the ordinary course.

The *Cooper* decision further held that Cooper deviated from the ordinary course of business when it stopped paying suppliers to the joint venture. The court acknowledged that Cooper's actions were "perhaps a reasonable reaction to the extralegal seizure of [the joint venture]," implying that management had taken action that might be thought of as an ordinary response to an extraordinary event. *Id.* But the court held that this arguably reasonable response nevertheless reflected "a conscious effort to disrupt the operations of the facility" and therefore fell outside of the ordinary course of business. *Id.* (emphasis omitted). Cooper thus failed "to cause [its largest subsidiary] to conduct business in the ordinary course, and demonstrate[d] just the opposite." *Id.* Even though management took actions that could have been characterized as an ordinary course response to an extralegal seizure, what mattered for the covenant was the departure from how the company had operated routinely in the past.

Citing *FleetBoston Financial Corp. v. Advanta Corp.*, 2003 WL 240885 (Del. Ch. Jan. 22, 2003), Seller responds that management cannot be limited to a playbook containing only plays that management has run previously on a regular basis. Dkt. 472 at 50–51. In *FleetBoston*, the seller of a consumer credit card business agreed that between signing and closing, the business would conduct solicitation campaigns "in the ordinary course of business consistent with past practices." *FleetBoston*, 2003 WL 240885, at *25. Instead, the business launched a "relationship management" campaign that offered very low interest rates to its current customers. *Id.* The buyer argued that the campaign was "unprecedented" and hence breached the ordinary course covenant. *Id.*

The court rejected the buyer's argument for two reasons. First, the court found that "the volume of relationship management accounts and [the interest rates] were consistent with [the business's] past practices and current marketing plans." *Id.* at *26. Second, the court noted that "during the Summer and Fall of 1997, competition for customers among the credit card companies had become increasingly fierce, manifesting itself in the form of lower [interest rates]." *Id.* The court explained that when "[f]aced with the threat of an exodus of existing balances, [the business] had only one alternative: match its competitors' strategy by offering attractive [interest rates] to its existing customers." *Id.* The court concluded that nothing in the transaction agreement suggested that the parties intended for the business "to be contractually precluded from making relationship management offers that would be competitive." *Id.*

***70** Citing the second rationale, Seller contends that a seller can take unprecedented actions as long as they are reasonable under the circumstances. *See* Dkt. 467 at 81. The *FleetBoston* case makes clear that an ordinary course covenant is not a straitjacket, but it nevertheless constrains the seller's flexibility to the business's normal range of operations. To that end, the court indicated that the buyer's argument that gave it "the most pause" was the buyer's contention that the business lowered its credit standards to attract less creditworthy customers and made inherently unprofitable offers. *FleetBoston*, 2003 WL 240885, at *27. The court seemed to believe that a significant change in credit standards could have fallen outside the ordinary course of business, but the court found that the evidence was "too thin" to support a factual finding to that effect. *Id.* The court also concluded that the evidence supported a finding that the low-interest-rate offers were profitable over time. *Id.*

The *FleetBoston* case thus does not suggest that when faced with an extraordinary event, management may take extraordinary actions and claim that they are ordinary under the circumstances. Put differently, the *FleetBoston* case does not support reading the Ordinary Course Covenant to permit management to do whatever hotel companies ordinarily would do when facing a global pandemic. Instead, *Cooper Tire* and other precedents compare the company's actions with how the company has routinely operated and hold that a company breaches an ordinary course covenant by departing significantly from that routine.[246]

246 The fact that the Ordinary Course Covenant includes a requirement to obtain Buyer consent for actions outside the ordinary course of business supports the *Cooper Tire* approach. Under Seller's interpretation of the covenant, the ordinary course of business permits management to do whatever they "ordinarily" would do in the absence of the transaction agreement, even if extraordinary times call for extraordinary actions. That view would mean that Seller rarely (if ever) would need to seek Buyer's consent because virtually any action could be justified as situationally ordinary. The obligation to seek Buyer's consent before engaging in action outside of the ordinary course of business implies an understanding consistent with *Cooper Tire*'s concept of the normal and routine operation of the business.

c. "Only In The Ordinary Course Of Business Consistent With Past Practice"

The parties also argue about what it means for the Ordinary Course Covenant to include the adverb "only" and the express language "consistent with past practice." SA § 5.1. Buyer views these additions as meaningful limitations. Seller treats them as inconsequential.

Generally speaking, there are two principal sources of evidence that the court can examine to establish what constitutes the ordinary course of business. First, the court can look to how the company has operated in the past, both generally and under similar circumstances. Second, the court can look to how comparable companies are operating or have operated, both generally and under similar circumstances. In *Akorn*, the ordinary course covenant did not include the phrase "consistent with past practice," and the court considered both sources. *See Akorn*, 2018 WL 4719347, at *88. The seller was a generic pharmaceutical company, and when analyzing whether the seller breached the ordinary course covenant, the court contrasted the seller's actions with "a generic pharmaceutical company operating in the ordinary course of business." *Id.* That dimension of the analysis looked at comparable companies. The court also considered that the seller had stopped engaging in important activities that it historically conducted, such as regularly auditing its operations, remediating deficiencies, and devoting IT resources to data integrity projects. *Id.* That dimension of the analysis looked at the company's past practice.

***71** By including the adverb "only" and the phrase "consistent with past practice," the parties created a standard that looks exclusively to how the business has operated in the past.[247] When determining whether a party has acted "consistent with past practice," the court must evaluate the company's operations "before and after entering into" the transaction agreement to determine whether those operations are "consistent." *Mrs. Fields Brand, Inc. v. Interbake Foods, LLC*, 2017 WL 2729860, at *32 (Del. Ch. June 26, 2017). Because of the standard that the parties chose, the court cannot look to how other companies responded to the pandemic or operated under similar circumstances.

247 *See* Kling & Nugent, *supra*, § 13.03, at 13-19 n.1 ("Arguably, an obligation to conduct business only 'in the ordinary course, consistent with past practice' is a stricter standard than one which merely refers to the 'ordinary course.' "); *Model Merger Agreement*, *supra*, at 123 ("The target might object to the limitation 'consistent with past practices,' particularly when its business has been changing in recent periods or where its business or its industry is troubled or is growing rapidly.").

d. "Commercially Reasonable Efforts"

Surprisingly, the parties even disagree about whether the Ordinary Course Covenant imposes a flat contractual obligation or whether it only imposes an obligation to use commercially reasonable efforts. Contrary to the plain language of the provision, Seller argues that the covenant only required commercially reasonable efforts. [248]

248 *See* Dkt. 467 at 84–85 ("The absence of commercially reasonable 'efforts' language before 'ordinary course' does not affect the analysis. The 'past practice' language permits a court to look ... to the company's practices to determine what is commercially reasonable under the circumstances." (citation omitted)). Glover, Seller's deal counsel, testified that he believed adding "commercially reasonable efforts" before the ordinary course obligation would be redundant, and that the commercial reasonability standard was "implicit in the ordinary course." Glover Dep. 296–99. Given the plain language of the text and Glover's experience, that testimony was not credible.

Seller argues obliquely that the Ordinary Course Covenant only requires that Strategic and its subsidiaries act with the intent to preserve their business. *See* Dkt. 467 at 85 ("Whether compared to past practices or industry conduct, the fundamental question is whether the Company acted consistent with the normal intent to preserve its business in all material respects."). A contract provision can turn on a party's mental state. *See, e.g.*, *Hexion*, 965 A.2d at 746–49 (interpreting merger agreement in which contractual limitation on liability did not apply to a "knowing and intentional breach"). But absent specific language, proving a breach of contract claim does not require *scienter*. *See Hifn, Inc. v. Intel Corp.*, 2007 WL 1309376, at *13 (Del. Ch. May 2, 2007) ("[T]o the extent that [plaintiff] is contending that [defendant's] subjective motivations for wanting out of the contract give rise to an inference that it acted in bad faith, that argument fails under settled law."); *Myer Ventures, Inc. v. Barnak*, 1990 WL 172648, at *5 (Del. Ch. Nov. 2, 1990) ("[T]he contract does not require scienter for a breach to exist."); *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1055 (Del. Ch. 1984) (holding that when party enforces conditions that "are expressed, the motivation of the invoking party is, in the absence of fraud, of little relevance"), *aff'd*, 575 A.2d 1131 (Del. 1990); *see also NACCO Indus., Inc. v. Applica, Inc.*, 997 A.2d 1, 35 (Del. Ch. 2009) (noting Delaware's recognition of efficient breach). *See generally Restatement*, *supra*, ch. 16 intro. ("The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach. 'Willful' breaches have not been distinguished from other breaches ...."). The Ordinary Course Covenant does not contain any language suggesting an intent-based obligation.

***72** "[L]iability for breach of contract under common law turns on a concept of strict liability and parties are held to the standard expressed in the words of the contract. If a party agrees to do something, he or she must do it or be liable for resulting damages." Kling & Nugent, *supra*, § 13.06, at 13-44. Clauses that obligate a party to use a certain degree of efforts to achieve a particular contractual outcome "mitigate the rule of strict liability for contractual non-performance that otherwise governs." *Akorn*, 2018 WL 4719347, at *86. Efforts clauses also recognize that "a party's ability to perform its obligations depends on others or may be hindered by events beyond the party's control." [249] In those situations, drafters commonly add an efforts clause to define the level of effort that the party must deploy to attempt to achieve the outcome. [250] "The language specifies how hard the parties have to try." *Akorn*, 2018 WL 4719347, at *86.

249 *Akorn*, 2018 WL 4719347, at *86; *see* Kling & Nugent, *supra*, § 13.06, at 13-44 ("[P]arties will generally bind themselves to achieve specified results that are within their control ..., and

reserve a 'reasonable best efforts,' 'commercial[ly] reasonable best efforts,' or 'best efforts' standard for things outside of their control ...."); *accord Model Stock Purchase Agreement*, *supra*, at 212; *see also* Coates Report ¶ 11(b) (ordinary course covenants "vary in content ... particularly regarding decisions that are within the control of the target, including how it responds to materialized risks of changes that may never have been within its control").

250 *See Model Stock Purchase Agreement*, *supra*, at 212 (" 'Efforts' clauses are commonly used to qualify the level of effort required in order to satisfy an applicable covenant or obligation.").

The Ordinary Course Covenant imposes an overarching obligation that is flat, absolute, and unqualified by any efforts language. The core obligation mandates that between signing and closing, absent Buyer's prior written consent, "the business of the Company and its Subsidiaries shall be conducted only in the ordinary course of business consistent with past practice in all material respects ... and in accordance with the Company Management Agreements." SA § 5.1. No efforts-based language modifies the core obligation. The Ordinary Course Covenant therefore "imposes an unconditional obligation" to operate in the ordinary course consistent with past practice. *Cooper Tire*, 2014 WL 5654305, at *15.

The sentence that establishes the Ordinary Course Covenant contains the phrase "commercially reasonable efforts," but that phrase does not modify the overarching ordinary-course obligation. Rather, it appears as part of the Inventory Maintenance Covenant. The overarching contractual duty to operate in the ordinary course *includes* "using commercially reasonable efforts to maintain commercially reasonable levels of Supplies, F&B, Retail Inventory, Liquor Assets and FF&E consistent with past practice." SA § 5.1. The location of the phrase "commercially reasonable efforts" demonstrates that it only modifies the Inventory Maintenance Covenant, not the overarching obligation. *See ITG Brands, LLC v. Reynolds Am., Inc.*, 2017 WL 5903355, at *6–7 (Del. Ch. Nov. 30, 2017) (explaining the implications of an independent clause with a non-restrictive dependent clause for purposes of contractual interpretation).

The phrase "commercially reasonable efforts" also appears in a separate obligation found in Section 5.1:

> The Seller shall cause the Company and its Subsidiaries to use their respective commercially reasonable efforts to preserve intact in all material respects their business organization and to preserve in all material respects the present commercial relationships with key Persons with whom they do business.

SA § 5.1 (the "Organizational Preservation Covenant"). This provision combines a flat obligation with efforts-based language. It begins by imposing an unqualified obligation on Seller ("[t]he Seller shall cause"), but then qualifies the obligation that Seller must cause "the Company and its Subsidiaries" to fulfill with effort-based language ("[t]he Seller shall cause the Company and its Subsidiaries to use their respective commercially reasonable efforts").

***73** The use of efforts-based language in the Inventory Maintenance Covenant and the Organizational Preservation Covenant demonstrates that the drafters of the Sale Agreement knew how to craft an efforts-based provision when they intended to do so. By contrast, the Ordinary Course Covenant imposes a flat contractual obligation. Seller's argument for an implicit efforts qualifier is plainly wrong.

e. The Relationship Between The Ordinary Course Covenant And A Material Adverse Effect

Finally, the parties differ on the relationship (if any) between the Ordinary Course Covenant and the existence of a Material Adverse Effect. Seller argues that the Ordinary Course Covenant necessarily permits changes to the business of "the Company and its Subsidiaries" as long as those changes would not satisfy the MAE Definition. According to Seller, any other interpretation "would negate the careful risk allocation negotiated by the parties—under which the MAE clause expressly assigned to Buyer the risk that materialized here, namely the pandemic and consequent decline in demand." Dkt. 467 at 84. Seller claims that pandemic risk "was not then assigned back to Seller through the ordinary course provision, which would necessarily prohibit the Company from taking any action to contend with the pandemic (even actions required by law), a result wholly inconsistent with the covenant's purpose." *Id.* The plain language of the Ordinary Course Covenant and the structure of the Sale Agreement foreclose this argument.

The plain language of the Ordinary Course Covenant does not support Seller's reading. An ordinary course covenant could provide that only a departure from the ordinary course that constituted a Material Adverse Effect would breach the covenant. A covenant drafted in that fashion would incorporate any exceptions in the definition of Material Adverse Effect so that if a deviation from the ordinary course fell within one of those exceptions, then the deviation would be excluded for purposes of the ordinary course covenant.

The Ordinary Course Covenant in this case does not incorporate the concept of a Material Adverse Effect. The parties selected a different materiality standard, which requires compliance with the Ordinary Course Covenant "in all material respects." That standard does not require a showing equivalent to a Material Adverse Effect, nor a showing equivalent to the common law doctrine of material breach. [251] The purpose of the standard is to "eliminate the possibility that an immaterial issue could enable a party to claim breach or the failure of a condition. The language seeks to exclude small, *de minimis*, and nitpicky issues that should not derail an acquisition." *Akorn*, 2018 WL 4719347, at *85 (footnote omitted). To qualify as a breach, the deviation must significantly alter the total mix of information available to the buyer when viewed in the context of the parties' contract. [252] The plain language of the Ordinary Course Covenant neither incorporates nor turns on whether the event prompting the departure from the ordinary course would qualify as an exception in the contractual definition of a Material Adverse Effect. [253]

251 *See Channel Medsystems*, 2019 WL 6896462, at *24 (rejecting an argument equating "in all material respects" with a material adverse effect as "devoid of merit"); *Akorn*, 2018 WL 4719347, at *85–86 (distinguishing "in all material respects" from common law doctrine of material breach); *Frontier Oil*, 2005 WL 1039027, at *38 (explaining that the "concept[s] of 'Material Adverse Effect' and 'material' are analytically distinct").

252 *See Channel Medsystems*, 2019 WL 6896462, at *17 ("Based on the analysis in *Akorn*, the court will apply here the disclosure-based standard that *Akorn* endorses in evaluating the alleged inaccuracies of representations in the Agreement."); *Akorn*, 2018 WL 4719347, at *85–86 (adopting the *Frontier Oil* materiality test because it "strives to limit the operation of the Covenant Compliance Condition and the Ordinary Course Covenant to issues that are significant in the context of the parties' contract, even if the breaches are not severe enough to excuse a counterparty's performance under a common law analysis"); *Frontier Oil*, 2005 WL 1039027, at *38 ("A fact is generally thought to be 'material' if [there] is 'a substantial likelihood that the ... fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.' " (omission in original) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976))).

253 When analyzed in combination, the Ordinary Course Covenant and the Covenant Compliance Condition create a double-materiality problem. The Ordinary Course Covenant requires that the business be operated in the ordinary course "in all material respects." SA § 5.1(a). The Covenant Compliance Condition only fails if Seller has not performed its obligations "in all material respects." SA § 7.3(a). Unlike the Bring-Down Condition, the Covenant Compliance Condition lacks a materiality scrape, resulting in double materiality. Lawyers sometimes obsess about these things, and logicians could write theses about their implications, but the parties have not argued that the double-materiality combination changes the nature of the materiality analysis. As in *Akorn*, the twice-material combination simply emphasizes that Covenant Compliance Condition will not fail unless the breach of the Ordinary Course Covenant is material. The departure from the ordinary course of business for the Company and its Subsidiaries must be a significant deviation from past practice and result in a meaningful change from Buyer's reasonable expectations about how the business would be operated between signing and closing. *See Akorn*, 2018 WL 4719347, at *86.

***74** The plain language of the No-MAE Representation points in the same direction. There, Seller represented that "there have not been any changes, events, state of facts [sic] or developments, *whether or not in the ordinary course of business* that, individually or in the aggregate, have had or would reasonably be expected to have a Material Adverse Effect." SA § 3.8(b) (emphasis added). The No-MAE Representation thus distinguishes between the question of whether the business operated in the ordinary course and whether the business suffered a Material Adverse Effect, and it makes the former irrelevant to the latter. The No-MAE Representation also does not specifically contemplate that Seller, Strategic, or their subsidiaries might take particular actions that otherwise would deviate from the ordinary course of business, and it does not authorize any such actions. The No-MAE Representation thus does not implicate the introductory clause in the Ordinary Course Covenant, which provides that its obligations apply "[e]xcept as otherwise contemplated by this Agreement." SA § 5.1.

The overall structure of the Sale Agreement reinforces this interpretation. The Ordinary Course Covenant and the No-MAE Representation are separate provisions, and they implicate separate closing conditions. The Ordinary Course Covenant is a covenant that implicates the Covenant Compliance Condition. The No-MAE Representation is a representation that implicates the Bring-Down Condition. Absent express contractual language, which the Sale Agreement lacks, neither provision would operate as a constraint on or exception to the other.

Moving beyond the Sale Agreement, a material adverse effect provision and an ordinary course covenant serve different purposes and rest on different assumptions. Conditioning the buyer's obligation to close on the absence of a material adverse effect addresses the risk of a significant deterioration in the value of the seller's business between signing and closing that threatens the fundamentals of the deal. [254] A condition that turns on the absence of a material adverse effect is concerned primarily with a change in valuation, irrespective of any change in how the business is being operated. *See generally* Miller, *COVID-19*, *supra*, at 12–18 (explaining that a "material adverse effect ... is really a change in the *reasonable valuation of the company*"). The provision assumes that the business has continued to operate in the ordinary course and protects the buyer against a significant decline in valuation.

254 *See Akorn*, 2018 WL 4719347 at *47 ("In any M & A transaction, a significant deterioration in the selling company's business between signing and closing may threaten the fundamentals of the deal."); Schwartz, *supra*, at 820 ("[T]he MAC clause allows the acquirer to costlessly avoid closing the deal if the target's business suffers a sufficiently adverse change during the executory period."); Miller, *Deal Risk*, *supra*, at 2012 ("Merger agreements typically address [the risk of a substantial decline in valuation] through complex and highly-negotiated 'material adverse change' or 'MAC' clauses, which provide that, if a party has suffered a MAC within the meaning of the agreement, the counterparty can costlessly cancel the deal." (footnote omitted)).

The ordinary course covenant recognizes that the buyer has contracted to buy a specific business with particular attributes that operates in an established way. The buyer has not contracted to purchase a basket of fungible goods. As a result, even without any change in valuation, a significant change in how the business operates can threaten the fundamentals of the deal. The seller's representations and warranties provide some protection to the buyer, [255] but "[f]or a variety of reasons, reliance on the target's representations ... will not provide the buyer adequate assurance as to the target's maintenance of its business." [256] An ordinary course covenant provides an additional and greater level of protection to ensure that "the business of the target will be substantially the same at closing as it was on the date the purchase agreement was signed." [257] The ordinary course covenant thus is primarily concerned with a change in how the business operates, irrespective of any change in valuation. It assumes stability in valuation and tests for variation in operations.

255 Kling & Nugent, *supra*, § 14.02[1], at 14-9; *accord id.* §§ 1.05[2]–[4].

256 *Model Merger Agreement*, *supra*, at 120.

257 *Model Stock Purchase Agreement*, *supra*, at 202; *accord* Kling & Nugent, *supra*, § 13.03, at 13-19.

***75** The two provisions that Seller seeks to link are separate and distinct. An unexpected event might well affect the valuation of a business and lead to changes in its operations, which would implicate both provisions. But that does not mean that the outcome of the analysis under both provisions would be the same. To the contrary, because the provisions guard against different risks, the contractual results could be different. If contracting parties want the analysis to be the same, then they have many options available. To pick just two, they could omit one of the provisions as superfluous, or they could build MAE language into the ordinary course covenant.

Because the Ordinary Course Covenant does not incorporate MAE language, the fact that Strategic did not suffer a Material Adverse Effect does not dictate the outcome under the Ordinary Course Covenant. Contrary to Seller's assertions, treating the provisions as separate does not alter the parties' bargain. Treating the provisions as coextensive would alter it.

2. Seller's Breach Of The Ordinary Course Covenant

Seller breached the Ordinary Course Covenant when Strategic made extraordinary changes to its business in response to the COVID-19 pandemic. The circumstances created by the pandemic warranted those changes, and the changes were reasonable responses to the pandemic. Consequently, if acting in the ordinary course of business meant doing what was ordinary during the pandemic, then Seller would not have breached the Ordinary Course Covenant. But under extant Delaware law, the Ordinary Course Covenant required Seller to maintain the normal and ordinary routine of the business.

Overwhelming evidence demonstrates that Strategic departed from the normal and customary routine of its business as established by past practice. In response to the COVID-19 pandemic, Strategic closed two of the Hotels entirely and limited operations at the other thirteen severely. Seller closed the Four Seasons Jackson Hole and the Four Seasons Palo Alto. By closing the Four Seasons Jackson Hole, Seller departed from past practice by lengthening its normal seasonal closure by approximately two months. [258] The Four Seasons Hotel Palo Alto did not close seasonally; its closure was unprecedented. When announcing the closures, Strategic cited "very low demand as well as governmental orders." [259]

258 *See* Lesser Dep. 86 (the Four Seasons Jackson Hole is normally closed for one month, but in 2020 it was closed for three months); *compare* Hogin Tr. 822 (the Four Seasons Jackson Hole ordinarily is closed "twice a year for about a month" and was scheduled to close in the first week of April), *with* JX 3207 at 1 (the Four Seasons Jackson Hole was closed by late March), and Hogin Tr. 823 ("we ended up reopening [the Four Seasons Jackson Hole] in the middle of June").

259 JX 3105 at 1; *see* JX 3207 at 1 (the Four Seasons Palo Alto "was running at zero occupancy, so [it] made sense to shut it down"); JX 3282 at 1 (the hotel was closed because "we can reasonably expect no demand as local employees shelter-in-place"); JX 3107 at 3 (the hotel is "small and closure is an effective way to reduce the operating [costs]"); JX 4537 at 6 (the hotel was closed based on "analyses of the costs and benefits of closing versus remaining open").

Strategic's other thirteen hotels were placed in a state that Strategic described as "closed but open." *See* JX 3159. The hotels stopped all food and beverage operations except for room service, which was limited to "breakfast, lunch and dinner with no overnight operations." [260] The hotels shut down or limited all other amenities, including gyms, pools, spa and health club operations, recreational activities, club lounge operations, valet parking, retail shops, and concierge and bellhop services. [261]

260 JX 3282 at 3; *see* Lesser Report at 78, 83, 88, 93, 103, 114, 119, 124, 129, 134, 139, 144, 149 (describing changes at individual hotels).

261 *See* JX 2771; JX 3282 at 3; Lesser Report at 10; JX 4547 at 23–24 [hereinafter Tantleff Report].

***76** Strategic slashed employee headcount, with over 5,200 full-time-equivalent employees laid-off or furloughed. [262] The remaining employees saw their work weeks shortened, were encouraged to take vacation or paid time off, and had any pay increases deferred until further notice. *See* JX 3282 at 3. Across many areas, Seller reduced hotel operations to skeleton staffing. Seller limited engineering coverage to safety and OSHA issues, and the Hotels' front desks assumed responsibility from call centers for all calls. [263]

262 Tantleff Report at 29; *see* Lesser Report at 78, 83, 88, 93, 103, 114, 119, 124, 129, 134, 139, 144, 149 (reporting furloughs and layoffs at individual hotels).

263 JX 2771; JX 3207 at 1; JX 3282 at 1; *see* Tantleff Dep. 24.

Strategic minimized spending on marketing and capital expenditures. Seller's expert on the hospitality industry calculated that marketing expenses decreased year-over-year by 33.1%, 76.4%, and 69% in March, April, and May of 2020. Lesser Report at 15–17. Strategic placed all non-essential capital spending on hold and directed all of the Hotels to "[h]old all FF&E spending until further notice." JX 3282 at 2–3.

These changes departed radically from the normal and routine operation of the Hotels and were wholly inconsistent with past practice. A reasonable buyer would have viewed them as having significantly altered the operation of the business.

- Hogin, Strategic's top executive, admitted that by April 23, 2020, "Strategic had made major material changes to its business when compared to its past practice as a result of COVID-19." Hogin Tr. 855–56.

- Buyer's expert on the hospitality industry opined that the changes in the Hotels were "the opposite of normal or ordinary." Tantleff Report at 27. During his thirty-year career in the hospitality industry, he had "never seen or heard of such monumental or extensive changes in the operations of a hotel or portfolio, much less a luxury one." *Id.* at 27–28.

- Seller's expert on the hospitality industry testified that the Hotels' "operations, once COVID hit, were dramatically negatively impacted by the pandemic compared to prior to the pandemic." Lesser Dep. 33. He could not identify any other period of time in history during which the Hotels had laid off or furloughed employees in remotely comparable numbers. *Id.* at 80.

- The experts agreed that the Hotels took unprecedented actions regarding employees. [264] Buyer's expert explained that the layoffs were material because they meant that to reopen, the Hotels would face the challenges of "rehiring and retraining employees, addressing collective bargaining agreements, re-stocking supplies, re-opening spas and restaurants with employees who may no longer be available to work .... The list is monumental." Tantleff Report at 28.

- Eliminating all food and beverage service except for room service for breakfast, lunch, and dinner was unprecedented and material. Between 2015 and 2018, revenue for food and beverage services constituted approximately thirty-five percent of hotel revenue. The dramatic reduction in these services caused this component of the Hotels' revenue to drop precipitously. [265]

- The changes that Strategic made to its sales and marketing efforts were unprecedented and material. The marketing budget dropped almost sixty percent year-over-year in March, April, and May 2020. The Hotels also shut down their call center operations, routing calls instead to the front desk. [266]

- Strategic's reduction in capital expenditures represented an extreme deviation from past practice. Delaying renovations and repairs will impair the Hotels' competitiveness and increase costs in the future. *See* Tantleff Report at 31, 33.

***77** • Reducing staffing and amenities was "inconsistent with the very nature of the luxury hotel business." Tantleff Report at 25. The reductions could imperil the Hotels' status as "Four Diamond" and "Five Diamond" hotels. *Id.* at 24–25.

In his testimony, Hogin tried to blunt these dramatic changes by drawing high-level general comparisons to previous crises, such as the global financial crisis in 2008, and asserting that during those crises, Strategic cut operations that ceased being profitable. [267] He admitted that Strategic had not previously shut down amenities such as spas or gyms. *See* Hogin Dep. 292–93. And although Hogin maintained that Strategic deployed "the same playbook[ ]" in the 2008 financial crisis, he conceded that "the depth of the recession or the change in demand dictates" the magnitude of changes that Strategic makes in response to economic downturns. Hogin Tr. 873. He acknowledged that the decline in revenues expected as a result of COVID-19 was much more severe than during the 2008 crisis. [268] Seller's expert described the industry-wide decline in hotel revenues during 2008 as a "blip[ ] on the screen" compared to the impact of COVID-19. Lesser Tr. 1292–93.

264 *See id.*; Tantleff Report at 23–24.

265 *See* JX 508; JX 5011; Lesser Report at 77.

266 *See* JX 3282 at 1; Tantleff Report at 27.

267 *See* Hogin Tr. 815–16; Hogin Dep. 292–94.

268 Hogin Tr. 847, 852; *compare* JX 19 at 25 (reporting 72.2% average occupancy rate in 2008), *and* JX 3518 at 8 (displaying positive $155 million in EBITDA in 2008), *with* JX 4966 (projecting negative $25.7 million in EBITDA and 28% occupancy rate for 2020).

In an effort to evade the implications of the dramatic changes to the Hotels' operations, Seller argues that the hotel operators—the hotel brands like Four Seasons, Fairmont, InterContinental, and JW Marriott—implemented those changes. *See* Dkt. 467 at 31–32. Legally, that is irrelevant. The

Ordinary Course Covenant uses passive voice. It requires that "the business of the Company and its Subsidiaries *shall be conducted* only in the ordinary course of business consistent with past practice in all material respects." For purposes of the covenant, it does not matter whether the decision to depart from the ordinary course of business was made by Seller, Strategic, a manager at a subsidiary of Strategic, or a third-party management firm.

Factually, Seller's argument is incorrect. The hotel management agreements between Strategic's subsidiaries and the hotel management firms generally delegate some decision-making authority to the hotel manager as an agent (defined as the "Operator"), but the relevant subsidiary (defined as the "Owner") retains ultimate control.[269] Strategic also controlled the purse strings, giving it final decision-making authority over whether to fund the Hotels.[270] And the record makes clear that Strategic made a wide range of decisions in response to the pandemic and directed the Hotels to take actions that radically changed the character of their operations.[271]

269 For example, under eleven of the fifteen agreements, Strategic retained ultimate control over hiring and firing employees, with the hotel management firm acting only as an agent for the Owner. *See* JX 5099 § 3.3 ("In the performance of its duties as operator and managing agent of the Hotel pursuant to this Agreement, the Operator shall act solely on behalf of and as agent for the Owner and not on its own behalf."); *accord* JX 5100 § 3.3; JX 5105 § 5.02; JX 5109 §§ 6.6, 7.1; *see also* JX 5101 §§ 3.02(c), 4.01 (delegating hiring and firing to the hotel operator but only in accordance with an "Annual Plan" approved by the Owner); JX 5102 §§ 2.03(c), 2.04 (delegating hiring and firing power to the hotel operator but prohibiting the operator from "adopt[ing] any major change in the policy of operating the Hotel"); JX 5103 § 5.02(c) (authorizing the hotel operator to hire and fire hotel employees but making the Owner responsible for "the expenses relating to the employment or discharge of such personnel"); JX 5104 § 5.02(c) (same); JX 5106 §§ 5.03(a), 23.01(lllll) (same); JX 5107 §§ 5.03(a), 23.01(lllll) (same); JX 5113 § 2.5(c) ("All Hotel Personnel shall be employed at Owner's cost and expense ...."). Four hotel management agreements delegated broader hiring-and-firing authority to the Operator, but the Owner retained authority to hire and fire certain senior hotel personnel. *See* JX 5108 §§ 1.04, 1.06; JX 5110 §§ 2.1, 2.6, 4.1; JX 5111 § 2.3; JX 5112 § 4.2.

270 *See* Hogin Tr. 826–27 (explaining that Strategic "fund[s] the bank accounts that are in the brands' names," so although "[e]ach [brand] manager put forward a plan," Strategic retained final decision-making authority); Tantleff Report at 19–20 (describing Strategic's "industry-standard arrangement" with its hotel operators and Strategic's "hands on" management role (internal quotation marks omitted)).

271 *See* JX 2990 at 1 (Strategic "holds the right to make the final decision" whether to close hotel operations); JX 3282 at 1 (memorandum from Strategic's management to its board of directors indicating that decisions to close two hotels, furlough and lay off employees, and employ "[s]keleton sales staff" were made by Strategic); *id.* at 3 (detailing Strategic's "Contingency Request to Hotels," which included closing or limiting amenities, pausing spending, laying off or furloughing employees, and reducing work week "for all managers and non-union hourly staff"); JX 3978 at 9 (describing similar changes as the result of decisions by Strategic management); Hogin Dep. 289–91 (confirming that Strategic directed the furloughs, layoffs, reduced work hours, and amenities closures).

***78** Seller's hospitality industry expert devoted much of his report to comparing Strategic's actions and financial performance with its competitors to support the argument that Strategic acted in the ordinary course of what managers do in response to a pandemic.[272] That is not the test. The parties agreed that to measure whether Seller deviated from ordinary course, the relevant question is whether "the business of the Company and its Subsidiaries" was conducted consistent with past practice. Quite obviously, it was not.

272 *See* Lesser Report at 4 ("[W]e have determined that throughout the pandemic Strategic has generally conducted its business in a manner that is consistent with typical owners of comparable hotels."); *id.* at 21–70 (comparing occupancy and revenue metrics between Strategic its competitors); *id.* at 71–

153 (comparing financial performance between Strategic and its competitors); *see also* Dkt. 435 at 31–32 (Seller arguing that "[m]ost other luxury hotels in the United States—including Mirae-owned properties—took similar, if not identical, steps in response to COVID-19" (citing Lesser Report)).

3. Seller's Claim That It Was Contractually Obligated To Deviate From The Ordinary Course Of Business

In a single sentence in its initial post-trial brief, Seller advanced two arguments. First, Seller argued that it was contractually obligated to depart from the ordinary course of business because Seller had represented that its operations complied with applicable law. Seller suggested that this representation created an implied obligation that required Seller to continue complying with the law to ensure that the representation remained true. *See* Dkt. 467 at 85 (citing SA § 3.9). In the same sentence, Seller implied that the Inventory Maintenance Covenant and the Organizational Preservation Covenant obligated Seller to deviate from the ordinary course of business. The Seller described those covenants as imposing obligations to "use commercially reasonable efforts to maintain supply and inventory [and] preserve the business and its relationships." *Id.* (citing SA § 5.1). Seller seemed to suggest that if it had to deviate from the ordinary course of business to comply with the law or with those covenants, then it did not breach the Ordinary Course Covenant by doing so.[273]

273 In its post-trial reply brief, Seller devoted two sentences to these arguments. *See* Dkt. 472 at 48–49. In the first sentence, Seller objected that Buyer "never explain[ed] how maintaining the Company's business and complying with the law could be outside the ordinary course 'in all material respects,' " without saying anything more. *See id.* at 48. In the second sentence, Seller asserted in conclusory fashion,

> Nor could there be a breach when Section 5.1 requires the Company to operate in the ordinary course "except as otherwise contemplated by the agreement," which requires "compl[ying] with all Laws" and using "commercially reasonable efforts" to maintain supply and inventory and "preserve" its organization and relationships, as Strategic did.

Id. at 48–49. Seller had an obligation to support its arguments and explain how they applied. It did not satisfy that obligation by making conclusory statements.

It is difficult to address these theories because Seller only mentioned them briefly, did not develop the arguments, and did not provide any supporting authority other than bare citations to provisions of the Sale Agreement. A court need not address arguments that are presented in such a cursory and elliptical manner.[274] These arguments are deemed waived and rejected on that basis.[275] Rejecting these arguments is particularly appropriate because Seller sought to create exceptions to the Ordinary Course Covenant, and Seller therefore bore the burden of proving that the exceptions were satisfied. *See* Part III.A, *supra*.

274 *In re Mobilactive Media, LLC*, 2013 WL 297950, at *12 n.152 (Del. Ch. Jan. 25, 2013) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.... It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work.... Judges are not expected to be mindreaders. Consequently, a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace." (omissions in original) (quoting *Roca v. E.I. duPont de Nemours & Co., Inc.*, 842 A.2d 1238, 1243 n.12 (Del. 2004))).

275 *See* *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived."); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993) ("The failure to raise a legal issue in the text of the opening brief generally constitutes a waiver of that claim on appeal." (footnote omitted)).

***79** That said, it is relatively easy to reject Seller's argument about the Inventory Maintenance Covenant. That covenant appears as a non-restrictive adverbial phrase within the Ordinary Course Covenant. That structure demonstrates that the Inventory Maintenance Covenant is a subsidiary obligation within the Ordinary Course Covenant. It cannot override the Ordinary Course Covenant because it is included within it. It is also overwhelmingly clear from the record that the Hotels' deviations from the ordinary course did not result from their efforts to comply with the Inventory Maintenance Covenant. The Hotels did not place their operations in a quasi-catatonic state because they faced a massive uptick in the use of soap, the consumption of alcohol, or thefts of towels that prevented them from maintaining inventory at levels consistent with past practice. Nothing suggests that the Inventory Maintenance Covenant was an issue.

The analysis of the Organizational Preservation Covenant is more difficult and less clear. The parties have not briefed the interaction between the Organizational Preservation Covenant and the Ordinary Course Covenant, which appear in separate sentences in Section 5.1. On a cold read, the introductory clause in the Ordinary Course Covenant provides that the business must be operated in the ordinary course "[e]xcept as otherwise contemplated by this Agreement or as set forth in Section 5.1 of the Disclosure Schedules." SA § 5.1. It is thus arguable that compliance with the Organizational Preservation Covenant might operate as an exception to the obligation to operate in the ordinary course. But that is not the only possible reading. It is also arguable that the efforts-based Organizational Preservation Covenant could be regarded as a subsidiary obligation, like the efforts-based Inventory Preservation Covenant.

The scope of the Organizational Preservation Covenant also is not clear. The covenant requires Seller to cause the Company and its Subsidiaries to use commercially reasonable efforts "to preserve in all material respects their business organization and to preserve in all material respects the present commercial relationships with key Persons with whom they do business." SA § 5.1. The Sale Agreement does not define "business organization" or "commercial relationships," and the parties have not pointed to any authorities that address what this obligation entails.

Factually, Seller has asserted that Strategic "sought to *preserve* its operations during the pandemic." Dkt. 467 at 81. To support that assertion, however, Seller relied on high-level descriptions of the business functions in which Strategic engages as an asset manager. *See id.* at 81–82. Seller's bottom line position asserts that Strategic operated in the ordinary course, consistent with past practice, by "maximiz[ing] margins given existing demand." *Id.* at 82. The breadth of this statement shows that it is no standard at all.

As discussed, Seller's interpretation of the "business" in question disregards the plain language of the Sale Agreement. Interpreted correctly, the relevant business includes operating the Hotels. Consequently, to use commercially reasonable efforts to maintain the relevant "business organization," Strategic needed to use commercially reasonable efforts to retain the Hotels' employees. Strategic instead laid off or furloughed over 5,200 employees, reduced its operations to skeleton staffing, and operated the Hotels in a state that it described as "closed but open." The layoffs and furloughs mean that to reopen the Hotels, Buyer would face serious challenges related to staffing and labor relations. *See* Tantleff Report at 28. Rather than preserving the business organization, Seller gutted it.

It is thus not clear in the abstract, without assistance from the parties, what the Organizational Preservation Covenant requires, how it interacts with the Ordinary Course Covenant, or whether Seller either complied with or breached the Organizational Preservation Covenant. As a result, Seller failed to carry its burden of proving that the Organizational Preservation Covenant forced Strategic to depart from the ordinary course of business such that the failure of the Covenant Compliance Condition would be excused.

***80** The most difficult issue is Seller's argument regarding compliance with applicable law. Whether Seller could rely on its obligation to comply with the law to evade liability for taking actions outside of the ordinary course is freighted with competing policy considerations. That said, Seller's representation that it complied with the law seems unlikely to have any impact on the analysis. That representation is important in its own right and for purposes of the Bring-Down Condition, but it is not clear what it adds for purposes of the Ordinary Course Covenant. As a general matter, parties are obligated to comply with the law, and Delaware law does not permit a court to enforce a contract prohibited by law.[276] The *Restatement* likewise recognizes that if compliance with a contractual obligation "is made impracticable by having to comply with a domestic or foreign governmental regulation or order," then the obligation is discharged. *Restatement*, *supra*, § 264.

276 *See Della Corp. v. Diamond*, 210 A.2d 847, 849 (Del. 1965) ("[I]t is against the public policy of this State to permit its courts to enforce an illegal contract prohibited by law."); *accord Restatement*, *supra*, § 178 ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

These principles suggest that if a governmental authority had issued an order that required a target business to close entirely due to the COVID-19 pandemic, and if a buyer sought an injunction forcing the business to remain open and to continue operating in accordance with its normal and ordinary routine, then the seller's obligation to operate in the ordinary course would be discharged. The buyer would be unable to obtain injunctive relief and could not obtain damages for breach of the discharged obligation. But a contractual provision that makes operating in the ordinary course a condition to the buyer's obligation to close does not raise the same issues. The condition allocates the risk of action outside of the ordinary course of business to the seller and extinguishes the buyer's obligation to close under those circumstances. No one is required to comply with an illegal contract, and no one receives damages based on a breach of an unenforceable obligation. The scenario involves a risk whose materialization the parties anticipated, and a contractual consequence that follows as a result.

The situation in this case is more complicated than either of these hypotheticals because two provisions in the Sale Agreement operate together to create a hybrid fact pattern. The Covenant Compliance Condition is not framed plainly as a condition that looks to whether the business of Strategic and its subsidiaries was operated in the ordinary course. The Covenant Compliance Condition instead conditions Buyer's obligation to close on Seller having "complied in all material respects with all covenants and conditions required by this Agreement." SA § 7.3(a). If Strategic deviated from the ordinary course to comply with a government order, then it could argue legitimately that the underlying obligation was discharged and hence that it "complied in all material respects with" the covenant. But Buyer could argue legitimately that the Covenant Compliance Condition in this scenario would turn on *whether* the business failed to operate in the ordinary course, not *why* it failed to do so. To my mind, there are credible and contestable contractual, conceptual, and policy-based arguments for both positions. It is not clear which position ultimately would prove more persuasive.

Assuming for the sake of argument that Seller could invoke illegality to exclude its deviation from ordinary course operations for purposes of the Covenant Compliance Condition, then Seller would bear the burden of proving that it indeed was legally obligated to deviate from the ordinary course. *See* Part III.A, *supra*. Seller did not make that showing. Seller does not seriously contend that the drastic changes that Strategic made in response to the outbreak of COVID-19 were required by law, nor does it cite any examples of legally-required deviations from the ordinary course. Seller cited testimony from Hogin, who described the impact of "orders precluding spas, pools, ... food and beverage, restaurants, and gyms," Dkt. 467 at 31 n.19 (citing Hogin Dep. 290, 293, 297), but Hogin did not actually testify about any specific order. He described the decision to close spas, pools, and food and beverage amenities as resulting from "the anticipation or the actual materializing of an executive order that said, don't operate spas, pools, food and beverage outlets." Hogin Dep. 297. He then confirmed that the decision was commercial: "Some [jurisdictions] were takeout only. If it didn't make sense to provide takeout only in a jurisdiction where takeout only was being offered, we did not." Hogin Dep. 297; *accord* Hogin Tr. 826 ("The compliance required that we weren't serving anything inside early on. And then it went to not serving anything other than takeout. We can't make a living serving takeout. It doesn't work."). In his deposition testimony, Hogin did not describe any government orders that required Strategic to close restaurant obligations at all; he simply described closures and limitations of food and beverage services. *See* Hogin Dep. 290. As to gym closures, Hogin's recollection was vague: "I believe the executive order across most or all of our portfolio was recommending or ordering gyms closed, but I'd have to go back and check the total accuracy of that." *Id.* at 293. None of this testimony suffices to establish that any government order required any particular class of amenities to shut down.

***81** The record shows that state and local governments issued stay-at-home orders in response to COVID-19 in all of the jurisdictions in which the Hotels were located. *See* JX 4817. But Strategic implemented sweeping changes before the orders went into effect. On March 16, 2020, a Strategic executive disseminated a set of guidelines to several Four Seasons employees that included a litany of changes, including reduced staffing, closure of amenities, limiting security coverage, encouraging employees to take vacation or paid leave, halting categories of spending, and minimizing operating expenses.[277] At that point, no state had issued a stay-at-home order. Three days later, on March 19, California issued a stay-at-home order; other states followed suit, but not until over a week later.[278] It is thus unclear whether the ordinary course deviations were legally required.

277 JX 2778 at 1; *see also* JX 2773 (email dated March 16, 2016, describing sweeping changes at the

JW Marriott Essex House hotel including closure of all food and beverage operations, "[l]ayoffs and reduced work weeks in all departments," and "[c]urtailment of all discretionary spending"); *see also* JX 2775 (memorandum attached to email dated March 16, 2020, directing work-from-home for Strategic employees).

278 JX 4817; *see also* Hogin Dep. 205–07 (acknowledging that Strategic implemented its work-from-home policy in Chicago before Illinois issued its stay-at-home order).

The record evidence also does not indicate whether state and local shutdown orders required the Hotels to close. Seller admitted that there was "no binding law, order, government regulation, or other legal directive that specifically required that ... the Four Seasons [Palo Alto] suspend all operations." JX 4537 at 6. Rather, Strategic shut down the hotel because there was no demand. [279] The public health order governing Teton County, Wyoming, where the Four Seasons Jackson Hole is located, limited gatherings but permitted "[t]ravel to and work at a place of employment, if the work cannot be remotely from home." JX 3287 at 3. A stay-at-home recommendation promulgated the day before the public health order identified hotels as essential businesses exempt from its recommendations. JX 3276 at 1–3. Strategic closed the Four Seasons Jackson Hole anyway. The stay-at-home order in Illinois exempted hotels and motels "to the extent used for lodging and delivery or carry-out food services." [280] Even if Strategic had been legally required to close two of its hotels and cease or limit amenities at the other hotels, that would not obligate Strategic to make other changes, such as layoffs and staff reductions, cuts to sales and marketing efforts, or decreased capital expenditures.

279 *See* JX 3107 at 3; JX 3207 at 1; JX 3282 at 1; JX 4537 at 6.

280 Ill. Exec. Order No. 2020-10 (Mar. 20, 2020), https://www2.illinois.gov/Pages/Executive-Orders/ExecutiveOrder2020-10.aspx. The parties did not introduce the order into evidence, although they included exhibits that reference it. *See, e.g.*, JX 3027 (press release announcing the executive order). The court can take judicial notice of the order. *See* D.R.E. 201(b); *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 873 (Del. 2020) ("The trial court may also take judicial notice of matters that are not subject to reasonable dispute." (internal quotation marks omitted) (quoting *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 169 (Del. 2006))).

There are thus substantial questions about whether Strategic was legally obligated to make changes to its business. Neither this argument nor the other arguments that Seller raised in passing enabled Seller to carry its burden of demonstrating that Strategic's deviations from the ordinary course of business were excused.

4. Seller's Argument About Buyer Consent

Finally, Seller suggested in a footnote in its reply brief that any deviation from the ordinary course of business could not constitute a breach of the Ordinary Course Covenant because that provision permitted deviations if Buyer consented and further provided that Buyer's consent "shall not be unreasonably withheld." Dkt. 472 at 51 n.34 (citing SA § 5.1(a)). During post-trial argument, Seller's counsel returned to this argument at somewhat greater length. *See* Dkt. 481 at 116. Seller admitted that it never sought Buyer's consent, but argued that if it had, then Buyer could not reasonably have withheld its consent. According to Seller, consent therefore should be deemed given, meaning that Seller did not breach the Ordinary Course Covenant.

***82** Compliance with a notice requirement is not an empty formality. Notice to the buyer is a prerequisite because it permits the buyer to engage in discussions with the seller and if warranted, seek information about the situation under its access and information rights. The buyer then can protect its interests. For example, it can propose reasonable conditions to its consent, and it can anticipate and account for the implications of the non-ordinary-course actions when planning for post-closing operations.

Seller did not cite any authority to support its Buyer-would-have-been-obligated-to-consent theory, much less any case involving an ordinary course covenant. Vast bodies of case law, commentary, and scholarship address the giving of notice in other contexts. The parties did not cite or discuss any of these authorities.

Absent authority suggesting a different outcome, the most logical reading of the Ordinary Course Covenant is that Seller was required to seek Buyer's consent before taking action outside of the ordinary course. If Seller asked, and if Buyer refused, then Seller could litigate the reasonableness of Buyer's refusal. Seller admitted that it did not seek Buyer's consent under Section 5.1 until April 2, 2020, after it had already made major operational changes. [281]

281 *Compare* JX 4335 at 61 ("[Seller] first requested [Buyer's] consent under Section 5.1 of the [Sale Agreement] on April 2, 2020."), *with* JX 3282 (memorandum dated March 30, 2020, summarizing major operational changes "taken to mitigate" the impact of COVID-19).

Seller waived this argument by not presenting it in a meaningful fashion. The notion that Buyer might have been obligated to consent if asked does not provide grounds to excuse the breach of the Ordinary Course Covenant.

5. The Finding Regarding The Covenant Compliance Condition

Buyer proved that the business of Strategic and its subsidiaries was not conducted only in the ordinary course, consistent with past practice, in all material respects. The resulting breach of the Ordinary Course Covenant was never cured, and the Covenant Compliance Condition thus failed.

D. The Title Insurance Condition

The Buyer's obligation to close was subject to a specific condition that the parties negotiated to address the Fraudulent Deeds. Appearing in Section 7.3(c), the condition consists of a single, dense, compound-complex sentence containing 366 words. Diagramming the sentence would likely be achievable only using software designed for computer-assisted drafting. The condition contains multiple points of potential failure, one of which is the Title Insurance Condition. Buyer proved that the Title Insurance Condition failed, relieving Buyer of its obligation to close.

1. The Plain Meaning Of The Title Insurance Condition

Section 7.3(c) conditioned Buyer's obligation to close on Strategic having done two things: (i) obtaining a specified type of documentation and (ii) providing that documentation to the Title Insurer. To satisfy the condition, the documentation had to be sufficient to accomplish two things: (i) satisfy the Expungement Condition by removing the Fraudulent Deeds from the public record and (ii) satisfy the Title Insurance Condition by enabling the Title Insurers to issue a specified level of title insurance. To satisfy the Title Insurance Condition, the documentation had to be sufficient for the Title Insurers to issue a policy of title insurance to Buyer in its capacity as the owner of the Hotels that either (i) did not contain an exception for the Fraudulent Deeds or (ii) contained an exception the Fraudulent Deeds and expressly provided coverage for the exception through an endorsement. [282]

282 This summary simplifies the title insurance requirement in Section 7.3(c). As discussed below, in addition to being sufficient for the Title Insurer to issue a policy to Buyer as owner of the Hotels, the documentation also had to be sufficient for the Title Insurer to issue a policy of title insurance to the lenders financing the Transaction.

***83** Parsing the actual language of Section 7.3(c) requires a difficult slog through a contractual thicket. Initially, Section 7.3(c) conditioned closing on Strategic having obtained a specified type of documentation. In the language of the provision,

> [t]he Company shall have obtained (X) a judgment, order, decree, ruling or other action from a Governmental Authority of competent jurisdiction (each a "Wild Deed Judgment") or (Y) such other documentation which is reasonably satisfactory to Buyer ....

Id. (the "Required Documentation").

Section 7.3(c) next required that the Required Documentation be sufficient to satisfy both the Expungement Condition and the Title Insurance Condition. To satisfy the Expungement Condition, the Required Documentation had to have resulted in the expungement of the Fraudulent Deeds. Using the language of the provision, the Required Documentation had to be sufficient so that

> when filed in the recording office for the applicable county in which each Company Property affected by each Fraudulent Deeds is located, [the Required Documentation] shall result in the expungement, removal or clearing of the Fraudulent Deed

> from the public record, with respect to any Company Property which is encumbered by a Fraudulent Deed.

Id.

To satisfy the Title Insurance Condition, the Required Documentation had to be sufficient for the Title Insurers to provide clean title insurance both to Buyer in its capacity as owner of the Hotels and to the lenders who were financing the Transaction. Using the language of the condition, Strategic must have

> submitted same [viz. the Required Documentation] to the [Title Insurers] for recording in a manner sufficient for the [Title Insurers] to issue as of the Closing Date
>
> (I) an owner's title insurance policy either (A) without taking exception therefrom for the Fraudulent Deeds or (B) issuing affirmative insurance (which may be in the form of an endorsement) providing coverage over the Fraudulent Deeds in form and substance reasonably acceptable to Buyer, and
>
> (II) a lender's title insurance policy for such Fraudulent Deed Encumbered Property that does not take exception therefrom for the Fraudulent Deeds,
>
> dated as of the Closing Date (subject to Seller's right to satisfy the foregoing pursuant to Section 5.10), in each case subject only to the payment by Buyer of the premium therefor on the Closing Date and satisfaction by Buyer, Seller and/or the Company of the other conditions to issuance of the owner and lender title insurance policies ....

Id. (formatting added) The parties have focused on subpart (I) of this aspect of Section 7.3(c), which refers the owner's title insurance policy; they largely have ignored subpart (II), which refers to the lender's title insurance policy. This decision follows their lead, which means that when this decision uses the term "Title Insurance Condition," it refers to the condition relating to the owner's title insurance policy. [283]

283 There is an odd divergence between the two subparts. Unlike the owner's policy, the aspect of the condition relating to the lender's policy does not permit the policy to take an exception for the Fraudulent Deeds and then provide express coverage through an endorsement. It is not clear why the parties framed the requirements differently.

***84** Section 7.3(c) finishes with a proviso that describes one way in which the Title Insurance Condition could fail:

> provided, that it shall be deemed a failure of condition hereof with respect to any Company Property affected by a Fraudulent Deed in the event that the [Title Insurers] confirm[ ] in writing that any Wild Deed Judgment or other document or instrument presented by Seller (or the Company) is insufficient to permit the [Title Insurers] to issue all or any portion of the title insurance with respect to such Company Property in the manner as described above following Buyer's request for a written explanation therefor from the [Title Insurers] (and Buyer hereby agrees to timely make such request of the [Title Insurers] promptly following receipt and review of any Wild Deed Judgment or other document or instrument delivered by Seller to Buyer for such purpose).

Id. (the "Written Confirmation Proviso").

By its terms, Section 7.3(c) does not impose any mandatory obligations on Strategic. It rather conditions Buyer's obligation to close on Strategic having accomplished the tasks identified in Section 7.3(c). Most notably, for present purposes, Strategic had to satisfy the Title Insurance Condition.

2. The Failure Of The Title Insurance Condition

The title commitments for each of the Hotels contain the DRAA Exception. The Title Insurers added this exception to the commitments on April 13, 2020, after Seller obtained the default judgments that ostensibly quieted title, thereby satisfying the Expungement Condition. [284]

284 *See* JX 3675 at 17; JX 3676 at 11; JX 3679 at 18; JX 3698 at 13.

The DRAA Exception encompasses "[a]ny defect, lien, encumbrance, adverse claim, or other matter resulting from, arising out of, or disclosed by, any of the following." JX 3698 at 13. The DRAA Exception then identifies four items, including,

- "(i) that certain '[DRAA Agreement],' dated on or about May 15, 2017, to which AnBang Insurance Group Co., Ltd., Beijing Dahuabang Investment Group Co., Ltd., Amer Group LLC, World Award Foundation Inc., An Bang Group LLC, and AB Stable Group LLC are purportedly parties and/or also interested, and the rights, facts, and circumstances disclosed therein,"
- "(ii) that certain action styled World Award Foundation, et al. v. AnBang Insurance Group Co, Ltd, et al., in the Court of Chancery of the State of Delaware, as DRAA C.A. No. 2019-0605-JTL and the rights, facts, and circumstances alleged therein,"
- "(iii) those certain actions, each styled World Award Foundation, et al. v. AnBang Insurance Group Co Ltd, et al., in the Superior Court of the State of Delaware, as Nos. C.A. N193-05055, C.A. N19J-05253, C.A. N193-05458, C.A. N19J-05868, C.A. N193-06026, and C.A. N19J-06027 and the rights, facts, and circumstances alleged therein," and
- "(iv) that certain action styled World Award Foundation, et al., v. AnBang Insurance Group Co., Ltd., in the Superior Court of State of California for the County of Alameda, as Case No. RG19046027 and the rights, facts, and circumstances alleged therein."

JX 3698 at 13 (formatting added). In other words, the DRAA Exception creates an exception from coverage for anything resulting from, arising out of, or disclosed by the DRAA Agreement, the DRAA Chancery Action, the Delaware enforcement actions, and the California Action.

***85** The DRAA Exception encompasses the Fraudulent Deeds. First, the DRAA Exception excludes from coverage any matter "resulting from, arising out of, or disclosed by" the DRAA Agreement "and the rights, facts, and circumstances disclosed therein." Even though fraudulent, the DRAA Agreement purports to provide the authority on which Hai Bin Zhou and Belitskiy relied when recording the Fraudulent Deeds. After supposedly making Anbang contractually liable for significant sums, the DRAA Agreement states,

> In the event that the deposit and assets under the preceding Paragraph 79 have not been delivered by then, after June 15, 2018, all other parties may, without going through arbitration or court, directly transfer and, following the Durable Power of Attorney conveyed in this Paragraph, persons appointed by the other five parties can directly transfer the ownership of the assets by signing a Grant Deed in front of any Notary Public. [Anbang] guarantees that the aforementioned assets are free from any joint liability; if there is any such liability, [Anbang] shall compensate the other parties ten times their worth, the other parties may file directly in the county recording office of the place where such asset is located.

JX 4837 at 13, 30. When preparing and filing the Fraudulent Deeds, Hai Bin Zhou and Belitskiy claimed to use the durable power of attorney granted by this paragraph, with each of the Fraudulent Deeds containing a reference to a "DPOA" or "POA" bearing the ostensible date of signing of the DRAA Agreement. *See* Part I.E, *supra*.

The plain language of the DRAA Exception therefore covers the Fraudulent Deeds. For purposes of the exception, it does not matter that the DRAA Agreement is fraudulent or that Hai Bin Zhou could not use it to create any rights against the Hotels that a legitimate legal system ultimately would respect. The Title Insurers were the masters of their offers of coverage, and they could limit that coverage in any way they wished.

Next, the DRAA Exception excludes from coverage any matter "resulting from, arising out of, or disclosed by" the Alameda Action "and the rights, facts, and circumstances disclosed therein." Seller's title expert agreed that the DRAA Exception exempts from coverage "anything referenced in or disclosed by the Alameda action," including any "fact, right, or circumstance," and that "what that means" is that "any encumbrance, claim, or other matter arising from the grant deed ... is excepted from coverage under the [DRAA Exception]."[285] An affidavit filed in the Alameda Action identifies all of the Fraudulent Deeds and describes the facts and circumstances surrounding the deeds. [286] As a result, the plain language of the DRAA Exception eliminates coverage for the Fraudulent Deeds. [287]

285 Chernin Tr. 1261–63; *accord id.* at 1257–58.

286 *See* JX 1757 at 2–6, 24–25, 73, 79, 143, 152, 157, 166, 226, 235, 240, 249, 284.

287 *See* Nielsen Tr. 1441–43 (explaining that because "there are references in the [Alameda Litigation] pleadings to the deeds," the DRAA Exception "fully encompasses the former exception for just the California deeds"); *see* JX 4541 ¶¶ 153, 169–171, 261.

Finally, the DRAA Exception excludes from coverage any matter "resulting from, arising out of, or disclosed by" the DRAA Chancery Action "and the rights, facts, and circumstances disclosed therein." When seeking a temporary restraining order against the petitioners in the DRAA Chancery Action, Anbang provided the court with copies of the Fraudulent Deeds for the Ritz Carlton Laguna Niguel, the Ritz Carlton Half Moon Bay, the Westin St. Francis, the Loews Santa Monica, and the Four Seasons Palo Alto. [288] When seeking to compel production of the DRAA Agreement, Anbang referred to the Fraudulent Deeds, citing the existence of "a multi-state conspiracy to derail a multi-billion deal that [Anbang] had entered into for the sale of a number of luxury for the sale of a number of luxury properties across the United States." JX 5181 at 845. Asserting that the DRAA Petitioners were "directly involved in that fraud," Anbang alleged the following:

> ***86** Petitioner AB Stable Group LLC was a grantee on the false deeds involving the Ritz-Carlton, Half Moon Bay and the Four Seasons Hotel [Palo Alto], two of the six hotels that are the object of Petitioners' real estate fraud scheme, and Andy Bang, who verified the petition commencing this action, is the secretary of AB Stable Group LLC according to corporate documents filed with the Delaware Secretary of State. In addition, Bang's eponymous Andy Bang LLC was the grantee of the false deed for the Montage Laguna Beach, another of the six California properties. Finally, as set forth in more detail in [Anbang's] opening brief in support of its TRO Motion, the individual who attempted to fraudulently transfer these deeds in the first instance was Daniil Belitskiy, who purports to be the VP of AB Stable Group LLC.

Id. at 845–46 (citations omitted). The opposition to the motion also referenced the deeds. *See id.* at 1078–79. And when providing the court with a status update about the DRAA Chancery Action and the Transaction, Anbang's counsel discussed the Fraudulent Deeds. *See id.* at 1112–13, 1118, 1130. The DLA Piper letter that was docketed in the DRAA Chancery Action also discussed the Fraudulent Deeds. *See id.* at 1186–91. In light of these disclosures in the DRAA Chancery Action, the DRAA Exception again eliminates coverage for the Fraudulent Deeds.

288 *See* JX 5181 at 379–80, 392–92, 417, 426, 431, 440, 464, 470.

In response to the plain language of Title Insurance Condition and the DRAA Exception, Seller argues that the Title Insurance Condition was satisfied because it only requires that the title insurance policies "not take exception therefrom for the Fraudulent Deeds." SA § 7.3(c); *see* Dkt. 467 at 86–87. Seller maintains that this language is satisfied if the title insurance policies do not explicitly reference the Fraudulent Deeds, even if the title insurance policies contain a broader exception that encompasses the Fraudulent Deeds.

Seller's interpretation is contrary to the plain language of the Title Insurance Condition. The parties agreed that Buyer would not be obligated to close without insurance policies that do "not take exception therefrom for the Fraudulent Deeds." SA § 7.3(c). The plain language of the condition does not treat the term "Fraudulent Deeds" as magic words that must appear in the exception. The condition turns on whether the title commitments take exception for the Fraudulent Deeds, regardless of the specific words used. The DRAA Exception plainly encompasses the Fraudulent Deeds, causing the Title Insurance Condition to fail. Both sides' title experts agreed. [289] Ivanhoe, who served both as Buyer's lead deal lawyer and as Buyer's lead real estate lawyer, expressed the same understanding. Ivanhoe Tr. 633. Seller's lead deal lawyer did not offer testimony on the issue, and its lead real estate lawyer did not testify at trial. [290]

289 Chernin Tr. 1263; Nielsen Tr. 1442–43.

290 At a conceptual level, the relationship between the broader DRAA Exception and a narrower exception for the Fraudulent Deeds tracks the relationship between a broad exception to the MAE Definition for a "calamity" and a narrower exception for a pandemic. *See* Part III.B.2, *supra.* The only difference is that the parties' positions are reversed. For the DRAA Exception, Buyer argues that the broader provision encompasses the narrower concept, while Seller argues that it cannot. For the calamity exception, Seller argues that the broader provision encompasses the narrower concept, while Buyer argues that it cannot. In both cases, the answer is the same: the broader exception encompasses the narrower concept.

Attempting to reinforce its argument about magic words, Seller correctly points out that (i) the title insurance commitments do not contain an exception that refers explicitly to the "Fraudulent Deeds," (ii) the DRAA Exception does not expressly use the term "Fraudulent Deeds," and (iii) earlier drafts of the title commitment contained a specific exception for the Fraudulent Deeds, but the Title Insurers removed that narrower exception when they added the broader DRAA Exception. [291] These observations are factually accurate but legally irrelevant.

291 *See* Dkt. 467 at 87–88. *Compare* JX 2532 at 16–17, *with* JX 3700 at 11–12. In making this argument, Seller relies heavily on testimony from Kravet, who agreed that the specific exception for the Fraudulent Deeds was removed when the DRAA Exception was added. *See* Dkt. 467 at 89–90 (citing Kravet Dep. 161, 216). Kravet's testimony accurately reflects the historical changes in the title insurance commitments, in which the Title Insurers initially included a specific exception for the Fraudulent Deeds, and then replaced it with the broader DRAA Exception. Kravet's testimony did not address the legal implications of the change, and he testified that the DRAA Exception was a "separate exception" that "stands on its own." Kravet Dep. 216.

***87** As Seller's title insurance expert explained, the deletion of an exception from a prior title commitment carries no independent significance because the scope of a title commitment is limited to the four corners of that commitment. [292] The plain language of the title commitments makes clear that the removal of an earlier exception does not affect the interpretation of existing exceptions. The title commitments stated,

> **LIABILITY OF THE COMPANY MUST BE BASED ON THIS COMMITMENT.**
>
> ...
>
> (c) Until the Policy is issued, this Commitment, as last revised, is the exclusive and entire agreement between the parties with respect to the subject matter of this Commitment and supersedes all prior commitment negotiations, representations, and proposals of any kind, whether written or oral, express or implied, relating to the subject matter of the Commitment.

JX 3698 at 3. This language functions like a powerful integration clause. Both parties' title experts agreed that in light of this language, the scope of the exceptions in the commitments depends entirely on the words in those exceptions, without giving any effect to any prior commitments. Chernin Dep. 87–88; Nielsen Dep. 1442.

292 *See* Chernin Tr. 1253–54; Chernin Dep. 86–87; *accord* Ivanhoe Tr. 766.

The operative question for purposes of the Title Insurance Condition is whether the DRAA Exception covers the Fraudulent Deeds, not whether the Title Insurers previously included a narrower exception that focused specifically on the Fraudulent Deeds. The plain language of the DRAA Exception encompasses the Fraudulent Deeds, which caused the Title Insurance Condition to fail.

Seller further argues that the DRAA Exception did not cause the Title Insurance Condition to fail because the Written Confirmation Proviso required that the Title Insurers "confirm that the judgment obtained is insufficient to issue insurance." Dkt. 467 at 87 n.63. In making this argument, Seller misreads the Written Confirmation Proviso, which contemplates that Section 7.3(c) "shall be deemed" to have failed in the event the title insurer issues such a notice "following Buyer's request for a written explanation therefor." SA § 7.3(c). The Written Confirmation Proviso does not require written confirmation from the Title Insurers for the Title Insurance Condition to fail; it instead provided one means by which the Title Insurance Condition would be deemed to have failed. The Written Confirmation Proviso enables the parties to determine whether the Title Insurance Condition failed without awaiting formal title commitments. But the Title Insurance Condition also would fail if the Title Insurers did not issue a policy that satisfied the Title Insurance Condition.

3. The Parenthetical Reference And The Possibility Of Satisfying The Title Insurance Condition By Complying With Section 5.10

To avoid the implications of the Title Insurance Condition, Seller tries to redraft Section 7.3(c) to eliminate it. That attempt fails.

Initially, Seller claims that Section 7.3(c) only requires that Seller obtain a "Wild Deed Judgment" that, once recorded, "shall result in the expungement ... of [each] Fraudulent Deed from the public record."[293] That assertion describes the Expungement Condition; it ignores the Title Insurance Condition.

[293] Dkt. 467 at 86 (alterations and omissions in original) (quoting JX 1226 § 7.3(c)).

In a slightly better argument, Seller claims that it satisfied Section 7.3(c) by complying with Section 5.10(a) and causing the Company to clear the Fraudulent Deeds in accordance with the Litigation Plan. *See* Dkt. 467 at 61. Seller did not satisfy Section 7.3(c) under this route either.

***88** In August 2019, Anbang proposed to address the Fraudulent Deeds through the Quiet Title Actions. Anbang made this proposal after representing to Mirae that the Fraudulent Deeds represented the solitary work of a twenty-something Uber driver with a criminal record, while withholding its broader knowledge about Hai Bin Zhou and his years of disputes with Anbang. Anbang's proposed solution thus only addressed the misleadingly narrow version of the problem that Anbang had identified, but it achieved the desired effect of making Mirae think that Anbang was being forthright and responsible.

The result was Section 5.10 of the Sale Agreement, in which Seller covenanted to cause Strategic "to take actions ... and use best efforts as are necessary to satisfy the condition to closing set forth in Section 7.3(c) prior to the Termination Date." SA § 5.10(a). In another example of the convoluted drafting that is typical of the Sale Agreement, Section 5.10 required Seller to cause Strategic "to take such actions ... as are necessary to satisfy the condition," thereby imposing an unconditional obligation, while following that requirement with an efforts-based obligation under which Seller committed to cause Strategic to "use best efforts as are necessary to satisfy the condition." The flat and unconditional obligation necessarily dominates the efforts-based obligation.

In Section 5.10(a), the parties agreed that actions required to satisfy Section 7.3(c) "includ[ed], without limitation," causing Strategic and any applicable subsidiary

> to hire counsel ... and cause such counsel to promptly commence and diligently prosecute such actions as necessary to accomplish the same [viz. satisfaction of the condition in Section 7.3(c)]. Buyer and Seller agree that those certain actions identified in Section 5.10(a)(ii) of the Disclosure Schedules (the "Litigation Plan") are approved for such purpose; provided, however, the actions set forth in the Litigation Plan shall not be deemed a limitation of Seller's obligation hereunder.

SA § 5.10(a). The parties approved Gibson Dunn as counsel to carry out the Litigation Plan. *Id.*

Seller now argues that as long as Strategic followed the Litigation Plan, then it necessarily satisfied all aspects of Section 7.3(c), including the Title Insurance Condition. Under Seller's logic, the Litigation Plan was "approved for such purpose," with the "purpose" being prosecuting the actions "necessary to accomplish the same," with the "same" being "to satisfy the condition to closing set forth in Section 7.3(c)."

This argument ignores the structure of Section 7.3, which requires fulfilling *both* the Expungement Condition *and* the Title Insurance Condition. At most, compliance with the Litigation Plan could satisfy the Expungement Condition;

it could not inherently result in satisfaction of the Title Insurance Condition.

Equally important, the plain language of Section 5.10(a) does not support Seller's reading. Section 5.10(a) imposed on Seller an obligation "to take such actions ... as are necessary to satisfy the condition to closing set forth in Section 7.3(c)." Section 5.10(a) did not modify the parameters of Section 7.3(c); it left them intact and obligated Seller to satisfy them. The bottom-line obligation thus required Seller to satisfy Section 7.3(c). Whether Seller fulfilled the covenant and satisfied Section 7.3(c) depended on the terms of Section 7.3(c), not Section 5.10(a).

Other language in Section 5.10(a) confirms that the provision does not equate carrying out the Litigation Plan with satisfying all of the conditions in Section 7.3(c). Seller's obligations under Section 5.10(a) "includ[ed], without limitation" pursuing the Litigation Plan, which by definition meant that Seller's obligations under Section 5.10(a) were not limited to pursuing the Litigation Plan and that Seller might need to take further action to satisfy Section 7.3(c). Eliminating any doubt, a proviso in Section 5.10(a) stated that "the actions set forth in the Litigation Plan shall not be deemed a limitation of Seller's obligation hereunder." And after making this statement, an additional proviso added

> ***89** nor shall [the actions set forth in the Litigation Plan] constitute the exclusive means for Seller to satisfy the condition to closing set forth in Section 7.3(c) and Seller shall have the right to take such action as it deems reasonably necessary to satisfy the condition to closing set forth in Section 7.3(c) (as the same may be satisfied under this Section 5.10). Seller shall make all material decisions pertaining to the action it takes to satisfy the condition to closing set forth in Section 7.3(c) (as the same may be satisfied under this Section 5.10); provided, that, following Closing, Seller shall not enter into or agree to any settlement, compromise or discharge relating to the Fraudulent Deeds unless in accordance with clause (iv) of this Section 5.10(a) below; provided, further, that, in the event that, following the Closing if such actions are still ongoing and Seller fails to diligently pursue such actions, Buyer shall have the right, by written notice to Seller, to assume control of such actions in accordance with the Litigation Plan.

Id. Carrying out the Litigation Plan and satisfying Section 7.3(c) were not coextensive.

And still more language, this time appearing in Section 5.10(c), illustrates that fulfilling the Litigation Plan was not equivalent to satisfying Section 7.3(c). In Section 5.10(c), the parties expressly agreed upon a means by which Seller could satisfy Section 7.3(c):

> Notwithstanding the foregoing, if prior to the Termination Date Seller shall have satisfied the condition to closing set forth in Section 7.3(c) with respect to at least three (3) but less than all of the Company Properties affected by the Fraudulent Deeds, then, so long as all other conditions to the parties' respective obligations set forth in Article VII are then satisfied or waived (other than those conditions which may only be satisfied at Closing), Seller may, in its sole discretion, and by delivery of written notice to Buyer, elect to satisfy the condition precedent to Buyer's obligation to close as set forth in Section 7.3(c) by delivering at Closing the Section 5.10(c) Closing Deliverables (as hereafter defined).

Id. § 7.3(c). The deliverables consisted of

- either cash or a letter of credit in an amount equal to the amount of the purchase price allocated to the properties that were still subject to Fraudulent Deeds,

- additional funds in an amount sufficient to satisfy the condition to closing set forth in Section 7.3(c) on a post-closing basis,

- additional funds sufficient to cover any release price premium, yield maintenance premium, spread maintenance premium or other prepayment charges or premiums payable to the Lenders by Buyer,

- a prorated portion of any acquisition costs incurred by Buyer under the Sale Agreement allocated to the properties that were still subject to Fraudulent Deeds, and

- for the three or more properties where the Fraudulent Deeds had been removed, an affidavit from an officer of Seller attesting to the expungement of the Fraudulent Deeds and such other documents or instruments as the Title Insurers reasonably required to satisfy the condition to closing set forth in Section 7.3(c).

Id. § 5.10(c). As shown by Section 5.10(c), when the parties agreed on requirements that would cause Section 7.3(c) to be satisfied, they said so explicitly. Just as important, even when they did so, expunging a certain number of the Fraudulent Deeds and providing economic assurances equivalent to the expungement of the remaining Fraudulent Deeds did not suffice. To satisfy the condition to closing set forth in Section 7.3(c), Seller still had to provide such other documents or instruments as the Title Insurers reasonably required. [294]

294 The existence of Section 5.10(c) and the specific path it contemplates for satisfying Section 7.3(c) helps to explain parenthetical language that otherwise could be confusing. In Section 7.3(c), after describing the title insurance policies and specifying that they are to be "dated as of the Closing Date," and before stating that the policies are to be "subject only to the payment by Buyer of the premium therefor on the Closing Date and satisfaction by Buyer," the provision states, "(subject to Seller's right to satisfy the foregoing pursuant to Section 5.10)." Although this language cites Section 5.10, the parenthetical necessarily refers to the specific means of satisfying Section 7.3(c) that appears in Section 5.10(c).
Two similar parenthetical references appear in Section 5.10(a) in the form of language stating that Seller has the right to take action and make decisions to satisfy the condition to closing set forth in Section 7.3(c) "(as the same may be satisfied under this Section 5.10)." Once again, although the citation is to "Section 5.10," the parenthetical necessarily refers to the specific means of satisfying Section 7.3(c) that appears in Section 5.10(c).
Regardless, the plain language of Section 5.10, including Section 5.10(c), demonstrates that compliance with Section 5.10 provides a means of satisfying only the Expungement Condition in Section 7.3(c). It does not also provide a means of satisfying the Title Insurance Condition.

4. Buyer's Actions Did Not Cause The Failure Of The Title Insurance Condition

***90** Up to this point in the analysis, the evidence establishes that Seller failed to satisfy the Title Insurance Condition, relieving Buyer of its obligation to close. Seller argues that Buyer cannot rely on the failure of the Title Insurance Condition because Buyer's actions caused the condition to fail. Seller failed to prove that Buyer caused the failure of the Title Insurance Condition by breaching a performance obligation.

a. No Breach

Seller relies on Sections 5.5(a) and (i) of the Sale Agreement to establish that Buyer breached a performance obligation sufficient to excuse the failure of the Title Insurance Condition. *See* Dkt. 467 at 90. According to Seller, both provisions impose broad obligations on the parties to use commercially reasonable efforts to complete the Transaction. Although the provisions look similar, they create different obligations. Only Section 5.5(a) is relevant.

Section 5.5(a) imposes the type of broad reasonable efforts obligation that Seller seeks to invoke. It states:

> Each of the parties shall use all commercially reasonable efforts to take, or cause to be taken, all appropriate action to do, or cause to be done, all things necessary, proper or advisable under applicable Law or otherwise to consummate and make effective the transactions contemplated by this Agreement as promptly as practicable, including to
>
> (i) obtain from Governmental Authorities all consents, approvals, authorizations, qualifications and orders as

are necessary for the consummation of the transactions contemplated by this Agreement and

(ii) promptly (and in no event later than five (5) Business Days after the date hereof) make all necessary filings, and thereafter make any other required submissions, with respect to this Agreement required under the HSR Act or any other applicable Law.

SA § 5.5(a) (formatting added) (the "Reasonable Efforts Covenant"). The Reasonable Efforts Covenant thus imposes a general obligation on each party to use commercially reasonable efforts "to do, or cause to be done, all things necessary, proper or advisable under applicable Law or otherwise to consummate and make effective the transactions contemplated by this Agreement." The "including" clause confirms that general obligation "includ[es]" an obligation to use commercially reasonable efforts to accomplish the two enumerated items, both of which involve obtaining government approvals and making regulatory filings.

Section 5.5(i) imposes a different type of obligation: It requires each party to use commercially reasonable efforts to take actions that the *other party identifies* as reasonably required to complete the Transaction. It states:

> Seller and Buyer will use commercially reasonable efforts to do, execute, acknowledge and deliver all and every such further acts, deeds, conveyances, consents, estoppels, waivers, assignments, notices, transfers and assurances *as may be reasonably required by the other party* for carrying out the intentions or facilitating the consummation of this Agreement, including, without limitation, such further acts, deeds, conveyances, consents, estoppels, waivers, assignments, notices, transfers and assurances as may be reasonably required in order to satisfy the contingencies and conditions established by any Lender in connection with the Buyer's financing of the transactions contemplated hereby.

SA § 5.5(i) (emphasis added) (the "Reasonable Assistance Covenant"). The provision thus imposes on each party a general obligation that is identical to the Reasonable Efforts Covenant—to use commercially reasonable efforts—but with an important difference. The Reasonable Assistance Covenant mandates that each party must use commercially reasonable efforts that are "reasonably required by the other party." Section 5.5(i) is thus a covenant to provide reasonable assurances.

***91** As noted, Seller relies on both the Reasonable Efforts Covenant and the Reasonable Assistance Covenant in arguing that Buyer caused the failure of the Title Insurance Condition. To succeed on its claim that Buyer breached the Reasonable Assistance Covenant, Seller must point to an action that it identified to Buyer as "reasonably required ... for carrying out the intentions or facilitating the consummation of this Agreement," which Buyer then failed to take. Seller has not identified any actions falling into this category. The analysis therefore focuses on the Reasonable Efforts Covenant.

The Reasonable Efforts Covenant requires "commercially reasonable efforts," which is one gradation in what many deal practitioners believe to be a hierarchy of efforts standards. [295] The ABA Mergers and Acquisitions Committee has ascribed the following meanings to commonly used terms:

- *Best efforts:* the highest standard, requiring a party to do essentially everything in its power to fulfill its obligation (for example, by expending significant amounts [of] management time to obtain consents).

- *Reasonable best efforts:* somewhat lesser standard, but still may require substantial efforts from a party.

- *Reasonable efforts:* still weaker standard, not requiring any action beyond what is typical under the circumstances.

- *Commercially reasonable efforts:* not requiring a party to take any action that would be commercially detrimental, including the expenditure of material unanticipated amounts [of] management time.

- *Good faith efforts:* the lowest standard, which requires honesty in fact and the observance of reasonable commercial standards of fair dealing. Good faith efforts are implied as a matter of law. [296]

Kling and Nugent "believe that most practitioners treat 'reasonable efforts,' 'commercially reasonable efforts' and 'reasonable best efforts' as all different from and as imposing less of an obligation than, 'best efforts.' "[297] They also observe that " 'reasonable best efforts' *sounds* as if it imposes more of an obligation than 'commercially reasonable efforts.' "[298]

295 *See* Kling & Nugent, *supra*, § 13.06, at 13-46 to -47; *Model Stock Purchase Agreement*, *supra*, at 212.

296 *Model Stock Purchase Agreement*, *supra*, at 212 (citation omitted); *see* Ryan A. Salem, Comment, *An Effort to Untangle Efforts Standards Under Delaware Law*, 122 Penn St. L. Rev. 793, 800–04 (2018) (identifying five commonly used standards: good faith efforts, reasonable efforts, best efforts, commercially reasonable efforts, and diligent efforts).

297 Kling & Nugent, *supra*, § 13.06, at 13-46 to -47 (footnote omitted); *see* Adams, *Contract Drafting*, *supra*, at 195 ("Anecdotal evidence suggests that many who work with contracts believe that *best efforts* obligations are more onerous than *reasonable efforts* obligations. The distinction is often expressed like this: *reasonable efforts* requires only what is reasonable in the context, whereas *best efforts* requires that you do everything you can to comply with the obligation, even if you bankrupt yourself.").

298 Kling & Nugent, *supra*, § 13.06, at 13-47.

Commentators who have surveyed the case law find little support for the distinctions that transactional lawyers draw.[299] Consistent with this view, in *Energy Transfer*, the Delaware Supreme Court interpreted a transaction agreement that used both "commercially reasonable efforts" and "reasonable best efforts." 159 A.3d at 271–73. Referring to both provisions, the high court stated that "covenants like the ones involved here impose obligations to take all reasonable steps to solve problems and consummate the transaction." *Id.* at 272. The high court did not distinguish between the two. While serving as a member of this court, former Chief Justice Strine similarly observed that even a "best efforts" obligation "is implicitly qualified by a reasonableness test—it cannot mean everything possible under the sun." *Alliance Data Sys. Corp. v. Blackstone Cap. P'rs V L.P.*, 963 A.2d 746, 763 n.60 (Del. Ch. 2009) (quoting *Coady Corp. v. Toyota Motor Distribs., Inc.*, 361 F.3d 50, 59 (1st Cir. 2004)). Another Court of Chancery decision—*Hexion*—framed a buyer's obligation to use its "reasonable best efforts" to obtain financing in terms of commercial reasonableness: "[T]o the extent that an act was both commercially reasonable and advisable to enhance the likelihood of consummation of the financing, the onus was on [the buyer] to take that act." *Hexion*, 965 A.2d at 749.

299 The most thorough analytical treatment of efforts clauses rejects the existence of a hierarchy. *See* Kenneth A. Adams, *Interpreting and Drafting Efforts Provisions: From Unreason to Reason*, 74 Bus. Law. 677, 693–703 (2019) (surveying field). Other commentators agree. *See* Kling & Nugent, *supra*, § 13.06, at 13-44 to -49 & nn.2–9, 11 (collecting cases); Adams, *Contract Drafting*, *supra*, at 193 (observing that "[t]here's widespread confusion over phrases using the word *efforts*" and recommending that drafters use a single standard of "reasonable efforts"); Salem, *supra*, at 800–21 (surveying case law; recommending that Delaware resolve the ambiguity created by different efforts standards by adopting a single standard of "reasonable efforts"); Zachary Miller, Note, *Best Efforts?: Differing Judicial Interpretations of a Familiar Term*, 48 Ariz. L. Rev. 615, 615 (2006) ("The judicial landscape is littered with conflicting interpretations of efforts clauses.").

***92** The language from *Hexion* also suggests that in a commercial agreement, including the word "commercially" in an efforts obligation is redundant. The leading commentator on efforts clauses agrees:

> Determining whether someone has tried hard involves considering the circumstances, and in the case of a business transaction, that necessarily involves acknowledging that the parties are engaged in the world of commerce. That would be the case whether or not the word *commercially* is used in the *efforts* standard.

Adams, *Interpreting and Drafting Efforts Provisions: From Unreason to Reason*, *supra*, at 702 (footnote omitted). Buyer's obligation under the Reasonable Efforts Covenant thus was an obligation to use reasonable efforts.

Seller contends that Buyer breached the Reasonable Efforts Covenant by seeking to convince the Title Insurers to adopt the DRAA Exception. *See* Dkt. 467 at 90–91. There are grounds for concern about Buyer's conduct, but Seller ultimately failed to prove a breach. The dispositive evidence on this point came from Seller's own title expert, who concluded that Ivanhoe acted appropriately when communicating with the Title Insurers.

The record indicates that during March and April 2020, Ivanhoe made statements to the Title Insurers that supported the inclusion of the DRAA Exception, rather than arguing that the Title Insurers should provide clean commitments without any exceptions. As someone who is not personally familiar with the dynamics of seeking title insurance, this behavior looks to me like conduct that was designed to undermine the deal. Viewed from that standpoint, that behavior would breach the Reasonable Efforts Covenant.

Not surprisingly, Seller argues that Ivanhoe sought to cause the Title Insurance Condition to fail and give his client a basis for refusing to close. Seller's account stresses that on February 19, 2020, after the Lenders discovered the DRAA Chancery Action and the related proceedings in Delaware Superior Court, the Lenders sent various filings from those actions to Greenberg Traurig.[300] Anbang and Gibson Dunn had never mentioned these lawsuits, so Greenberg Traurig immediately began investigating them. As part of that process, a litigator in Greenberg Traurig's Delaware office circulated a summary of the filings, including a copy of the transaction from the status conference held on January 8, 2020.[301]

300 Dkt. 467 at 21; *see* JX 2246.

301 *See* Ivanhoe Tr. 673–76; JX 2280.

While these events were unfolding, Ivanhoe was vacationing in the Middle East. He returned on February 21, 2020, and participated in a call with Gibson Dunn.[302] The Gibson Dunn lawyers downplayed the Delaware filings, arguing that they were part and parcel of the same fraud involving the Fraudulent Deeds and that they had been addressed by the January Chancery Judgment. The Gibson Dunn lawyers did not tell Ivanhoe about Anbang's long history of trademark disputes with Hai Bin Zhou, nor did they share the information they had about Hai Bin Zhou.

302 *See* JX 2292; Ivanhoe Tr. 588–89.

Although Ivanhoe was taken aback that Gibson Dunn and Anbang had not mentioned the filings previously, he again relied on what Gibson Dunn told him. His litigation colleague's review of the filings in the DRAA Chancery Action also suggested that the threat from that proceeding had been beaten back. On Sunday, February 23, 2020, Ivanhoe told the Lenders' counsel that he had consulted with Mirae and that they did not view the DRAA Chancery Action as an impediment:

> ***93** Their view is that since the Delaware litigation does not involve Strategic or the hotel properties (and has been successfully beaten back by Anbang with the latest Delaware judgment and Alameda County ruling), there is little to no risk on our transaction from these cases.[303]

According to Seller, because Ivanhoe determined that the DRAA Chancery Action did not pose any risk, he could not later advocate to the Title Insurers that the DRAA Chancery Action and the DRAA Agreement posed a risk. *See* Dkt. 467 at 91–92. Doing so, Seller claims, constituted bad faith and a clear breach of the Reasonable Efforts Covenant.

303 JX 2304; *accord* JX 2311 at 2 (Jones Lang telling Goldman on February 23, 2020, “Mirae is prepared to proceed based on its understanding of the [Delaware] litigation.”).

The problem for Seller's argument is that events did not stop after Ivanhoe communicated with the Lenders on February 23, 2020. On February 25, Stamoulis filed the DLA Letter in the DRAA Chancery Action. Over the weekend of February 29, 2020, Ivanhoe reviewed the DLA Letter, which raised alarm bells. As he explained at trial, “you have the partner at a major law firm, major international law firm, I think a peer of ours and Gibson and Dunn, who is now describing the basis of all of these claims ....” Ivanhoe Tr. 600. He called the head of Greenberg Traurig's litigation practice and asked him to assemble a team to address “a very serious problem on a very large transaction.” *Id.* Ivanhoe viewed the situation as an “emergency.” *Id.*

Ivanhoe's testimony was credible and supported by corroborating evidence. In addition, as the judge presiding over the DRAA Chancery Action, I recall reviewing the DLA Letter when it was filed on the docket. It depicted a different and more serious situation than Anbang and its counsel had presented, and it caused me to question whether counsel had provided me with the full story. In fact, they had not. Anbang and its counsel knew much more about Hai Bin Zhou and his fraud than they had shared.

I am therefore persuaded that Ivanhoe viewed the DLA Letter as materially changing the landscape and elevating the risk to the Transaction. I am likewise persuaded that the letter caused Ivanhoe to lose whatever remaining faith he might have had in Anbang and Gibson Dunn. They had delayed disclosing the Fraudulent Deeds. They had failed to disclose the DRAA Chancery Action, the Delaware Judgments, and the Alameda Action. And they did not share any information about Hai Bin Zhou or the history of the trademark litigation. Instead, they claimed that the whole mess was the work of a twenty-something-year-old Uber driver with a criminal record. Anbang and Gibson Dunn's behavior destroyed their credibility.

By March 10, 2020, Ivanhoe concluded that he needed to disclose to the Title Insurers the information that the Greenberg Traurig team had assembled. *See* Ivanhoe Tr. 601–02, 604–06. Ivanhoe forwarded to Kravet, the agent for the title companies, all of the filings from the DRAA Chancery Action, the proceedings in Delaware Superior Court, and the Alameda Action. *See id.* at 604–05. After doing so, Ivanhoe and his litigation partners continued to provide the Title Insurers with information and analysis as they evaluated the risk. *See id.* at 615, 629–30. At the time, Buyer and Greenberg Traurig sought to understand the risk posed by the DRAA Agreement so that they could work out a solution that would enable the Transaction to close. In an internal email, dated March 12, 2020, a senior member of Buyer's deal team told his colleagues that “the key at the moment is to have a clarification on the Delaware litigation issue first.” JX 2737 at 1.

***94** As Ivanhoe commendably admitted at trial, he did not want Seller to be able to force Buyer to close until Ivanhoe understood the risk posed by the DRAA Chancery Action and the DRAA Agreement. He believed that if the Title Insurers raised an exception based on the DRAA Chancery Action, then that exception would operate as a “failsafe” that would eliminate any risk that Buyer could be forced to close before the risk was fully understood and addressed. Ivanhoe Tr. 724–25. Seller portrays Ivanhoe's forthright testimony as an admission that he was trying to torpedo the deal, but I do not view it that way. Ivanhoe acted reasonably. He tried to protect his client's rights within the scope of the Sale Agreement by ensuring that if the Transaction closed, then his client would have title insurance.

During the same period, by contrast, Anbang refused to acknowledge the apparent seriousness of the DLA Letter or the risk posed by the as-yet-unseen DRAA Agreement. With the benefit of hindsight, it seems likely that Anbang's different perspective stemmed from the fact that Anbang had been dealing with Hai Bin Zhou since 2008. Anbang properly regarded him as a hold-up artist. During the intervening years, Anbang had investigated Hai Bin Zhou, and since the discovery of the Fraudulent Deeds, both Anbang and Gibson Dunn had done so extensively. They had assembled a trove of information, so their dismissive views were well-founded. But Anbang and Gibson Dunn did not share this information with Buyer (or with the court), and they failed to understand that parties who did not possess similar information could have concerns about the DLA Letter. Anbang and Gibson Dunn also appear not to have understood how they destroyed their own credibility by initially withholding information about the Fraudulent Deeds, then providing misleading half-truths about their origins, and later failing to disclose the DRAA Chancery Action, the Delaware Judgments, and the Alameda Action.

Seemingly blind to the problems that they had created, Anbang and Gibson Dunn became more aggressive in attempting to force a closing. Glover, the lead deal lawyer from Gibson Dunn, “made very clear” to Ivanhoe that “Anbang was not going to take an adjournment to address these things.” Ivanhoe Tr. 616. “[H]e said something like, ‘Well, if you're not ready on the date you have to close, we will litigate.’ ” *Id.* Those bullying tactics only caused Buyer and Greenberg Traurig to become more concerned, which understandably led Ivanhoe to want to ensure that his client was protected.

On April 10, 2020, the senior representatives of the Title Insurers met to make a decision on the DRAA Exception. They spoke with Gibson Dunn, then spoke among themselves. At the end of the call, they reached out to Ivanhoe and asked him to join. Ivanhoe Tr. 619–20, 623. Ivanhoe had no agenda and no script, and he did not know what questions the Title Insurers would ask. *Id.* at 619–20. To ensure that all of the Title Insurers had the same information, he provided an overview of the facts. *Id.* at 626–28. The Title Insurers then asked directly for his candid view of potential title risks and what he thought they should do. *Id.* at 626, 631. Unlike the Gibson Dunn lawyers, who had eschewed candor throughout the deal process, Ivanhoe provided the complete, unvarnished truth. He explained that he thought that

> there was a very clear link between the Delaware litigation, the Fraudulent Deeds and the 15 Properties that seem to have been pledged to the Delaware Petitioner, something that they and we have notice of, and asked how they could possibly insure and omit both the Fraudulent Deeds and not raise an exception to title for the Delaware case.

JX 3645 at 1. Ivanhoe testified credibly that if he had provided any other assessment, then his client would have faced an unacceptable risk: If a claim emerged post-closing, and if discovery in litigation revealed his contemporaneous concerns about the DRAA Agreement and the DRAA Chancery Action, then Buyer could have lost coverage. Ivanhoe Tr. 763. If Anbang and Gibson Dunn had been equally candid with Mirae by disclosing the Fraudulent Deeds in May 2019 and explaining the context of the longstanding dispute with Hai Bin Zhou, then the Transaction likely would have closed, and this litigation would never have happened.

***95** If I were considering Ivanhoe's actions without the benefit of expert testimony, I still would be concerned that Ivanhoe could have caused Buyer to breach its obligations under the Reasonable Efforts Covenant by arguing for an exception to coverage for the DRAA Chancery Action. Whether that evidence rose to a preponderance would be a difficult call. But in this case, both sides retained experts who evaluated the interactions with the Title Insurers. Seller's own title insurance expert opined that "they all seem to be working in a normal fashion ... toward accomplishing a closing." Chernin Tr. 1250. He reached this opinion after reviewing "the corpus of communications between buyer or seller's counsel, on the one hand, and Mr. Kravet or the title insurers, on the other hand." [304] The testimony of Seller's own expert is dispositive on the question of whether Ivanhoe's interactions with the Title Insurers breached Buyer's obligations under the Reasonable Efforts Covenant.

304 *Id.* at 1249–50; *accord* JX 4543 ¶ 21(d).

Two unique aspects of title insurance practice explain how Seller's expert could conclude that everyone interacted in a normal fashion, even though Ivanhoe seemed to be working against the Transaction by suggesting that the Title Insurers include the DRAA Exception. The first is the knowledge-of-the-insured doctrine. The second is drafting practice for title insurance policies.

Under the knowledge-of-the-insured doctrine, a title insurer can deny coverage for a claim if the insured withheld knowledge relating to the claim from the title company before the title company issued the policy. Even if an insured disclosed all the factual information that it possessed, a title insurer can avoid coverage if the insured had an internal negative assessment of the risk that it failed to disclose under the principle that "a prospective insured cannot select and present only favorable information on a subject and delete less favorable information on the same point, even if no follow up questions are asked." *Commonwealth Land Title Ins. Co. v. IDC Prop., Inc.*, 547 F.3d 15, 20–23 (1st Cir. 2008) (upholding denial of coverage where insured failed to disclose its unfavorable internal assessment). If a party applying for insurance "withholds information from the insurer about a title risk out of concern that the insurer will not protect against the risk," then "that concealment of the material risk is emphatic proof that the applicant obtained insurance by the concealment." J. Bushnell Nielsen, *Title & Escrow Claims Guide* § 11.3.4, 2016 WL 6637232 (2020 ed.).

To avoid any risk under the knowledge-of-the-insured doctrine, Ivanhoe ensured that the Title Insurers knew everything that he did, including his assessment of the risks. Ivanhoe Tr. 600–01. Seller's title insurance expert admitted that Ivanhoe's communications with the Title Insurers "fulfilled [Buyer's] obligations to provide information to avoid application of a knowledge of the insured exclusion." Chernin Dep. 53–54. To someone who lacks expertise as to title insurance, Ivanhoe's communications might seem designed to cause the Title Insurers to include an exception for coverage that would cause the Title Insurance Condition to fail. But because of the knowledge-of-the-insured doctrine, Ivanhoe had to provide his negative assessments to avoid a situation in which the Title Insurers later might deny coverage.

The second reason why Ivanhoe's actions make sense is the nature of drafting practice in the title insurance industry. The standard structure of a title insurance policy consists of a base policy that provides coverage, followed by a list of exceptions removing coverage, followed by a series of endorsements restoring coverage for particular exceptions. The experts agreed that title insurance companies prefer to exclude known risks through exceptions, then provide coverage for specific exceptions through endorsements. Mertens Dep. 139–41; Chernin Dep. 106. Ivanhoe's communications with the Title Insurers reflected the preferred approach. He advised them to identify an exception, and then to address the exception through an endorsement.

***96** The consensus among the experts regarding the knowledge-of-the-insured doctrine and drafting practice in the title insurance industry negates Seller's otherwise intuitive argument that all Ivanhoe needed to do was provide the Delaware filings and DLA Letter to the Title Insurers. At that point, the argument goes, he had fulfilled his obligation to the Title Insurers and needed to exercise reasonable efforts to advocate in favor of the deal. That meant pushing the Title Insurers to omit any exception that would encompass the Fraudulent Deeds. *See Hexion*, 965 A.2d at 753 ("Hexion had been feeding the banks Huntsman's updated forecasts as it received them. Its obligations to update the banks ended there."). The testimony of Seller's title expert establishes that in the title industry, the practice is different. A party seeking title insurance is obligated to provide more information, including negative assessments. The title insurers then address the known risks through exceptions and endorsements. Ivanhoe acted properly by continuing to disclose his concerns about the DRAA Chancery Action and the DRAA Agreement and by suggesting that the Title Insurers include the DRAA Exception to make their coverage position clear.

The consensus among the experts regarding the knowledge-of-the-insured doctrine and drafting practice in the title insurance industry also negates Seller's second intuitive argument. By suggesting that the Title Insurers should include the DRAA Exception, the argument goes, Ivanhoe sought to obtain less coverage for his client than if he sought to exclude the exception. That is illogical, so Ivanhoe must have been trying to tank the deal. To the contrary, Ivanhoe believed that if the title commitments did not include the DRAA Exception, then his client would be at risk under the knowledge-of-the-insured doctrine. Once the Title Insurers knew about the DRAA Agreement and the related litigation, the standard practice in the industry was to include the DRAA Exception and then address it with an endorsement.

Based on the factual record and the expert testimony in the case, Ivanhoe's conduct did not give rise to a breach of the Reasonable Efforts Covenant. Seller therefore cannot rely on a breach of the Reasonable Efforts Covenant to excuse the failure of the Title Insurance Condition.

b. No Causation

Assuming for the sake of argument that Ivanhoe's conduct breached the Reasonable Efforts Covenant, Seller failed to prove that the breach caused the failure of the Title Insurance Condition, as required by Section 7.4 of the Sale Agreement. The Title Insurers made an independent decision to include the DRAA Exception. Ivanhoe's actions did not cause the Title Insurance Condition to fail.

For starters, the decision-makers for the Title Insurers were not ingénues. They were "a veritable who's who of the most senior title insurance professionals in America."[305] Seller's expert on title insurance opined that "title insurers are independent and make their own decisions independent of whatever advocacy seller's counsel or buyer's counsel presents," and he concluded after reviewing the record that the Title Insurers acted in that fashion in this case. Chernin Dep. 158–59. Kravet was a first-hand witness to the Title Insurers' deliberations, and he did not perceive any basis to think that the Title Insurers were influenced to add an exception. Kravet Dep. 203.

305 Kravet Dep. 206; *see id.* at 204–08 (describing individuals).

Moreover, the critical issue for the Title Insurers, particularly after the DLA Letter, was to review a copy of the DRAA Agreement. On April 7, 2020, three days before the meeting when Ivanhoe allegedly convinced the Title Insurers to add the DRAA Exception, the Title Insurers informed Lance that they needed a copy of the DRAA Agreement to evaluate the risk. JX 3525 at 5. The Title Insurers' position on the risk posed by the DRAA Agreement and the related litigation did not change.

The Title Insurers also did not provide Ivanhoe with disproportionate access or special treatment. Lance, the lead real estate lawyer from Gibson Dunn, and a group of litigators from Gibson Dunn advocated persistently for "clean" title commitments in multiple emails, calls, and letters with the Title Company. [306] On March 17 and 18, 2020, Lance and his Gibson Dunn colleges engaged in calls with the Title Insurers and provided them with documents in an effort to convince them that the DRAA Action and the DRAA Agreement were frauds that should not result in an exception to title. When the Title Insurers remained unconvinced, Gibson Dunn kicked its advocacy up a gear, sending the Title Insurers a series of missives over the next two weeks. [307] On April 9, Gibson Dunn held a call with the Title Insurers' highest-ranking decision makers, and on April 13, Gibson Dunn sent the Title Insurers more documents. *See* JX 3662. Gibson Dunn later sent the Title Insurers a detailed letter which concerned the "allocation of risk in the Purchase Agreement," and "strongly urge[d] ... that no exception is required or appropriate for these matters ... arising from criminal activity by shadowy, unknown actors." JX 3674 at 4. Last, after obtaining a copy of the DRAA Agreement, Gibson Dunn sent it to the Title Insurers on April 22 with a detailed letter identifying purported "examples of why this document is fraudulent" in an effort to convince the Title Insurers to remove the DRAA Exception. JX 3950 at 1–3. The Title Insurers were unpersuaded.

306 *See* Lance Dep. 367–69, 375–79; JX 2652 at 52.

307 *See* JX 3119 at 1; JX 3638 at 9–13.

***97** The Title Insurers' rejection of Gibson Dunn's advocacy is noteworthy, because the Title Insurers had a financial interest in accepting Gibson Dunn's arguments and not asserting the DRAA Exception. The Transaction was a massive deal, and the Title Insurers and Kravet stood to gain "tens of millions" of dollars in fees by and providing clean title commitments. Ivanhoe Tr. 604. The Title Insurers also had the potential to receive additional fees by providing title commitments in connection with the refinancing of the debt on the properties. This court has seen situations in which advisors modified their positions or engaged in motivated reasoning to reach results that helped their clients or earned them contingent compensation. Here, the Title Insurers were not working for Mirae or Greenberg Traurig, and they did not have any financial incentive to cater to what Ivanhoe and Buyer allegedly wanted.

Finally, the record indicates that the senior representatives of the Title Insurers made a thorough decision. They reviewed the Gibson Dunn analyses and dozens of documents from the DRAA Chancery Action, the enforcement actions in Delaware Superior Court, and the Alameda Action. They deliberated in three internal calls. And they ultimately determined to include the DRAA Exception.

Under the circumstances, assuming for the sake of argument that Ivanhoe breached the Reasonable Efforts Covenant, that breach did not cause the failure of the Title Insurance Condition. The Title Insurers made a separate and independent decision.

5. The Finding Regarding The Title Insurance Condition

The Title Insurance Condition failed because the Title Insurers did not issue title commitments that provided coverage for the Fraudulent Deeds. The Title Insurers issued title commitments containing the DRAA Exception, which was broad enough to eliminate coverage for the Fraudulent Deeds. Buyer did not breach the Reasonable Efforts Covenant through its dealings with the Title Insurers, nor did Buyer cause the Title Insurance Condition to fail. Consequently, the non-satisfaction of the Title Insurance Condition is not excused. The failure of the Title Insurance Condition extinguished Buyer's obligation to close.

IV. BUYER'S RIGHT TO TERMINATE

The next category of legal issues involves Buyer's right to terminate the Sale Agreement. The parties' rights to termination appear in Section 8.1 of the Sale Agreement, which consists in its entirety of two (yes, two) sentences. The first is a linguistic train wreck containing 453 words, spanning four contractual subsections, and setting forth eleven distinct subparts or provisos. The second is twenty-eight words long and addresses notice of termination. It is not linked structurally to the other subparts. It appears to be an afterthought.

Buyer relies on two subsections in the first sentence to support its right to terminate. Section 8.1(b) of the Sale Agreement granted each party the right to terminate in the event that the other breached. Section 8.1(c) granted each party the right to terminate in the event that the contractually defined Termination Date passed. Buyer validly terminated the Sale Agreement under the first provision and has the right to terminate under the second.

A. The Termination Right For Breach

Section 8.1(b)(ii) provides that Buyer may terminate the Sale Agreement at any time prior to closing

> if the Buyer is not in material breach of its obligations under this Agreement and
>
> the Seller breaches or fails to perform in any respect any of its representations, warranties or covenants contained in this Agreement and such breach or failure to perform
>
> (A) would give rise to the failure of a condition set forth in Section 7.3,
>
> (B) cannot be or has not been cured within 15 days following delivery of written notice of such breach or failure to perform and
>
> (C) has not been waived by the Buyer.

SA § 8.1(b)(ii) (formatting added) (the "Termination Right for Breach"). Section 8.1(b) also contains a reciprocal termination right for Seller in the event of Buyer's breach, but it is not relevant here. *See* SA § 8.1(b)(i).

***98** On April 17, 2020, the scheduled closing date, Buyer issued a Notice of Default in which Buyer cited a series of breaches of the Sale Agreement, including Seller's failure to comply with the Ordinary Course Covenant. JX 3841 at 2–3. Buyer gave Seller the contractually required fifteen days to cure, while noting that cure did not seem possible. *Id.* at 4. On April 27, Seller filed this litigation. Seller failed to cure the identified breaches within fifteen days, and on May 3, Buyer terminated the Sale Agreement. JX 4100 at 2.

Buyer's termination notice validly terminated the Sale Agreement. This decision already has found that Seller failed to comply with the Ordinary Course Covenant, supplying the predicate breach for Buyer to exercise the Termination Right for Breach. This decision has held that Seller's failure to comply with the Ordinary Course Covenant caused the Covenant Compliance Condition to fail, which satisfying subpart (A) of the Termination Right for Breach. Seller failed to cure its breach of the Ordinary Course Covenant, satisfying subpart (B) of the Termination Right for Breach. And Buyer never waived compliance with the Ordinary Course Covenant, satisfying subpart (C) of the Termination Right for Breach.

The only remaining question is whether Seller proved that Buyer was in "material breach of its obligations under this Agreement." By using the term "material breach," the Termination Right for Breach invokes the common law standard, under which "[a] party is excused from performance under a contract if the other party is in material breach thereof." *BioLife Sols., Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003). As a matter of common law, "[a] breach is material if it goes to the root or essence of the agreement between the parties, or touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." *Mrs. Fields*, 2017 WL 2729860, at *28. Under this doctrine, whether a breach is material "is determined by weighing the consequences in the light of the actual custom of men in the performance of contracts similar to the one that is involved in the specific case."[308] The *Restatement* provides five guiding factors: (i) "the extent to which the injured party will be deprived of the benefit which he reasonably expected," (ii) "the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived," (iii) "the extent to which the party failing to perform or to offer to perform will suffer forfeiture," (iv) "the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances," and (v) "the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." *Restatement, supra*, § 241. "[N]onperformance will attain this level of materiality ... when the covenant not performed is of such importance that the contract would not have been made without it." 14 *Williston on Contracts* § 43:6 (4th ed. 2003). The resulting standard is more onerous than a requirement of compliance "in all material respects." *See Akorn*, 2018 WL 4719347, at *86.

308 *BioLife Sols.*, 838 A.2d at 278 (internal quotation marks omitted); *accord* 23 *Williston on Contracts* § 63:3 (4th ed. 2003).

Seller has not shown that Buyer breached the Sale Agreement, much less that Buyer committed a material breach. Seller has not even argued the test for material breach. The closest that

Seller came to arguing a material breach was to allege a breach of the Reasonable Efforts Covenant, and that ultimately unproven breach affected the Title Insurance Condition, not the Covenant Compliance Condition or the Ordinary Course Covenant. Buyer has proven that both the Title Insurance Condition and the Covenant Compliance Condition failed, which extinguished Buyer's obligation to close. Buyer therefore validly terminated the Sale Agreement as of May 4, 2020, by invoking the Termination Right for Breach.

B. The Temporal Termination Right

***99** Section 8.1(c) provides that the Sale Agreement may be terminated at any time prior to closing

> by either the Seller or the Buyer if the conditions to Closing as set forth in Article VII shall not have been satisfied by June 10, 2020;
>
> provided, that if all conditions to closing shall have been satisfied (other than those conditions that may only be satisfied as of the Closing) other than the condition to Closing set forth in Section 7.3(c) (subject to Section 5.10), then the Termination Date shall automatically be extended until September 10, 2020 (such date, as it may be so extended, the "Termination Date");
>
> notwithstanding the foregoing, the right to extend the Termination Date or to terminate this Agreement under this Section 8.1(c), as applicable, shall not be available to such party whose failure to fulfill any obligation under this Agreement shall have been the cause of the failure of the Closing to occur on or prior to such date ....

SA § 8.1(c) (formatting added) (the "Temporal Termination Right").

Buyer is entitled to terminate the Sale Agreement under the Temporal Termination Right. This decision already has found that the Covenant Compliance Condition failed, meaning that "the conditions to Closing as set forth in Article VII" were not "satisfied by June 10, 2020." Assuming the Covenant Compliance Condition was a condition that "may only be satisfied as of the Closing" (an issue the parties did not brief), then the Termination Date extended automatically to September 10, 2020. As of that date, the Covenant Compliance Condition remained unsatisfied, meaning that Buyer could exercise the Temporal Termination Right.

As of September 10, 2020, Buyer also could exercise the Temporal Termination Right because the Title Insurance Condition had failed. Buyer could not have exercised the Temporal Termination Right previously based on the Title Insurance Condition because that condition appears in Section 7.3(c), and its non-satisfaction (assuming the satisfaction of other pertinent conditions) resulted in the automatic extension of the Termination Date until September 10. Once that date came and went, Buyer could exercise the Temporal Termination Right because the Title Insurance Condition remained unsatisfied.

The only possible impediment to Buyer's ability to exercise the Temporal Termination Right is if Buyer's "failure to fulfill any obligation under this Agreement shall have been the cause of the failure of the Closing to occur." Seller has not proven that Buyer failed to fulfill an obligation under the Sale Agreement, much less that the failure caused the Closing not to occur.

V. THE CONSEQUENCES OF TERMINATION

The last category of issues involves the consequences of termination. Each side wants to keep the deposit. Each side claims that it is entitled to its attorneys' fees and expenses. Buyer seeks its transaction-related expenses, which are effectively a form of reliance damages. Seller seeks damages so that it receives "complete and full relief." Dkt. 367 at 96 n.69.

A. The Deposit

Sections 8.2(a) and (b) govern the fate of the deposit once the Sale Agreement is terminated. Section 8.2(a) identifies four scenarios in which Seller receives the deposit, but none of those scenarios came to pass. Under Section 8.2(b) of the Sale Agreement, if

***100** closing does not occur "for reasons other than as set forth in Section 8.2(a)," then Buyer receives the deposit, "together with all interest accrued thereon." In mandatory language, the provision states that "Buyer and Seller shall instruct the Escrow Agent to transfer to Buyer the full amount of the [d]eposit, together with all interest accrued thereon, by wire transfer of immediately available funds to an account designated by Buyer in writing."

Accordingly, under the plain language of Section 8.2(b), Buyer is entitled to the deposit and all accrued interest. Seller is not entitled to the deposit or any interest.

B. Attorneys' Fees And Expenses

The Sale Agreement contains a standard fee-shifting provision that entitles the prevailing party to recover its attorneys' fees and expenses from the non-prevailing party. It states,

> If there shall occur any dispute or proceeding among the parties relating to this Agreement or the transactions contemplated hereby, the non-prevailing party shall pay all reasonable costs and expenses (including reasonable attorneys' fees and expenses) of the prevailing party.

SA § 9.22 (the "Prevailing Party Provision").

Under Delaware law, "[a]bsent any qualifying language [indicating] that fees are to be awarded ... [on a] partial basis," a fee-shifting provision like the Prevailing Party Provision "will usually be applied in an all-or-nothing manner." *W. Willow-Bay Ct., LLC v. Robino-Bay Ct. Plaza, LLC*, 2009 WL 458779, at *8 (Del. Ch. Feb. 23, 2009). For purposes of such a provision, the "prevailing party" is the party that prevails on "the main issue in the case." *World-Win Mktg., Inc. v. Ganley Mgmt. Co.*, 2009 WL 2534874, at *3 (Del. Ch. Aug. 18, 2009). The Prevailing Party Provision does not contain any language indicating that fees are to be awarded on a partial basis.

Buyer prevailed on the main issues in the case—whether Buyer was obligated to close and later validly terminated the Sale Agreement. Buyer is therefore entitled to its reasonable attorneys' fees and expenses. As the non-prevailing party, Seller is not entitled to recover any of its fees or expenses.

C. Transaction-Related Expenses

Both sides seek their transaction-related expenses, which are a form of reliance damages. Unlike many transaction agreements, the Sale Agreement preserves a non-breaching party's right to recover transaction-related expenses from a breaching party. It also preserves a non-breaching party's ability to recover damages, including expectation damages, in the event of a willful breach.

1. Common Law Principles Governing Contract Damages

The common law has established a series of default rules governing the ability of a party to recover damages for a breach of contract. They form a backdrop to negotiated provisions.[309]

309 *See Restatement, supra*, § 204 ("When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."); *see also* Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 Va. L. Rev. 1523, 1533 (2016); Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 Yale L.J. 814, 817–18 (2006); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L.J. 87, 87–88 (1989).

***101** As a matter of common law, a party to a contract "has a right to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged." *Restatement, supra*, § 346(1). "Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will ... put him in as good a position as he would have been in had the contract been performed." *Id.* § 347 cmt. a. Delaware follows the *Restatement* and recognizes that "the standard remedy for breach of contract is based upon the reasonable expectations of the parties ex ante. This principle of expectation damages is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract." *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001) (citing *Restatement* § 347 cmt. a).

"As an alternative to [expectation damages], the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance ...." *Restatement, supra*, § 349. Reliance damages recognize that

> [t]he promisee may have changed his position in reliance on the contract by, for example, incurring expenses in preparing to perform, in performing, or in foregoing opportunities to make other contracts. In that case, the court may recognize a claim based on his reliance rather than on his expectation. It does this by attempting to put him back in the position in which he would have been had the contract not been made .... Although it may be equal to the expectation interest, it is ordinarily smaller because it does not include the injured party's lost profit.

Id. § 344 cmt. a. Delaware follows the *Restatement* in this respect as well. *See, e.g.*, *NAACO Indus., Inc. v. Applica Inc.*, 997 A.2d 1, 19 (Del. Ch. 2009).

At common law, "every breach gives rise to a claim for damages," but "not every claim for damages is one for damages based on all of the injured party's remaining rights to performance under the contract." *Restatement, supra,* § 236 cmt. b. An injured party's claim for damages depends on whether the breaching party committed a partial breach or a total breach.

A partial breach is one that is "relatively minor and not of the essence." 23 *Williston on Contracts* § 63:3. When a partial breach has occurred, "the [injured party] is still bound by the contract and may not abandon performance ...." *Id.* Despite performing, the injured party "is entitled to damages caused even by the immaterial breach, albeit that these may be nominal in amount." *Id.*

A total breach is one that "touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract, or affect[s] the purpose of the contract in an important or vital way." *Id.* (footnotes omitted). In the case of a total breach, "the [injured] party is discharged from further performance, and is entitled to substantial damages." *Id.*; *see* 3 *Farnsworth on Contracts* § 12.09, at 12-79 (4th ed. Supp. 2019) ("[I]f the breach is material, the owner can choose ... to terminate, refuse to render any further performance, and claim damages for total breach."). Alternatively, an injured party may choose "to hold itself ready to perform the remainder of the contract and demand performance from the other party ...." 23 *Williston on Contracts* § 63:13. If the injured party chooses this path, then the injured party re-establishes its obligation to perform.[310] Nevertheless, this election by the injured party "does not waive the right to obtain damages for the breach." *Id.* This court summarized the rule as follows: "Continuing performance waives the argument that the waiving party's performance obligation was discharged, but it does not waive recovery for the material breach." *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2020 WL 3581095, at *14 & n.141 (Del. Ch. July 2, 2020) (citing 23 *Williston on Contracts* § 43:15)).

310 *See* 14 *Williston on Contracts* § 43:15 (4th ed. 2003) (explaining that if a party chooses to perform, "the general rule that one party's uncured, material failure of performance will suspend or discharge the other party's duty to perform does not apply" (footnote omitted)); 2 *Farnsworth on Contracts* § 8.20, at 8-166 to -67 ("Under this reasoning, the injured party cannot later reconsider, terminate, and recover damages for total breach unless the party in breach should commit a further breach, subsequent to the election, that would give the injured party a second chance to terminate.").

2. Standard Provisions In Transaction Agreements Governing Contract Damages

***102** Parties to transaction agreements frequently agree to provisions that alter the default common law rules governing remedies. *See* Tina L. Stark et al., *Negotiating and Drafting Contract Boilerplate* 207, 373 (2003) [hereinafter *Boilerplate*]. Absent a provision limiting remedies, "all remedies, whether at common law, under statute, or under equitable principles, are cumulative." *Id.* at 211.

Parties can alter the common law rules by limiting the remedies available for breach (a "limited-remedies provision"). *See id.* at 219–20. A straightforward limited-remedies provision might identify a breakup fee as the exclusive remedy for breach. *See id.* at 230-31. A simple version of such a provision might state:

> **Breakup Fee.** If Seller breaches Section __, Seller shall pay to Buyer the sum of $________. This fee is the

> exclusive remedy to Buyer under this letter of intent in the event of a breach by Seller of Section __.

Id. at 231. The author notes that if the provision did not refer to the fee as "the exclusive remedy," then the seller would remain exposed to a claim for "all of the buyer's actual out-of-pocket costs and any other claims for damages that the buyer may be able to prove." *Id.*

Parties may draft provisions that address the effect of terminating an agreement (an "effect-of-termination provision"). The following provisions give the buyer (i) a right to terminate in the event of a material breach or failure of performance by the seller and (ii) confirm that termination is not the buyer's only remedy for breach:

> **Termination by Buyer.** Buyer is entitled to terminate this Agreement upon written notice to Seller, with the effect set forth in Section __ of this Agreement, *if*
>
> (a) Seller has materially violated or breached any of the agreements, representations or warranties contained in this Agreement, and Buyer has not waived the violation or breach in writing at or before Closing; or
>
> (b) Seller has failed to satisfy a condition to the obligations of Buyer, and Buyer has not waived the condition in writing at or before closing.
>
> **Effect of Termination.** Termination of this Agreement pursuant to Section __ does not terminate, limit or restrict the rights and remedies of Buyer. In addition to Buyer's right under common law to redress for any breach or violation, Seller shall indemnify and defend Buyer against all losses, damages (including, without limitation, consequential damages), cost and expenses (including, without limitation, interest (including prejudgment interest in any litigated matter), penalties, court costs, and attorney's fees and expenses) asserted against, imposed upon, or incurred by Buyer, directly or indirectly, arising out of or resulting from the breach or violation and the enforcement of this Section.

Id. at 220. The second clause "presents Buyer with the possibility of a common law claim for remedies from the breach of contract, as well as a contractual 'right' to indemnification for a broad spectrum of incidental and consequential damages." *Id.* at 221. Notably, this effect-of-termination provision confirms the common law rule under which termination is not an injured party's exclusive remedy. When a party has committed a breach that "touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract," the injured party may *both* terminate the contract *and* claim damages. 23 *Williston on Contracts* § 63:3; *see* 3 *Farnsworth on Contracts* § 12.09, at 12-79.

***103** Another common provision requires each party to bear the fees and expenses it has incurred pursuing a transaction regardless of whether or not the transaction closes (a "pay-your-own-way provision"). Whether parties agree to such a provision or provide for expense reimbursement is a transaction-specific issue: "There is certainly no general rule in the area of expense reimbursement. In each case the issue is negotiated and a resolution achieved depending upon the relative negotiating strength of the parties." Kling & Nugent, *supra*, § 13.05[2], at 13-42.

The following provision is a simple example of a pay-your-own-way provision:

> Except as expressly provided in this Agreement, each party shall pay its own fees and expenses (including, without limitation, the fees and expenses of its agents, representatives, attorneys and accountants) incurred in connection with the negotiation, drafting, execution, delivery and performance of this Agreement and the transactions it contemplates.

Stark, *Boilerplate*, *supra*, at 379.

As suggested by the introductory language "[e]xcept as expressly provided in this Agreement," a transaction agreement may create exceptions to a pay-your-own-way provision. The *Boilerplate* treatise provides the following example of a provision that "might be used in tandem" with a pay-your-own-way provision to make clear "that, in the event of a breach, the breaching party will pay the other party's transaction costs." *Id.* at 381.

> (a) *Negligent or Unintentional Breaches.* If this Agreement terminates because of a breach based on a negligent

or unintentional misrepresentation by one party (the "Breaching Party"), but not the other, then the Breaching Party shall pay to the other party an amount equal to the lesser of

(i) all documented out-of-pocket expenses and fees incurred by the other party (including, without limitation, fees and expenses of all legal, accounting, financial, public relations and other professional advisors arising out of or relating to this Agreement and the transactions it contemplates); and

(ii) $__ million.

(b) *Breaches of Covenants and Intentional Breaches.* If this Agreement terminates because of a breach of a covenant or because of a breach based on an intentional misrepresentation or gross negligence by the Breaching Party, but not the other, then the Breaching Party shall pay to the other party an amount equal to

(i) the amount payable pursuant to subsection (a), *plus*

(ii) all other amounts that the other party is entitled to receive at law or in equity.

Id.

3. The Provisions In The Sale Agreement

The Sale Agreement contains an effect-of-termination provision and a pay-your-own-way provision. Both provisions limit potential liability, but both contain exceptions that preserve specific types of liability.

The Sale Agreement contains the following effect-of-termination provision:

> In the event of termination of this Agreement as provided in Section 8.1, this Agreement shall forthwith become void and there shall be no liability on the part of either party except (a) for the provisions of Sections 3.19 and 4.7 relating to broker's fees and finder's fees, Section 5.4 relating to confidentiality, Section 5.6 relating to public announcements, this Section 8.2 and Article IX and (b) that nothing herein shall relieve either party from liability for any willful breach of this agreement or any Agreement made as of the date hereof or subsequent thereto pursuant to this Agreement.

SA § 8.2(c) (the "Effect-Of-Termination Provision").

The Effect-Of-Termination Provision states that if terminated, the Sale Agreement "shall forthwith become void." Under the common law, termination results in an agreement becoming void, but that fact alone does not eliminate liability for a prior breach. *See 23 Williston on Contracts* § 63.3; 3 *Farnsworth on Contracts* § 12.09, at 12-79. The Effect-Of-Termination Provision alters the common law rule by stating that upon termination, subject to two exceptions, "there shall be no liability on the part of either party." Setting aside the exceptions, the Effect-Of-Termination Provision broadly waives contractual liability and all contractual remedies. [311]

[311] *See* ABA Mergers & Acqs. Comm., *Model Tender Offer Agreement* 240 (2020) [hereinafter *Model Tender Offer Agreement*] (discussing exceptions to a provision contemplating no liability upon termination and stating that "[w]ithout this proviso, the language in Section 8.02 would provide that neither party would be liable for breach to the other after termination, regardless of pre-closing breaches"); Kling & Nugent, *supra*, § 15A.02 at 15A-4.3 (noting the effect of a broad elimination of liability upon termination and suggesting that "[it] is important ... to continue and carve out a proviso to the effect that the foregoing will not relieve any party for liability for its breach of any provision prior to termination"). *Cf. Model Stock Purchase Agreement*, *supra*, at 275, 280–81 (discussing effect-of-termination provision that did not contain liability-extinguishing language but did contain an exception for specified provisions as well as confirmatory language stating that "termination of this Agreement will not relieve an party from any liability for any Breach of this Agreement occurring prior to termination"); ABA Mergers & Acqs. Comm., *Model Asset Purchase Agreement with Commentary* 199 (2001) [hereinafter *Model Asset Purchase Agreement*] (discussing effect-of-termination provision without liability-extinguishing language and with confirmatory

language stating that "the terminating party's right to pursue all legal remedies will survive such termination unimpaired").

***104** The two exceptions in the Effect-Of-Termination Provision modify its broad waiver of contractual liability. The first exception preserves liability under specified provisions in the Sale Agreement, which survive and can be enforced (the "Specified-Provision Exception"). The second exception preserves liability for bad conduct, here for a "willful breach" (the "Bad Conduct Exception"). Both exceptions are relatively standard. [312]

312 *See, e.g.*, *Hexion*, 965 A.2d 715 (interpreting effect-of-termination provision in merger agreement that included both specified-provision exception and bad-conduct exception); *Frontier Oil*, 2005 WL 1039027, at *39 (same); *Model Tender Offer Agreement*, *supra*, at 240 (discussing effect-of-termination provision that broadly eliminated liability subject to specific-provision exception and bad-conduct exception); *see also Model Merger Agreement*, *supra*, at 273–74 (discussing effect-of-termination provision without liability-extinguishing language but with specified-provision exception and bad-conduct exception).

By preserving liability under Article IX, the Specified-Provision Exception maintains the scheme for transaction-related expenses that appears in that article. The pertinent provision states,

> Except as otherwise provided herein, all fees and expenses incurred in connection with or related to this agreement and the transactions contemplated hereby shall be paid by the party incurring such fees or expenses, whether or not such transactions are consummated. In the event of termination of this Agreement, the obligation of each party to pay its own expenses will be subject to any rights of such party arising from a breach of this Agreement by the other.

SA § 9.1 (the "Pay-Your-Own-Way Provision").

The Pay-Your-Own-Way Provision begins by barring any recovery of fees or expenses "[e]xcept as otherwise provided herein." That introductory clause preserves the right to recover fees and expenses under the Prevailing Party Provision. It also ensures that the Pay-Your-Own-Way Provision does not limit any right of recovery under the Effect-Of-Termination Provision. But the Pay-Your-Own-Way Provision further states that the obligation of "each party to pay its own expenses will be subject to any rights of such party arising from a breach of this Agreement by the other" (the "Breach Exception"). This exception "avoid[s] a conflict between a judgment for damages due to a breach of the acquisition agreement and any obligation to pay expenses by providing that a judgment for a breach will supersede [a provision like the Pay-Your-Own-Way Provision]." [313]

313 *Model Asset Purchase Agreement*, *supra*, at 249 (discussing pay-your-own-way provision with breach exception, stating that the obligation of each party to pay its own way is "subject to any rights of such party arising from a Breach"); *see Model Stock Purchase Agreement*, *supra*, at 351 (discussing pay-your-own-way provision with breach exception, stating that "[t]he obligation of each party to bear its own fees and expenses will be subject to any rights of such party arising from a Breach of this Agreement by another party").

Notably, the reference to "breach" in the Breach Exception is not limited to a "willful breach." The Breach Exception contemplates the potential recovery of transaction expenses for any breach.

Reading these provisions together, the Effect-Of-Termination Provision broadly eliminates liability except as preserved through the Specified-Provision Exception or the Bad-Conduct Exception. The Specified-Provision Exception preserves the regime for expense allocation established in the Pay-Your-Own-Way Provision. Although that provision requires each party to pay its own expenses, the Breach Exception preserves the right of a non-breaching party to recover transaction expenses (effectively a form of reliance damages) regardless of the nature of the breach. The Bad-Conduct Exception preserves the full panoply of contract damages, including expectation damages, in the event of a willful breach.

***105** This combination of provisions enables Buyer to recover its transaction expenses. Buyer proved that Seller breached the Ordinary Course Covenant. Buyer introduced evidence that it incurred transaction expenses of $3.685 million, and Seller has not contested that amount. Buyer did not have to prove a willful breach to recover these transaction expenses, because that right was preserved under the Breach Exception. Buyer did not seek expectation damages, which would require a willful breach by Seller. Because the question of willful breach does not appear to be at issue, this decision does not reach it.

Buyer therefore is awarded transaction expenses in the amount of $3.685 million. Seller has not proven that Buyer breached the Sale Agreement. Seller is not entitled to recover any transaction expenses.

4. Additional Damages For Fraud

Buyer contends that it is entitled to additional amounts because it proved post-signing fraud. This decision has not reached Buyer's fraud claim, and Buyer did not articulate how its damages for post-signing fraud would differ from the amounts Buyer can recover under the Breach Exception. This decision therefore does not address the suggestion that Buyer might recover additional damages on a fraud theory.

VI. CONCLUSION

The Covenant Compliance Condition and the Title Insurance Condition were not satisfied on the closing date, which relieved Buyer of its obligation to close. Seller failed to cure its breach of the Ordinary Course Covenant, and Buyer properly terminated the Sale Agreement. Buyer is entitled to the return of the deposit with all associated interest. Buyer is awarded transaction-related expenses of $3.685 million. Buyer also is entitled to its attorneys' fees and expenses under the Prevailing Party Provision. Separate and apart from the Prevailing Party Provision, Buyer is entitled to court costs as the prevailing party. Seller is not entitled to any relief.

The court will enter judgment in the form of a final order. Within thirty days, the parties will submit a joint letter that either attaches an agreed-upon form of final order or identifies the issues that still need to be addressed at the trial level and proposes a schedule for resolving them.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

BAY CAPITAL FINANCE, L.L.C., Plaintiff,
v.
BARNES AND NOBLE EDUCATION, INC., Michael P. Huseby, Emily Chiu, Daniel Dematteo, David Golden, John Ryan, Jerry Sue Thornton, and David Wilson, Defendants.

C.A. No. 2019-0539-KSJM
|
Date Submitted: December 19, 2019
|
Date Decided: March 30, 2020

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MEMORANDUM OPINION

McCORMICK, V.C.

***1** The plaintiff desired to nominate a slate of directors for election at the defendant company's 2019 annual meeting. The company's advance notice bylaw required the plaintiff to own stock in record name by the deadline for nominating directors. The plaintiff failed to become a record holder before the deadline, and the company thus rejected the plaintiff's nomination notice. Undeterred, the plaintiff commenced this litigation to require the company to accept its nomination notice. In its verified complaint, the plaintiff claimed that it relied to its detriment on language in the company's 2018 proxy that inaccurately described the method for computing the nomination deadline. The plaintiff further alleged that the board chairman rejected the plaintiff's nomination in bad faith due to a personal animus against the plaintiff's principal. Based on the plaintiff's claim that it relied on the inaccurate proxy language, the plaintiff was granted expedited proceedings toward a hearing on a motion to preliminarily enjoin the annual meeting.

Discovery pulled at the plaintiff's verified allegations as if they were loose threads on a sweater, unraveling them line-by-line to reveal the naked truth. In a rather shocking turn of events, discovery revealed that the plaintiff never relied on the inaccurate proxy language. In fact, the plaintiff first learned of the inaccurate language after it was too late to comply with the bylaw deadline. The plaintiff's primary case was thus a bold-faced lie. Naturally, the plaintiff's motion for a preliminary injunction was denied. Thereafter, the company issued corrective disclosures and the annual meeting took place, mooting most of the plaintiff's claims.

The defendants have moved for summary judgment on what little remains of the plaintiff's case—the claim that the chairman breached his fiduciary duties when refusing the plaintiff's nomination notice. This decision grants that motion. The plaintiff relies on language in the company's bylaws granting the chairman the discretion to refuse non-compliant nomination notices. The undisputed facts are that it was the full board, and not the chairman acting pursuant to this grant of authority, that rejected the plaintiff's nomination notice.

The defendants have also moved for fees and costs incurred in connection with this litigation. This decision grants most of that motion as well. Not only was the plaintiff's primary claim based on a lie, but the plaintiff also obstructed discovery directed to its principal. Either one of these insults likely would have been sufficient grounds for shifting fees to a degree; the presence of both makes the outcome unavoidable.

I. FACTUAL BACKGROUND

The facts are drawn from the materials presented in the defendants' motion for summary judgment.

A. Plaintiff Misses the Deadline for Nominating Directors for Election.

Plaintiff Bay Capital Finance, L.L.C. ("Bay Capital" or "Plaintiff") is a private investment fund formed under Delaware law. [1] Sunil Suri is Plaintiff's Principal and Managing Member. [2]

1 C.A. No. 2019-0539-KSJM, Docket ("Dkt.") 1, Verified Compl. ("Compl.") ¶ 6; Dkt. 43, Defs.' Answer & Affirmative Defenses to Pl.'s Verified Compl. ("Ans.") ¶ 6.

2 Compl. ¶ 6; Ans. ¶ 6.

***2** Defendant Barnes & Noble Education, Inc. (the "Company") provides solutions for the education industry. [3] The Company is a Delaware corporation formed through an August 2015 spin-off from Barnes & Noble, Inc. [4] Its stock trades on the New York Stock Exchange under the ticker symbol BNED. [5] The individual defendants (with the Company, "Defendants") were members of the Company's board of directors (the "Board"). [6] Defendant Michael P. Huseby served as Chairman of the Board and CEO of the Company. [7]

3 Compl. ¶ 8; Ans. ¶ 8.

4 Compl. ¶ 1; Ans. ¶ 1.

5 Compl. ¶ 7; Ans. ¶ 7.

6 Compl. ¶ 10; Ans. ¶ 10.

7 Compl. ¶ 9; Ans. ¶ 9.

Between February and June of 2019, Plaintiff submitted four proposals to purchase the Company's outstanding equity. [8] The Board rejected each of these proposals. [9] Plaintiff's counsel, Daniel Gordon, suggested that Plaintiff could nominate a competing slate of directors for election at the 2019 annual meeting. [10] Plaintiff resolved to explore this possibility. [11]

8 Compl. ¶ 14, Ans. ¶ 14; (2/7/19 proposal); Compl. ¶ 15, Ans. ¶ 15 (3/8/19 proposal); Compl. ¶ 16, Ans. ¶ 16 (6/7/19 proposal); Compl. ¶ 18, Ans. ¶ 18 (6/27/19 proposal).

9 Compl. ¶ 14, Ans. ¶ 14 (2/7/19 proposal); Compl. ¶ 15, Ans. ¶ 15 (3/8/19 proposal); Compl. ¶ 16, Ans. ¶ 16 (6/7/19 proposal); Compl. ¶ 18, Ans. ¶ 18 (6/27/19 proposal).

10 Dkt. 72, Aff. of Brian S. Yu in Supp. of Defs.' Opening Br. in Supp. of Their Mot. for Summ. J. & an Award of Fees & Costs ("Yu Aff.") Ex. 11, at BC EXP 0065711 (Gordon emailing Suri on 6/4/19: "We would give the CEO Y days to respond and advise him that absent a sale we intend to pursue either a public tender offer for the company or the nomination of a new slate of directors in advance of their September annual meeting."); Yu Aff. Ex. 12, at BC EXP 0095826–27 (Gordon emailing Suri on 6/12/19, to summarize his research of the Company's governance documents and suggest that Plaintiff could "nominate a replacement slate of Directors to be voted upon at the next annual meeting").

11 Yu Aff. Ex. 12, at BC EXP 0095825 (Suri responding to Gordon on 6/12/19: "Why don't you think of some candidates and I some").

Since August 2015, the Company's bylaws have contained an advance notice provision requiring that a stockholder seeking to nominate director candidates for election at an annual meeting deliver "notice of nomination" of director candidates "not less than 90 days ... prior to the first anniversary of the date of the immediately preceding annual meeting." [12] Based on the date of the 2018 annual meeting, the nomination deadline for the 2019 annual meeting was June 27, 2019. The bylaw also requires that the stockholder be "a holder of record ... at the time of giving of the notice," which this decision refers to as the record-holder requirement. [13] The bylaw further provides that "[t]he chairman of the meeting may refuse to acknowledge the nomination of any person not made in compliance with the foregoing procedure." [14]

12 Yu Aff. Ex. 4, art. III, § 3 (Company bylaws effective September 21, 2017); *see also* Yu Aff. Ex. 5, art. III, § 3 (Company bylaws effective August 1, 2015).

13 Yu Aff. Ex. 4, art. III, § 3; *see also* Yu Aff. Ex. 5, art. III, § 3.

14 Yu Aff. Ex. 5, art. III, § 3.

Plaintiff was generally advised of the nomination deadline as early as April 2019, when Suri retained Citigroup Inc.'s Banking, Capital Markets & Advisory Group ("Citi") to advise Plaintiff on strategies for acquiring the Company. [15] Suri directed Citi to "to review all the records," which included the Company's bylaws. [16] On April 18, Citi made a presentation to Suri. In an analysis based explicitly on the Company's bylaws, Citi identified the Company's "Advance Notice Requirement" as one of the potential "Limits on Ability to Change the Board." [17] Citi further advised: "Nominations and proposals must be received between 90 and 120 days prior to the first anniversary of the preceding year's annual meeting." [18] Suri received this presentation and recalled reviewing it. [19]

15 *See* Yu Aff. Ex. 10, at BC EXP 0009336 (Citi vice president circulating discussion materials in advance of 4/18/19 conference call).

16 Yu Aff. Ex. 7 ("Suri Dep. Tr.") at 150:7–20.

17 Yu Aff. Ex. 10, at BC EXP 0009354 (4/18/19 Citi presentation to Suri summarizing the Company's "Defense Profile").

18 *Id.* (4/18/19 Citi presentation to Suri).

19 Suri Dep. Tr. at 90:1–19.

***3** Plaintiff was specifically advised of the record-holder requirement in June 2018. On June 12, after "reviewing [the Company's] Corporate By-laws and other governance documents," Gordon explained that, in order to nominate a slate of directors, Plaintiff would need to first become a stockholder of record:

> It is important that we become a shareholder *and instruct the brokerage firm to designate us as "record holder" of the shares*. Even if it is just 1,000 shares, it is essential that our name appear as a shareholder on the Company's shareholder registry (instead of having our shares lumped in with other customers of Merrill Lynch). Whichever brokerage firm you use *can take steps necessary to designate us as the "record holder" for the shares if they are specifically directed to do so*. [20]

Suri responded that he was "actioning the purchase of the shares" to be held "in the name of Bay Capital." [21] Gordon wrote again on June 13: "Please let me know when the purchase is completed. ... We will need to move very quickly ...." [22] Bay Capital did not purchase any shares in the Company on June 12 or 13. [23]

20 Yu Aff. Ex. 12, at BC EXP 0995826 (6/13/19 email chain between Gordon and Suri (emphasis added)).

21 *Id.* at BC EXP 0995825 (6/13/19 email chain between Gordon and Suri).

22 *Id.*

23 Suri Dep. Tr. at 139:4–6.

Plaintiff was advised of an exact date by which he needed to satisfy the record-holder requirement on June 16. Gordon sent Suri an email flagged as "High Importance," which attached a copy of the Company's bylaws and included the relevant text of the advance notice bylaw in the body of the email. [24] Gordon underlined the relevant bylaw language concerning the nomination deadline:

24 *See generally* Yu Aff. Ex. 13 (6/16/19 email from Gordon to Suri summarizing and attaching the Company's operative bylaws).

> Please note the following:
>
> - Any record holder of BNED shares may nominate one or more directors for election to the BNED Board of Directors so long as the notice served on the Secretary (the "Notice") is timely. For the Notice to be timely, the Bylaws provide for the following:
>
> *Any stockholder of record entitled to vote for the election of directors at a meeting may nominate persons for election as directors only if timely written notice of such stockholder's intent to make such nomination is given, either by personal delivery or by United States mail, postage prepaid, to the Secretary. To be timely, a stockholder's notice must be delivered to or mailed and received at the principal executive offices of the Corporation (i) with respect to an election to be held at an annual meeting of the stockholders, not less than 90 days nor more than 120 days prior to the first anniversary of the date of the immediately preceding annual meeting*

The email then advised: "[T]he preceding annual meeting took place on September 25, 2018. Therefore, our Notice would need to be served on [the Company's] Secretary *no later than June 25, 2019*." [25] Suri testified that he recalled receiving and reviewing this email. [26] Suri responded that he agreed and listed a number of individuals he considered as possible nominees. [27] He also said that he would purchase stock in the Company that week.[28] Bay Capital did not purchase any stock in the Company that week.[29]

25 *Id.* at BC EXP 0064466 (emphasis added). Of course, the actual deadline was June 27, 2019, not June 25 as Gordon advised. Although the June 25, 2019 date was a mistake, it is not one that helps Plaintiff's case.

26 Suri Dep. Tr. at 189:12–190:9, 191:20–192:1.

27 Yu Aff. Ex. 14, at BC EXP 0064403 (6/16/19 email from Suri listing directors).

28 *Id.* (6/16/19 email from Suri stating that he "will this week purchase the shares").

29 *See* Suri Dep. Tr. at 192:24–193:2; *id.* at 195:12–25.

Plaintiff received three subsequent communications, each conveyed with increasing urgency, pressing Plaintiff to purchase stock in record name. On June 19, Gordon reminded Suri that, in order to nominate "a new slate of directors ... we need to be a record holder of shares in [the Company]."[30] Suri responded that day: "The shares are being bought."[31] On June 20, Gordon reminded Suri another time that "we need Bay Capital to be the 'shareholder of record.' "[32] And on June 21, Gordon yet again reminded Suri that Bay Capital's nomination letter "needs to be delivered by June 25, 2019 so as to be considered timely under the Company's Bylaws."[33] Suri did not purchase any stock in the Company on June 19, 20, or 21, despite these reminders.

30 Yu Aff. Ex. 15, at BC EXP 0064310 (6/19/19 email from Gordon to Suri).

31 *Id.* (6/19/19 email from Suri to Gordon).

32 Yu Aff. Ex. 16, at BC EXP 0064204 (6/20/19 email from Gordon to Suri).

33 Yu Aff. Ex. 17, at BC EXP 0032644 (6/21/19 email from Gordon to Suri).

***4** It was not until June 24 that Suri placed an order for 25,000 shares of the Company through a broker.[34] That date risked being too late because the settlement of any trade typically occurs days after the order is placed,[35] and only after a trade is settled can the broker submit a request to register that stock in the name of the purchaser such that the purchaser becomes a holder of record.

34 Yu Aff. Ex. 18, at BC EXP 0091845 (6/24/19 email from Suri to Gordon forwarding trade confirmation).

35 Yu Aff. Ex. 21, at CPU0026 (Computershare informing Suri that settlement "normally takes a minimum of 2 business days to process").

Suri forwarded the June 24 order confirmation to Gordon, who again advised Suri: "Please stress to [the broker] the need for [Bay Capital] to be listed as the shareholder of record. Without this status [the Company] can reject the nomination notice."[36] Suri acknowledged this communication.[37] Gordon then emailed the broker and Suri together explaining: "There is one technical element to this process which is *critically important*. The shares acquired by Bay Capital *need to be registered in Bay Capital's name*. In other words, Bay Capital *has to be listed on the company's stockholder registry as the Shareholder of Record*."[38]

36 Yu Aff. Ex. 18, at BC EXP 0091845 (6/24/19 email from Gordon to Suri).

37 *Id.* (6/24/19 response from Suri: "Yes coming").

38 Yu Aff. Ex. 19, at BC EXP 0063305 (6/24/19 email from Gordon to Suri (emphasis added)).

Gordon forwarded the trade confirmation to outside counsel engaged by Plaintiff to launch the proxy fight on June 25.[39] Counsel responded that trade confirmation did not evidence that Bay Capital's shares were "held <u>in record name</u> by Bay Capital Finance, LLC."[40] Counsel further advised that the process of moving the shares into record name "typically takes 1-3 business days."[41] Gordon forwarded that email to JP Morgan and emphasized that "we MUST have the shares listed in record name by June 27, 2019."[42]

39 *See* Yu Aff. Ex. 20, at BC EXP 0063184 (6/25/19 email from Gordon to Plaintiff's counsel).

40 *Id.* at BC EXP 0063183 (6/25/19 email from Plaintiff's outside counsel to Gordon) (emphasis in original).

41 *Id.* at BC EXP 0063183–84 (6/25/19 email from Plaintiff's counsel).

42 *Id.* at BC EXP 0063183 (6/25/19 email from Gordon forwarding Plaintiff's outside counsel's instructions to JPMorgan).

On the morning of June 27, Gordon emailed the Company's proxy solicitor, Computershare, to request an "account statement confirming that Bay Capital's shares have been transferred to its Computershare account." [43] Computershare responded around 11:00 a.m. advising that "[a]s of this morning no shares have been credited to the account." [44] After some back and forth with Computershare, Gordon concluded around noon that Bay Capital "[would] not have shares in record name prior to the close of business [on June 27, 2019]." [45]

43 Yu Aff. Ex. 1, at BC EXP 0062980 (6/27/19 email from Gordon to JPMorgan and Computershare requesting account statement).

44 *Id.* at BC EXP 0062979 (6/27/19 email from Computershare to Gordon).

45 *Id.* at BC EXP 0062977 (6/27/19 email from Gordon to Suri).

On the evening of June 27, after Plaintiff learned that it would not timely satisfy the record-holder requirement, Plaintiff submitted a nomination notice. [46] In the notice, Suri represented repeatedly that Bay Capital was a "stockholder of record." [47] On June 28, Computershare reported to the Company that the shares posted to Bay Capital's account on June 28 and that Bay Capital was thus not "a holder of record as of 6/27/19." [48]

46 Compl. ¶ 32; Ans. ¶ 32; Yu Aff. Ex. 22 (6/27/19 Bay Capital Notice of Nomination).

47 Yu Aff. Ex. 22, at BNED-0001583; *id.* at BNED-0001585 (stating that Bay Capital held 25,000 shares "in record name"); *id.* at BNED-0001586 (stating: "The Nominating Stockholder hereby represents that it is a holder of record of stock of the Company entitled to vote in the election of directors ....").

48 Yu Aff. Ex. 48, at CPU0021 (6/28/19 email from Computershare).

***5** Although the Company bylaws granted Huseby the authority to "refuse to acknowledge" any non-compliant nomination notice, Huseby did not refuse the nomination notice pursuant to that grant of authority. [49] Rather, the full Board considered Plaintiff's nomination notice at a special meeting on June 28. At the meeting, the Board "unanimously instructed legal counsel to prepare and deliver to Bay Capital a confirmation that the letter of nomination was invalid under the Company's bylaws." [50] That same day, Company counsel informed Suri and Bay Capital that the June 27 nomination notice was invalid because Plaintiff failed to timely satisfy the record-holder requirement. [51]

49 Dkt. 62. Pl.'s Reply Br. in Further Supp. of Its Mot. for a Prelim. Inj. ("Pl.'s PI Reply Br.") Ex. PX-15, at 13:7–14 (Huseby testifying at his deposition that he did not read Plaintiff's nomination letter); *id.* at 92:21–24 (same); *see also* Yu Aff. Ex. 37, at 47:17–48:25 (Huseby testifying that he did not believe he had discretion to accept a late nomination); *id.* at 93:10–13 (Huseby testifying that the rejection was "a decision made by the board"). When ruling on summary judgment, the Court may consider the factual record developed by the parties at the preliminary injunction phase. *See, e.g.*, *TrustCo Bank v. Mathews*, 2015 WL 295373 (Del. Ch. Jan. 22, 2015).

50 Pl.'s PI Reply Br. Ex. PX-14, at BNED-0002330 (minutes of special meeting of the Board).

51 Yu Aff. Ex. 24 (6/28/19 letter from Company counsel to Plaintiff and outside counsel). In its reply brief at the preliminary injunction stage, Plaintiff argued for the first time that Defendants "actively work[ed] to disqualify Bay Capital's nomination" by causing the employees at Computershare to "run[ ] around" in disarray. Pl.'s PI Reply Br. at 3–4. Plaintiff pressed these allegations at the preliminary injunction hearing but again failed to offer a factual basis to support them. Rather, the record reflects "that the meeting date was set in accordance with the Company's historical practices and on a clear day before any dispute arose with Bay Capital." Dkt. 74, Oral Arg. & Rulings of the Ct. on Pl.'s Mot. for a

Prelim. Inj. ("PI Oral Arg. Tr.") at 112:24–113:8; *see* Dkt. 55, Transmittal Aff. of Eliezer Y. Feinstein in Supp. of Defs.' Answering Br. in Opp'n to Pl.'s Mot. for Prelim. Inj. ("Feinstein Aff.") Exs. DX-25, DX-27, DX-28, DX-29, DX-11, DX-12, DX-13, DX-14, DX-15, DX-40, DX-41, DX-42, DX-43, DX-44, DX-48. In fact, after the close of business, the Company's counsel even requested that Computershare double check that "there [was] no transfer effected through [June 27] that is not reflected in the list." Yu Aff. Ex. 48, at CPU0022 (6/27/19 email from Company counsel requesting confirmation).

B. Plaintiff Seeks to "Ratchet Up the Pressure" Against the Company by Pursuing Litigation Based on a False Narrative.

Having missed the deadline due to its own negligence, Plaintiff went looking for a reason to blame the Company. It was in this context that Suri first learned of the 2018 proxy language. In a June 27 email, Gordon advised Suri that the 2018 proxy "appears to be in conflict with the bylaws." [52] Gordon made a good call: the 2018 proxy in fact contained language conflicting with the advance notice bylaw. Whereas the bylaw pegs the deadline to the *previous* annual meeting, the 2018 proxy pegged the deadline to the *next* annual meeting, providing:

> In accordance with the charter of the Corporate Governance and Nominating Committee, in order for the Corporate Governance and Nominating Committee to consider a candidate submitted by a stockholder for election at a stockholder meeting, the Company must receive the [requested] information not less than 90 days, nor more than 120 days, prior to such meeting. [53]

52 Yu Aff. Ex. 1, at BC EXP 0062977 (6/27/19 email from Gordon to Suri).

53 Yu Aff. Ex. 6, at 16 (2018 proxy statement). Plaintiff, however, claimed that he could not have known this at the relevant time, because the Company did not disclose the 2019 annual meeting date until August 15.

***6** Gordon then made a bad call: he advised that Plaintiff could exploit this after-the-fact discovery by resubmitting its nomination notice and "argu[ing] that we were in compliance with the proxy language." [54]

54 Yu Aff. Ex. 1, at BC EXP 0062977 (6/27/19 email from Gordon to Suri).

Outside counsel repeated Gordon's advice in an email on June 29, advising Suri that the Company "[had] a discrepancy in [its] 2018 proxy statement which sets forth a different nomination deadline than the Bylaws .... It is still an issue for the Company that we can exploit that they disseminated a false and misleading proxy statement last year to shareholders." [55] In a separate June 29 email, Gordon advised that Bay Capital could pursue litigation to "ratchet up the pressure" on the Company to settle with Bay Capital, even though "Delaware case law is strong in terms of permitting the advance nomination period within the Bylaws." [56]

55 Yu Aff. Ex. 26, at BC EXP 0002227 (6/29/19 email chain between Suri and counsel).

56 Yu Aff. Ex. 45, at BC EXP 0062763 (6/29/19 email exchange between Gordon and Suri).

Suri approved of Gordon's proposed approach. In response to the first email, Suri wrote: "Perfect. As we are invited to debate – then we should oblige! Pursue unabated." [57] In response to the second email, Suri wrote: "Once we started we cannot pull back or be reticent. We pursue expeditiously." [58]

57 Yu Aff. Ex. 26, at BC EXP 0002227 (6/29/19 email from Suri to Plaintiff's counsel).

58 Yu Aff. Ex. 45, at BC EXP 0062763 (6/29/19 email from Suri to Gordon).

Plaintiff's advisors executed the strategy. On July 1, Plaintiff sent the Company an "updated Notice of Stockholder Nomination," an exhibit to which confirmed Plaintiff was not a record holder until June 28. [59] In a separate July 1 letter from counsel, Plaintiff identified the discrepancy between the advance notice bylaw and the 2018 proxy statement and demanded that the Company accept Plaintiff's nomination notice. [60]

59 Yu Aff. Ex. 25, at BNED-0001449 (7/1/19 email from Plaintiff's counsel to the Company); *id.* at BNED-0001474 ("Direct Registration Advice" indicating the June 28, 2019 record date).

60 Yu Aff. Ex. 2, at 2 (7/1/19 letter from Plaintiff's counsel to the Company).

Although Gordon had initially advised that Plaintiff should "argue that we were in compliance with the proxy language,"[61] there was no way for Plaintiff to know at the time whether the nomination in fact complied with the proxy language. This is because the Company had not yet announced the 2019 annual meeting date from which to count back to the deadline as specified in the 2018 proxy statement.[62] Perhaps in view of this dilemma, Plaintiff made a subtle but important shift in strategy, arguing that it relied on, rather than complied with, the 2018 proxy disclosure. The letter stated:

> Bay Capital *relied on the Company's proxy disclosure in formulating its plans and timing in nominating a slate of directors for the Annual Meeting*, and only upon its discovery of the earlier purported deadline under the Bylaws, delivered the Nomination while its shares were in the process of being transferred into record name.[63]

61 Yu Aff. Ex. 1, at BC EXP 0062977 (6/27/19 email from Gordon to Suri).

62 Coincidentally, it was later revealed that the 2018 proxy's computation method derived the same June 27 deadline established by the bylaw.

63 Yu Aff. Ex. 2, at 2 (7/1/19 letter from Plaintiff's counsel to the Company (emphasis added)).

***7** Of course, Plaintiff's claim of reliance was false. Plaintiff never relied on the proxy language in "formulating its plans and timing." Plaintiff relied on the advance notice bylaw and did not even know of the proxy language until after it missed the relevant deadline.

Plaintiff repeated the lie in pleadings filed with this Court. After the Company responded by denying the July 1 demand,[64] Plaintiff commenced litigation seeking a preliminary injunction to require the Company to include Plaintiff's nominated slate of directors for election at the annual meeting.[65] In the Verified Complaint filed on July 15, Plaintiff claimed that it relied on an inaccurate Company disclosure in the 2018 proxy to determine the deadline by which director nominations were due.[66] Plaintiff further claimed that Huseby breached his fiduciary duties by refusing Plaintiff's nomination. In the motion to expedite, Plaintiff represented that "Bay Capital initially relied on the Company's 2018 Proxy Statement under which it faced no imminent deadline."[67]

64 Feinstein Aff. Ex. DX-61 (7/2/19 letter from Company counsel explaining that Bay Capital's nomination was "untimely and invalid").

65 Compl. ¶ 5.

66 *Id.* ¶ 30 ("Bay Capital relied on the 2018 Proxy, under which it faced no imminent deadline. Upon review of the Bylaws, however, the error in the 2018 Proxy became apparent.").

67 Dkt. 2, Pl.'s Mot. for Expedited Proceedings ¶ 5; *see also* Dkt. 53, Telephonic Oral Arg. & Rulings of the Ct. on Pl.'s Mot. for Expedited Proceedings at 5:8–12 (Plaintiff's counsel arguing: "Bay Capital is entitled to a declaratory judgment that the [C]ompany's erroneous statements caused confusion about the proper timing and the process for the nomination of directors").

The Court granted Plaintiff's motion to expedite on July 22, 2019. In doing so, the Court placed great weight on the clear inconsistencies between the advance notice bylaw and the 2018 proxy language, as well as Plaintiff's assertion that it had relied on the 2018 proxy language and thus "had no way of knowing what that deadline was" because the date of the 2019 annual meeting had yet to be announced.[68]

68 Dkt. 53 at 29:11–31:13; *see also* PI Oral Arg. Tr. at 38:1–11, 96:11–17 ("Because, as of June 27th, the [C]ompany had not yet announced to its stockholders the date of the 2019 meeting, Bay Capital did not believe that deadline applied, I was

told. ... [I]t was on this theory that I deemed Bay Capital's claims colorable ....").

C. Plaintiff's Litigation Conduct

Plaintiff requested expedition, and (in the "be careful what you ask for" category) Plaintiff was granted expedition. After receiving an August 14 hearing date, Suri realized that it might interfere with his travel plans, and his enthusiasm for expedition appeared to wane. Plaintiff's counsel wrote to the Court explaining that "Suri ... [would] be out of the country between the commencement of discovery and August 14,"[69] and therefore Suri was unavailable to be deposed absent scheduling relief. The Court denied the Plaintiff's requested scheduling relief and ordered that Suri make himself available for a deposition during the discovery period.[70]

69 Dkt. 23 at 4 (7/24/19 letter from Plaintiff's litigation counsel to the Court requesting adjournment of the preliminary injunction hearing date).

70 Dkt. 92, Telephonic Scheduling Conference Tr. at 5:19–6:4; *see also id.* at 7:5–10.

***8** Suri then made himself available for a deposition, but he required Defendants' counsel to depose him in London. He arrived at his deposition 30 minutes late,[71] left in the middle of the deposition for over two hours to attend meetings he had scheduled that same day,[72] and unilaterally terminated the deposition in the middle of defense counsel's questioning.[73]

71 *Compare* Suri Dep. Tr. at 110:22 (Plaintiff's litigation counsel stating that he had his client arrive to the deposition at 10:00 a.m.), *with* Dkt. 36, Notice of Dep. of Sunil Suri (start time of 9:30 a.m.).

72 Suri Dep. Tr. at 147:19–23 (going off the record at 2:36 p.m. before going back on the record at 5:16 p.m.).

73 *See id.* at 244:16–17 (Suri: "Actually, I don't need to answer any more questions. I am done ...."); *id.* at 246:4–12 (Plaintiff's litigation counsel: "We are done. Sir, we are done. ... You cannot instruct him to do anything. We are leaving.").

Worse yet, Suri was evasive in his responses. For example, when asked the value of assets managed by Bay Capital, Suri responded "between one dollar and as much as a billion dollars,"[74] and he refused to provide any narrower range.[75] When pressed for a more precise estimate, Suri responded: "I gave you the range, counselor. I said the value of the assets ranges anywhere from a dollar to a billion dollars. That to me is a reasonable response to your question."[76] When asked the number of people employed by Bay Capital and the number of buildings owned by Bay Capital, Suri responded with additional imprecise ranges.[77]

74 *Id.* at 34:17–19.

75 *See generally id.* at 34:20–39:20.

76 *Id.* at 36:18–23.

77 *Id.* at 41:20–22 (employees); *id.* at 14:11–19:23 (buildings).

D. Defendants Move for Summary Judgment.

At the August 14 preliminary injunction hearing, the Court denied the motion on the ground that Plaintiff was not likely to prevail on the merits of its claim of reliance given that Plaintiff's non-compliance with the Company's advance notice bylaw was nobody's fault but its own.[78]

78 PI Oral Arg. Tr. at 115:6–12 (finding that "not even Delaware's strong public policy favoring the stockholder franchise will save Bay Capital from its dilatory conduct. Bay Capital blew the deadline. It then made up excuses for doing so. No record evidence suggests that the company is in any way at fault for that mistake").

At the end of the preliminary injunction hearing, the Court expressed concerns regarding Plaintiff's litigation conduct and added that "whether this litigation conduct warrants fee shifting" was "an open issue" to be decided at a later date.[79] After efforts to settle the litigation failed, Defendants moved for free shifting and for summary judgment.[80] The parties completed briefing on November 11, 2019,[81] and the Court heard oral arguments on December 19, 2019.[82]

79 *Id.* at 119:16–21.

80 Dkt. 69, Defs.' Mot. for Summ. J.; Dkt. 70, Defs.' Mot. for an Award of Fees & Costs.

81 Defs.' Opening Br.; Dkt. 78, Pl.'s Answering Br. to Defs.' Mot. for Summ. J. & an Award of Fees & Costs ("Pl.'s Answering Br."); Dkt. 80, Defs.' Reply Br. in Further Supp. of Their Mot. for Summ. J. & an Award of Fees & Costs.

82 Dkt. 91, Oral Arg. on Defs.' Mot. for Summ. J. & Fee Shifting & Mot. to Stay Disc. & Rulings of the Ct. on Mot. to Stay Disc.

II. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT TWO.

***9** Summary judgment serves to "avoid a useless trial" [83] and "should, when possible, be encouraged for it should result in a prompt, expeditious and economical ending of lawsuits." [84] Court of Chancery Rule 56 provides that summary judgment is appropriate when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." [85] A party is entitled to judgment as a matter of law "where there are no material factual disputes." [86] "If, however, there are material factual disputes, that is, if the parties are in disagreement concerning the factual predicate for the legal principles they advance, summary judgment is not warranted." [87] "In discharging this function, the court must view the evidence in the light most favorable to the non-moving party." [88]

83 *McKesson Corp. v. Derdiger*, 793 A.2d 385, 388–89 (Del. Ch. 2002).

84 *Davis v. Univ. of Del.*, 240 A.2d 583, 584 (Del. 1968).

85 Ct. Ch. R. 56(c).

86 *Merrill v. Crothall-American, Inc.*, 606 A.2d 96, 99 (Del. 1992) (citing *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)).

87 *Id.*

88 *Id.* (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)).

The Complaint asserts three Counts:

- In Count One, Plaintiff seeks a declaration that Plaintiff's nomination notice setting forth a slate of candidates was valid and should be presented to the Company's stockholders.
- In Count Two, Plaintiff seeks a declaratory judgment that the Company's CEO Huseby breached his fiduciary duties by improperly rejecting Bay Capital's slate of candidates and not exercising in good faith his discretion to accept the nominations even if they did not strictly comply with the bylaws.
- In Count Three, Plaintiff alleges that the Board and Huseby breached their fiduciaries duties by disclosing misleading information in the Company's annual proxy statement concerning the deadline for submissions to the annual meeting. [89]

89 Compl. ¶¶ 50–60.

In response to Defendants' motions, Plaintiff conceded that Count One had been mooted by the 2019 annual meeting on September 25, 2019, and that Count Three had been mooted by supplemental disclosures issued by the Company on August 15, 2019. [90] Those Counts are dismissed, [91] and this decision addresses Defendants' summary judgment motion as to Count Two only.

90 Pl.'s Answering Br. at 1, 8.

91 *Gen. Motors Corp. v. New Castle Cty.*, 701 A.2d 819, 823 (Del. 1997) ("According to the *mootness* doctrine, although there may have been a justiciable controversy at the time the litigation was commenced, the action will be dismissed if that controversy ceases to exist." (citing *Glazer v. Pasternak*, 693 A.2d 319, 320 (Del. 1997))).

In Count Two, Plaintiff points to language in the advance notice bylaw granting the Board chairman discretion to refuse a non-compliant notice of nomination: "The chairman of the meeting may refuse to acknowledge the nomination of any person not made in compliance with the foregoing procedure ...." [92] Plaintiff alleges that Huseby breached his fiduciary duties by "[f]ailing to exercise in good faith the discretion granted him under Article III, Section 3 of the Company's Bylaws to accept Bay Capital's nominations even if not submitted in strict compliance with the Bylaws." [93]

92 Yu Aff. Ex. 5, art. III, § 3.

93 Compl. ¶ 57.

For Huseby to be liable for breach of his fiduciary duties under Article III, Section 3, Huseby would have had to act pursuant to that grant of authority. He did not.[94] Rather, the full Board considered and rejected the nomination notice at the July 28 special meeting.[95] Plaintiff's claim thus lacks any factual predicate. Plaintiff appears to argue that Huseby *should have* invoked his discretion under Article III, Section 3 to make his own determination, a determination that conflicted with the determination of the full Board. Unsurprisingly, Plaintiff cites to no authority to support this proposition. The Court is aware of none.

94 Yu Aff. Ex. 37, at 47:17–48:25 (Huseby testifying that he did not believe he had discretion to accept a late nomination); *id.* at 93:10–13 (Huseby testifying that the rejection was "a decision made by the board"); *see also* Pl.'s PI Reply Br. Ex. PX-14, at BNED-0002330 (draft minutes of a special meeting of the Board stating that "[t]he Board also unanimously instructed legal counsel to prepare and deliver to Bay Capital a confirmation that the letter of nomination was invalid under the Company's bylaws"); Pl.'s PI Reply Br. Ex. PX-15, at 13:7–14 (Huseby testifying at his deposition that he did not read Plaintiff's nomination letter); *id.* at 92:21–24 (same).

95 Pl.'s PI Reply Br. Ex. PX-14, at BNED-0002330. Because Plaintiff has not challenged the Board's action, this decision does not and need not address it.

***10** Plaintiff's sole ploy in response to Defendants' motion is to state in a Rule 56(f) Affidavit that it requires additional "information regarding any Board investigation into Bay Capital or Mr. Suri."[96] But Plaintiff does not connect this statement to the relevant determination—Huseby's (lack of) action under Article III, Section 3. Moreover, at the summary judgment stage, Rule 56(e) provides that the non-moving party "must set forth specific facts showing that there is a genuine issue for trial."[97] "To invoke Rule 56(f), the opposing party must submit an affidavit requesting discovery and stating its scope."[98] Although this Court has "broad discretion" in permitting additional discovery under Rule 56(f), the onus is on the non-moving party to state "with some degree of specificity, the additional facts sought by the requested discovery."[99] Plaintiff received documents and deposition testimony from Huseby during expedited discovery,[100] and Plaintiff's Rule 56(f) Affidavit does allege with any degree of specificity additional facts to be sought through additional discovery.[101] Thus, Defendants are entitled to summary judgment on Count Two.

96 Dkt. 78, Aff. of Sean Bellew in Supp. of Pl.'s Opening Br. Opposing Defs.' Mot. for Summ. J. & an Award of Fees & Costs Pursuant to Ch. Ct. R. 56(f) ¶ 5.

97 Ct. Ch. R. 56(e).

98 *Corkscrew Min. Ventures, Ltd. v. Preferred Real Estate Invs., Inc.*, 2011 WL 704470, at *3 (Del. Ch. Feb. 28, 2011) (citing *von Opel v. Youbet.com, Inc.*, 2000 WL 130625, at *1 (Del. Ch. Jan. 26, 2000)).

99 *Ryan v. Lyondell Chem. Co.*, 2008 WL 2923427, at *22 (Del. Ch. July 29, 2008), *rev'd on other grounds*, 970 A.2d 235 (Del. 2009); *see also Wimbledon Fund LP v. SV Special Situations LP*, 2011 WL 378827, at *4 (Del. Ch. Feb. 4, 2011) (explaining that "[t]he purpose of a Rule 56(f) affidavit is to avoid situations where an opposing party receives an adverse judgment on a summary judgment record due to a lack of adequate time for discovery but also to require a party who needs discovery to respond to a summary judgment motion to timely explain what discovery it needs to do so").

100 *See generally* Yu Aff. Ex. 39 (Huseby deposition transcript).

101 It bears noting that although Plaintiff's motion for a preliminary injunction was denied on August 14, 2019, Plaintiff did not serve any discovery requests after Defendants moved for summary judgment on September 4, 2019. Plaintiff also did not serve any discovery requests before it filed its answering brief on October 11, 2019. A party that delays in taking discovery, despite having had the opportunity to do so, cannot raise its own failure as a defense against summary judgment. *See Comet Sys., Inc. S'holders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1033–34 (Del. Ch. 2008); *Lyondell Chem.*, 2008 WL 2923427, at *22 (declining to excuse the plaintiff's own delay in requesting additional discovery while the summary judgment motion was pending).

III. DEFENDANTS ARE ENTITLED TO A PORTION OF THEIR ATTORNEYS FEES AND COSTS.

Bad faith litigation conduct allows a court to shift fees as exception to the American Rule that requires each party to pay its own attorneys' fees.[102] "Although there is no single definition of bad faith conduct, courts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records or knowingly asserted frivolous claims."[103] "The bad faith exception is applied in 'extraordinary circumstances' as a tool to deter abusive litigation and to protect the integrity of the judicial process."[104] "The party seeking fees must demonstrate by clear evidence that the other party acted in subjective bad faith."[105]

102 *Shawe v. Elting*, 157 A.3d 142, 149 (Del. 2017).

103 *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 546 (Del. 1998) (internal citations omitted).

104 *Montgomery Cellular Hldg. Co. v. Dobler*, 880 A.2d 206, 227 (Del. 2005) (citing *Johnston*, 720 A.2d at 546).

105 *Shawe v. Elting*, 157 A.3d at 150 (citing *Lawson v. State*, 91 A.3d 544, 552 (Del. 2014)); *see also* *Beck v. Atlantic Coast PLC*, 868 A.2d 840, 843 (Del. Ch. 2005) (shifting fees were plaintiff and his counsel prosecuted the action in bad faith by "fil[ing] false and misleading complaints with this court that misrepresented factual circumstances at the core of [the] case").

***11** Abuse of the discovery process provides another basis to shift fees. "[S]anctions may be imposed upon anyone participating in a Delaware proceeding who engages in abusive litigation tactics."[106] "The Delaware Supreme Court has made clear that " '[d]iscovery abuse has no place in our courts.' "[107] To remedy discovery abuses, this Court "has the power to issue sanctions ... under its inherent equitable powers, as well as the Court's inherent power to manage its own affairs."[108] "[W]hen a party fails to comply with discovery orders of the Court or otherwise engages in discovery abuses, the award of attorneys' fees and expenses to the opposing party is mandatory, absent a showing by the wrongdoer that his actions were substantially justified or that other circumstances make the award unjust."[109]

106 *Kaung v. Cole Nat. Corp.*, 884 A.2d 500, 508 (Del. 2005) (collecting cases).

107 *Terramar Retail Ctrs., LLC v. Marion #2-Seaport Tr. U/A/D June 21, 2002*, 2018 WL 6331622, at *8 (Del. Ch. Dec. 4, 2018) (quoting *Holt v. Holt*, 472 A.2d 820, 824 (Del. 1984)).

108 *Id.* at *10.

109 *Bader v. Fisher*, 504 A.2d 1091, 1096 (Del. 1986).

Plaintiff's misleading statements at the outset and throughout this case warrant fee shifting under the bad faith exception to the American Rule. In the Complaint, Plaintiff averred that it "relied on the 2018 Proxy."[110] Suri signed the Verification to the Complaint, affirming "that the factual allegations contained therein, are true and correct to the best of [his] knowledge."[111] Plaintiff doubled down on this representation in its motion for expedited proceedings, where it stated that "Bay Capital initially relied on the Company's 2018 Proxy Statement."[112] As discussed above, the Court granted the motion for expedited proceedings based primarily on this assertion.[113]

110 Compl. ¶ 30.

111 Dkt. 1, Verification to Compl.

112 Dkt. 2, Pl.'s Mot. for Expedited Proceedings ¶ 5.

113 PI Oral Arg. Tr. at 96:8–23.

As discovery revealed, Plaintiff's claim of reliance was false. In fact, Suri never relied on the 2018 proxy statement, and he was unaware of any discrepancies until June 27, 2019, when Gordon manufactured a basis for ratcheting up the pressure on the Company.[114] Nevertheless, Plaintiff continued to press its claims of reliance and moved for a preliminary injunction. In that motion, Plaintiff again stated that "Bay Capital relied on the Proxy Statements in preparing its slate of director candidates for consideration at the annual meeting, only accelerating the process when it realized the Proxy Statements conflicted internally with the bylaws."[115] At the preliminary injunction hearing, the Court noted that there was "no evidence that [Plaintiff] actually relied on the proxy in waiting until the last minute to buy shares. In fact, the evidence reflects that [Plaintiff] was very much aware of the advance notice bylaws."[116] In response, Plaintiff's counsel stated that "the fact of the matter is, it was relied on." [117] Plaintiff did not provide a factual basis from which anyone could reach that conclusion.

114 Yu Aff. Ex. 1, at BC EXP 0062977 (6/27/19 email from Gordon to Suri).

115 Dkt. 51, Pl.'s Opening Br. in Supp. of Its Mot. for a Prelim. Inj. at 15–16.

116 PI Oral Arg. Tr. at 31:8–13.

117 *Id.* at 31:18–19.

Plaintiff's discovery abuses further warrant fee shifting. In particular, Suri's conduct during his own deposition raises serious concerns. Plaintiff assigns blame to Defendants for what happened that day, arguing that they "failed to call the court for assistance during the deposition, never requested a meet and confer, and never filed a motion to compel." [118] But Delaware law imposes no such rigid duties on parties seeking fees for discovery misconduct. [119]

118 Pl.'s Answering Br. at 21.

119 *See, e.g.*, *CSH Theatres, LLC v. Nederlander of S.F. Assocs.*, 2018 WL 3646817, at *31–36 (Del. Ch. July 31, 2018) (awarding fees and costs in connection with a deposition where deponent "willfully gave nonsensical and nonresponsive answers"), *aff'd sub. nom. In re Shorenstein Hays-Nederlander Theaters LLC Appeals*, 213 A.3d 39 (Del. 2019).

***12** In view of Plaintiff's bad faith conduct and abusive litigation tactics, Defendants are entitled to recover a portion of their fees. Defendants are entitled to two-thirds of their fees excluding time spent on the summary judgment briefing. [120] The one-third deduction accounts for fees incurred in connection with the Company's defense of Count Three. As the Court remarked at the preliminary injunction hearing, the 2018 proxy language describing the nomination deadline conflicted with the language of the advance notice bylaw. [121] The Company could have mooted the issue early on and avoided any fees; it instead chose to litigate. Thus, the Court grants Plaintiff that one-third of Defendants' fees would have been expended on litigation relating to Count Three. [122]

120 The summary judgment briefing primarily focused on Defendants' fee request, and the Court does not include time spent preparing motions for fee requests in fee awards. *See Beck*, 868 A.2d at 856.

121 PI Oral Arg. Tr. at 119:22–120:2. Plaintiff argues that it is entitled to a mootness fee in connection with this amendment. But Plaintiff failed to move for mootness fees. Thus, this decision does not address the merits of Plaintiff's argument.

122 *See Beck*, 868 A.2d at 856 (reducing fee award after granting the "charitable assumption" that the defendants would have had to expend over half of their requested fees on a motion to dismiss in the event that the plaintiffs had acted candidly to put forth an otherwise colorable claim).

IV. CONCLUSION

For the foregoing reasons, Defendants' Motions for Summary Judgment and for an Award of Fees and Costs are GRANTED IN PART.

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2021 WL 5267734

Court of Chancery of Delaware.

BANDERA MASTER FUND LP, Bandera Value Fund LLC, Bandera Offshore Value Fund Ltd., Lee-Way Financial Services, Inc., and James R. McBride, on behalf of themselves and similarly situated Boardwalk Pipeline Partners, LP Unitholders, Plaintiffs,
v.
BOARDWALK PIPELINE PARTNERS, LP, Boardwalk Pipelines Holding Corp., Boardwalk GP, LP, Boardwalk GP, LLC, and Loews Corp., Defendants.

C.A. No. 2018-0372-JTL
|
Date Submitted: July 14, 2021
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MEMORANDUM OPINION

LASTER, V.C.

***1** In 2005, Loews Corporation formed Boardwalk Pipeline Partners, LP (“Boardwalk” or the “Partnership”). Loews controlled Boardwalk by controlling Boardwalk's general partner. From 2005 until 2018, Boardwalk was a master limited partnership (“MLP”), meaning that the common units representing its limited partner interests traded on an exchange.

Throughout its existence, Boardwalk has served as a holding company for subsidiaries that operate interstate pipeline systems for the transportation and storage of natural gas. The Federal Energy Regulatory Commission (“FERC” or the “Commission”) regulates interstate pipelines. Loews took Boardwalk public in 2005 after FERC implemented a regulatory policy that made MLPs a highly attractive investment vehicle for pipeline companies.

As a business matter, Loews wanted to be able to take Boardwalk private again if FERC took regulatory action that would have a material adverse effect on Boardwalk. To address that business issue, the lawyers who drafted Boardwalk's partnership agreement included a provision that gave Boardwalk's general partner the right to acquire the limited partners’ interests if certain conditions were met (the “Call Right”). Two conditions are front and center in this case.

The first condition required that the general partner receive “an Opinion of Counsel that the Partnership's status as an association not taxable as a corporation and not otherwise subject to an entity-level tax for federal, state or local income tax purposes has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers” (respectively, the “Opinion,” and the “Opinion Condition”). The Opinion Condition required counsel to address a mixed question of fact and law: whether an event had or was reasonably likely in the future to have a material adverse effect on the maximum applicable rate that Boardwalk could charge its customers. By focusing on a rate that could be charged to customers, the Opinion Condition meshed imperfectly with Loews’ business goal of protecting against future regulatory action that would have a material adverse effect on Boardwalk. And as this decision details, the Opinion Condition used language that presented a host of interpretive difficulties.

The second condition required that the general partner determine that the Opinion was acceptable (the “Acceptability

Condition"). Boardwalk's general partner was itself a limited partnership. The general partner of that limited partnership was a limited liability company, and it had both a board of directors and a sole member, each of which had authority to make certain decisions regarding the Partnership. Boardwalk's partnership agreement did not specify which decision-maker in this structure would determine whether the Opinion was acceptable. Other agreements did not clearly answer the question either. Reading the agreements in combination led to at least two possible answers. Under one interpretation, the LLC's board of directors would make the acceptability determination. That made sense from a governance perspective, because the LLC's board of directors included outside directors who could inject a measure of independence into the determination. Under another interpretation, the LLC's sole member would make the determination. The LLC's sole member was a subsidiary of Loews, and all of the decision-makers at that entity were Loews insiders. That interpretation enjoyed more textual support, but it rendered the Acceptability Condition surplusage, because Loews always had the ability to make a *de facto* acceptability determination when deciding whether or not to exercise the Call Right.

***2** In March 2018, FERC proposed a package of regulatory policies that could have made MLPs an unattractive investment vehicle for pipeline companies. Everyone recognized that the proposals were not final, and industry players lobbied vigorously to change them. One of the major questions surrounding the proposals was how FERC would treat a pipeline's outstanding balance for accumulated deferred income taxes ("ADIT"). Boardwalk made clear in its public comments to FERC that it was impossible to determine the effect of FERC's proposals on Boardwalk's rates until FERC made a decision on the treatment of ADIT.

Boardwalk and other industry participants expected FERC to provide further insight at its July 2018 meeting. At that meeting, FERC implemented its proposals in conjunction with a determination that pipelines could eliminate their outstanding ADIT balances. Rather than making MLPs a less attractive investment vehicle for pipeline companies, that regulatory result made MLPs even more attractive.

In the interim, Loews seized on the period of maximum uncertainty that existed after FERC announced the proposed changes but before FERC implemented the actual changes. Loews caused Boardwalk's general partner to exercise the Call Right, and the acquisition closed just one day before FERC announced the final package of regulatory measures.

By acquiring the limited partner interest, Loews generated what its management team described euphemistically as $1.5 billion in "Value Creation"—much of which would be characterized more aptly as value expropriation. And Loews was able to acquire the limited partners' interest at a highly attractive price even though the regulatory changes ultimately did not have any negative effect on Boardwalk.

Loews achieved this remarkable result because its in-house legal team and outside counsel worked hard to generate a contrived Opinion. The Opinion that outside counsel provided did not satisfy the Opinion Condition because outside counsel did not render it in good faith. Outside counsel knowingly made unrealistic and counterfactual assumptions, knowingly relied on an artificial factual predicate, and consistently engaged in goal-directed reasoning to get to the result that Loews wanted. Among other noteworthy decisions detailed in this opinion, outside counsel determined that the regulatory proposals were sufficiently final to trigger the Call Right, even though everyone knew the proposals were not final. And outside counsel determined that the proposals were reasonably likely to have a material adverse effect on Boardwalk's rates, even as Boardwalk stated in its comments to FERC that it was impossible to determine the effect on Boardwalk's rates until FERC made a decision on the treatment of ADIT. To address the issue that management deemed impossible to assess, outside counsel examined hypothetical indicative rates, failed to incorporate the admittedly low chance that Boardwalk's rates actually would change, and derived the magnitude of the assumed change from a simple syllogism. Viewed as a whole, outside counsel's conduct went too far to constitute a good faith effort to render a legal opinion.

Loews locked in its ability to exercise the Call Right by having the sole member of the LLC that served as the general partner of Boardwalk's general partner pronounce the Opinion acceptable. That determination did not satisfy the Acceptability Condition because the partnership agreement is ambiguous. Under the doctrine of *contra proferentem*, the resulting ambiguity must be resolved against the general partner, not in favor of the general partner. In this case, the doctrine requires interpreting the partnership agreement so that only the board of directors of the LLC could pronounce the Opinion acceptable. Four of the eight members of that board of directors were outsiders. Vesting the decision in that decision-maker is more favorable to the limited partners than an interpretation that gives sole authority over the decision to the sole member of the LLC, where all of the decision-makers were Loews insiders.

***3** A bevy of lawyers strived to paper the record so that the Opinion Condition and the Acceptability Condition would appear satisfied. In reality, they were not. The general partner therefore breached the partnership agreement by exercising the Call Right and acquiring the limited partners' interests.

At this point in the analysis, the general partner argues that it is nevertheless insulated against liability by two protective provisions in the partnership agreement. The first provision generally exculpates the general partner against liability, but contains an exception for willful misconduct. Because the general partner acted intentionally and opportunistically, the general partner's contractual breach constituted willful misconduct, and the general partner is not exculpated from liability. The second provision protects the general partner if it relies on opinions, reports, or other statements provided by someone that the general partner reasonably believes to be an expert. Here, the general partner participated knowingly in the efforts to create the contrived Opinion and provided the propulsive force that led the outside lawyers to reach the conclusions that Loews wanted. The general partner therefore cannot claim to have relied on the Opinion, and the defense is unavailable.

The general partner is liable for damages in the amount of $689,827,343.38, plus pre- and post-judgment interest on that amount from July 18, 2018, through the date of payment. The plaintiffs are entitled to an award of costs as the prevailing party.

I. FACTUAL BACKGROUND

Trial took place over four days using the zoom videoconferencing platform. Eight fact witnesses and six experts testified live. The parties introduced 1,978 exhibits, including twenty deposition transcripts.

In the pre-trial order, the parties commendably agreed to nearly 400 stipulations of fact. The court thanks litigation counsel for their efforts as officers of the court in preparing those detailed stipulations. This decision relies on them when applicable. [1] The stipulations do not address all of the factual issues, and they do not determine the inferences to be drawn from the stipulated facts when evaluated in conjunction with the evidence.

1 Citations in the form "PTO ¶ —" refer to stipulated facts in the pre-trial order. *See* Dkt. 173. Citations in the form "[Name] Tr." refer to witness testimony from the trial transcript. Citations in the form "[Name] Dep." refer to witness testimony from a deposition transcript. Citations in the form "JX — at —" refer to a trial exhibit, with the page designated by the internal page number. If a trial exhibit used paragraph numbers or sections, then references are by paragraph or section. Citations in the form "PDX — at —" refer to the plaintiffs' demonstrative exhibits that summarized information appearing of record in other sources.

The court has evaluated the credibility of the witnesses and carefully weighed the evidence. The court has placed the burden of proof on the plaintiffs for all contested issues. The plaintiffs proved the following factual account by a preponderance of the evidence.

A. The Partnership

Boardwalk is a limited partnership organized under the laws of the State of Delaware. During the period relevant to this litigation, Boardwalk owned three principal subsidiaries, each of which operated an interstate pipeline and storage system for natural gas: Texas Gas Transmission, LLC ("Texas Gas"); Gulf South Pipeline Company, LP ("Gulf South"); and Gulf Crossing Pipeline Company LLC ("Gulf Crossing").

***4** Loews formed Boardwalk in August 2005. At all times since Boardwalk's formation, Loews has controlled Boardwalk. Loews is a diversified conglomerate whose shares trade on the New York Stock Exchange under the symbol "L." Loews is controlled and managed by members of the Tisch family.

FERC regulates interstate pipeline companies, including the rates that pipelines can charge for cost-based services. PTO ¶ 61. Loews took Boardwalk public as an MLP after FERC implemented a regulatory policy that made MLPs a highly attractive investment vehicle for pipeline companies. Thirteen years later, Loews exercised the Call Right after FERC proposed a package of regulatory policies that could have made MLPs an unattractive investment vehicle for pipeline companies. As it turned out, the package of policies that FERC actually implemented made MLPs an even more attractive investment vehicle for pipeline companies. Because of the importance of the potential and actual regulatory changes to the case, a basic understanding of the regulatory landscape is necessary to make sense of what transpired.

1. The Regulation Of Pipeline Rates

As part of its regulatory mandate, FERC determines the maximum rates—also known as "recourse rates"—that a pipeline can charge the firms who pay the pipeline to transport and store their product—known as "shippers." PTO ¶¶ 61, 80, 111. Under the Natural Gas Act ("NGA"), a pipeline's recourse rates must be "just and reasonable." PTO ¶ 88.

FERC establishes a pipeline's recourse rates through a litigated administrative proceeding known as a "rate case." *Id.* ¶ 81; JX 89 at 7–8. If a pipeline believes its recourse rates are too low, then it can file a rate case under Section 4 of the NGA to obtain new, higher rates. JX 89 at 7. If FERC or a shipper believes the pipeline's recourse rates are too high, they can file a rate case under Section 5 of the NGA to challenge the rates. *See id.* at 7–8.

Recourse rates remain in effect until FERC approves new rates in a subsequent rate case. PTO ¶ 88. Once approved, a pipeline's recourse rates are listed publicly in a schedule known as a "tariff." As a result, they are sometimes called "tariff rates." *See* JX 1744 (Webb Report) ¶ 89.

Recourse rates are not mandatory rates. FERC generally grants pipelines the authority to contract with shippers to provide services at agreed-upon rates. PTO ¶ 97. The resulting "negotiated rates" are "not bound by the maximum and minimum recourse rates in the pipeline's tariff." *Id.* FERC also allows pipelines "to selectively discount their rates," resulting in what are referred to as, unsurprisingly, "discounted rates." *Id.* Negotiated and discounted rates are alternatives to recourse rates. The term "recourse rate" reflects the fact that a shipper always has *recourse* to the rates specified in the tariff and cannot be forced to pay a different rate. PTO ¶ 97.

A rate case is a complex affair that involves a five-step process, known as "cost-of-service ratemaking." JX 89 at 7, 10. Cost-of-service ratemaking aims to "establish just and reasonable rates" that will provide the pipeline with the opportunity to recover all components of its cost of service and to generate a reasonable rate of return that will adequately compensate its investors. PTO ¶ 93.

What follows is a high-level overview of each of the five steps. Those curious about cost-of-service ratemaking may consult FERC's 106-page Cost-of-Service Rates Manual, which includes much more detail on each of the five steps and an example of the five steps as applied to a fictional pipeline company. *See generally* JX 89.

***5** The first step in the ratemaking process is to determine the pipeline's cost-of-service requirement, which represents the total revenue that the pipeline needs both to cover its expenses and to provide a reasonable rate of return on its invested capital. *Id.* at 12. The total investment in a pipeline is known as its rate base. *Id.* at 14. To arrive at a pipeline's cost-of-service requirement, FERC (1) multiplies a pipeline's rate base by its overall rate of return, then (2) adds a pipeline's operating and maintenance expenses, administrative and general expenses, depreciation expenses, and non-income and income taxes, and (3) subtracts any revenue credits. *Id.* at 12–13. The pipeline's overall rate of return is a function of the pipeline's capitalization ratio, its cost of debt, and an allowed rate of return on equity ("ROE"). *Id.* at 20. In 2018, to calculate a pipeline's allowed ROE, FERC used a discounted cash flow model. Webb Report ¶ 67.

As noted, a pipeline's rate base "represents the total investment of the pipeline," determined using a formula specified by FERC. JX 89 at 14. Among other things, the formula accounts for ADIT, discussed in greater detail below. *Id.* at 14, 17–18.

After determining the pipeline's cost-of-service requirement, the analysis moves to step two. That phase involves computing a "functionalized cost-of-service" by allocating the expenses associated with a pipeline system between its two main functions: transmission and storage. JX 89 at 29–30. There are two main categories of expenses: operation and maintenance expenses, and administrative and general expenses. *Id.* at 30. Assigning operation and maintenance expenses to one function or another is relatively easy because of existing pipeline accounting requirements. *Id.* Assigning administrative and general expenses is less straightforward, and FERC prefers to allocate those expenses using a four-step process known as the Kansas-Nebraska Method. *Id.* at 30–31. FERC then functionalizes any remaining expenses, costs, or credits. *Id.* at 31–32. At the end of step two, the analysis has generated a functionalized cost of service for both the transmission and storage functions.

Step three is itself a two-step process. *Id.* at 34. Each of the functionalized costs is "classified as either fixed or variable." *Id.* A functionalized cost is fixed if it "remain[s] constant regardless of the volume of throughput" and typically is "associated with capital investment in the pipeline system." *Id.* Variable costs, unsurprisingly, are those that "vary with the volume of throughput." *Id.* The fixed and variable costs are then further designated as either reservation (demand) costs or usage (commodity) costs. *Id.* at 35. Whether a cost is classified as a demand or a commodity cost can have an effect on the rate. *Id.* Generally, variable costs are designated as commodity costs. *Id.* There is no similar consensus on fixed costs, which require a case-by-case assessment. *Id.*

Step four splits the functionalized and classified costs derived in steps two and three "between jurisdictional and non-jurisdictional services, among zones and among jurisdictional services." *Id.* at 39. FERC uses volume metrics to allocate costs between jurisdictional and non-jurisdictional services, but the importance of that distinction has waned over time. *Id.* at 42–43. When a pipeline is divided into geographic regions, FERC uses distance metrics to allocate costs among zones. *Id.* at 43.

The final step of rate design "directly translate[s] the costs allocated to the jurisdictional customers into unit charges or rates." *Id.* at 45. The goal of this phase is to design rates that enable the pipeline to "recover the jurisdictional cost-of-service." *Id.* Rate design includes both a "firm service rate," which is made up of a "reservation charge" and a "usage charge," and an "interruptible service rate," which is "charged per unit of gas transported." *Id.* at 45–46. Calculating the "interruptible service rate" requires a separate multi-step analysis. *Id.* at 47–48.

***6** The accuracy of a rate design is determined by running a revenue check. *Id.* at 49. A rate is accurate if the product of the rates for each service and its accompanying billing determinant (for example the volume of gas transported over a given contractual period) equals the cost of service calculated at step one. *Id.* The numbers need not be exactly equal, but they must be within 1/100th of a percent of each other. *Id.*

2. The Income Tax Allowance And ADIT

One component of a pipeline's cost of service is the income taxes that the pipeline pays. In the years before 1995, FERC allowed all pipelines to include an "income tax allowance" in their cost-of-service calculations, regardless of how they were organized as entities. As a general rule, including the income tax allowance increases the total cost of service, which in turn supports a higher rate base and a greater revenue requirement. JX 89 at 12. A higher cost of service generally (but not always) leads to higher recourse rates. That result favors pipelines, who could therefore charge shippers higher rates.

A related component of a pipeline's cost of service is ADIT, which is an accounting concept that arises because various tax provisions authorize pipelines to depreciate their assets on an accelerated basis. PTO ¶ 98. When calculating recourse rates, however, FERC uses straight-line depreciation. Because a pipeline can claim depreciation more quickly for tax purposes than for rate setting, the pipeline pays lower income taxes in the years when accelerated depreciation applies, resulting in greater cash flows than FERC's rate-setting calculations contemplate. *Id.* ¶ 99. Once the period of accelerated depreciation ends, the process reverses, and the pipeline ends up paying higher taxes than FERC's rate-setting calculations contemplate. *Id.* ¶ 100.

By accelerating depreciation and deferring taxes, the pipeline benefits from the time-value of money. To reflect the fact that the taxes ultimately must be paid, the pipeline records the accumulated value of the tax deferral on its balance sheet as ADIT. During the years when the pipeline benefits from accelerated depreciation and pays lower taxes, the ADIT balance builds up. After the period of accelerated depreciation, once the pipeline begins paying higher taxes, the ADIT balance declines. *Id.* ¶¶ 99–100.

In substance, the accelerated depreciation acts as an interest-free loan from the government that the pipeline eventually must repay. The balance on the pipeline's balance sheet is therefore referred to as an "ADIT liability." *Id.* ¶ 99. More importantly for present purposes, FERC historically treated a positive ADIT balance as a cost-free source of capital. *Id.* ¶ 98. FERC therefore subtracted the ADIT balance from the pipeline's rate base for purposes of the cost-of-service calculation.

As a general rule, subtracting ADIT decreases the total cost of service, which in turn supports a lower rate base and a lower revenue requirement. A lower cost of service thus generally (but not always) leads to lower recourse rates. *See id.* ¶¶ 98, 101. That result favors shippers, who have recourse to lower rates.

The foregoing discussion makes explicit an obvious economic reality: pipelines and shippers have opposing interests in setting recourse rates. As a general rule, pipelines want higher recourse rates, and they advocate for regulatory approaches that tend to generate higher rates. Shippers want lower recourse rates, and they advocate for regulatory approaches that tend to generate lower rates.

3. Changes In Cost Of Service Do Not Necessarily Lead To Changes In Recourse Rates.

***7** Although the cost-of-service calculation is a core part of the ultimate determination of recourse rates, a change in a pipeline's cost of service is not the same as a change in its recourse rates. The two ideas reflect "different things." Wagner Tr. 286. A pipeline's cost of service changes over time, but those changes do not automatically trigger changes in recourse rates. *See id.* at 265. As a result, it is improper to equate a change in cost of service with a change in recourse rates. *See* McMahon Tr. 547–48; JX 575 at 2; JX 1139 at 30–31.

Instead, there must be a "vehicle" for a rate change, namely a rate case under Section 4 or 5 of the NGA. *See, e.g.*, McMahon Tr. 481; Wagner Tr. 264–66; Webb Tr. 936–37. If there is no rate case, then there cannot be a change in recourse rates. If a rate case is unlikely, then a change in recourse rates is unlikely. Wagner Tr. 266.

If a rate case is filed, and if the evidence shows that one cost-of-service input has changed, then rates still might end up increasing, decreasing, or staying the same. As described above, the complex five-step analysis in a rate case looks to all of the cost-of-service inputs and applies principles of rate design. It does not simply adjust a single cost-of-service variable (such as the income tax allowance) to generate a change in recourse rates. *See* Wagner Tr. 274–75; Webb Tr. 914. That type of approach is called "single-issue ratemaking," and FERC has a general policy against it. [2]

2 *See* JX 1743 (Court Report) ¶ 39 ("[A]lthough one component of the cost-of-service calculation may have increased, others may have declined[,] .... and any decreases in an individual component may be offset against increases in other cost components."); McMahon Tr. 548 (same); Johnson Tr. 663 (agreeing that "if you change one variable in a rate calculation, you have to revisit all the other variables as well"); *id.* at 614–16 (same); Sullivan Dep. 102 (agreeing that changing one cost-of-service element does not provide "meaningful information" regarding recourse rates).

There is also a longstanding legal prohibition against FERC engaging in "retroactive ratemaking." That term refers to any effort to adjust a pipeline's current rates to make up for over- or under-collection in prior periods. *See* Court Tr. 854–55. Put another way, "FERC's regulation of rates has to be prospective only." Johnson Tr. 662. In a decision from 1990, the United States Court of Appeals for the District of Columbia (the "DC Circuit")—the final court of appeal as of right from FERC determinations—applied the prohibition against retroactive ratemaking to an ADIT balance. *Pub. Utils. Comm'n of Cal. v. FERC*, 894 F.2d 1372 (D.C. Cir. 1990). The case involved a pipeline changing how it priced its services such that it would no longer draw on an accumulated ADIT balance to fund future tax liability. *See id.* at 1375–76. The pipeline's customers sought a refund of the ADIT balance, but the court rejected that request. Among other reasons, the court stated that refunding ADIT would violate the prohibition on retroactive ratemaking by forcing the pipeline to return a portion of the rates that FERC had approved and the pipeline had collected during prior periods. *Id.* at 1383.

4. FERC's 2005 Policy

Because cost-of-service calculations ultimately affect rates, and because pipelines and shippers have opposing interests when it comes to rates, FERC's regulations and policies regarding cost-of-service calculations are subject to constant challenge. Pipelines and shippers engage relentlessly in litigation and lobbying to advance their competing interests.

***8** One perennial debate concerns the extent to which a pipeline organized as a pass-through entity for tax purposes, and which therefore does not pay taxes at the entity level, can nevertheless claim an income tax allowance for purposes of its cost-of-service calculation. The prevailing pass-through entity in the pipeline industry is the limited partnership, so the debate has been framed in terms of the extent to which a pipeline organized as a limited partnership can claim an income tax allowance.

In 1995, FERC issued a ruling that permitted a pipeline organized as a limited partnership to claim an income tax allowance when calculating its cost of service, but only to the extent that its partnership interests were held by a corporation. FERC announced that ruling in a decision involving the Lakehead Pipeline Company, so the ruling became known as the *Lakehead* policy. *See* *Lakehead Pipeline Co., Ltd. P'ship,* 71 FERC ¶ 61,338 (1995), *abrogated by SFPP, L.P. v. FERC*, 967 F.3d 788 (D.C. Cir. 2020).

When adopting the *Lakehead* policy, the Commission focused on the existence of two potential levels of taxation before returns from the pipeline reached investors. The Commission noted that for the partnership interests owned by the corporation, the corporation would have to pay corporate-level tax before distributing any returns to its investors. The Commission reasoned that the pipeline should be able to take into account the corporate-level tax when determining the level of return that those investors would require. By contrast, the Commission noted that for the partnership interests owned by individual investors, there would not be an intervening level of tax; those investors would receive the returns from the pipeline directly. Accordingly, the Commission reasoned that because the individuals would not pay corporate-level tax, the pipeline should not receive a tax allowance for those individuals. Otherwise, the Commission concluded, the pipeline would be able to claim an unrealistically large cost-of-service requirement and provide its investors with a rate of return greater than warranted. *See Lakehead*, 71 FERC ¶ 62,313–15, 62,329. [3]

3 An example illustrates how the *Lakehead* policy operates. Assume that a pipeline is organized as an MLP, that its corporate general partner owns 50% of the partnership interests, and that public investors own the rest. If the corporation paid taxes at a rate of 35%, then the pipeline could claim a tax allowance of 17.5%, reflecting the taxes paid at the corporate level. Rosenwasser Tr. 42. The pipeline could not, however, claim a tax allowance for taxes paid by the individual investors.

Nine years later, in 2004, the DC Circuit abrogated the *Lakehead* policy. The case involved challenges to the Commission's determinations in a rate case involving SFPP, L.P., an oil pipeline organized as a limited partnership. *See BP West Coast Products, LLC v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004). The Commission had applied the *Lakehead* policy to SFPP, ruling that SFPP could claim a tax allowance for the taxes paid by its corporate parent, which owned a 42.7% interest in the partnership. The Commission had determined that SFPP could not claim a tax allowance for any of the interests held by its public investors. The DC Circuit rejected that analysis and the *Lakehead* policy in general, finding that the Commission had not provided any grounds for distinguishing between the tax liability of the corporate partner and the tax liability of other partners. *Id.* at 1290. The DC Circuit explained that the regulated entity was entitled to include its own costs of service in its rate base, including taxes, but not costs incurred by its investors, again including taxes. *Id.* The DC Circuit held squarely that "no such [tax] allowance should be included." *Id.* at 1291.

***9** In 2005, FERC responded to the *BP West* decision by heading in the opposite direction. Rather than concluding that a pipeline organized as a partnership could not claim an income tax allowance, as *BP West* held, FERC announced that it would "return to its pre-*Lakehead* policy" and permit a pipeline organized as a partnership to claim an income tax allowance for all of its partners. PTO ¶ 104; *see* JX 205 (the "2005 Policy"). In reaching this conclusion, the Commission took the view that all partners pay income taxes and that their taxes should be imputed to the pipeline for purposes of determining the pipeline's cost of service. PTO ¶ 104. Because a pipeline organized as a limited partnership does not actually pay entity-level income taxes, the 2005 Policy made pipelines organized as limited partnerships a highly attractive investment vehicle. *See id.* ¶ 106; Rosenwasser Tr. 39–40.

B. Loews Forms Boardwalk.

To take advantage of the 2005 Policy, Loews formed Boardwalk in August 2005. PTO ¶ 106. Loews planned to take Boardwalk public through an initial public offering ("IPO") later that year. *Id.* Loews retained Michael Rosenwasser, then a partner at Vinson & Elkins LLP, to lead the legal team that prepared Boardwalk's organizational documents and supported the IPO. *Id.* ¶ 51.

1. Boardwalk's Structure

Loews organized Boardwalk as a Delaware limited partnership. As a result, its internal affairs were (and are) governed by its partnership agreement. By the time of the events giving rise to this litigation, the operative version was the Third Amended and Restated Agreement of Limited Partnership dated June 17, 2008. JX 352 (the "Partnership Agreement" or "PA").

The Partnership's general partner was another Delaware limited partnership, defendant Boardwalk GP, LP (the "General Partner"). The General Partner held a 2% general partner interest in the Partnership and owned all of its incentive distribution rights. JX 256 at 14. The General Partner did not have a board of directors. *Id.*

The sole general partner of the General Partner was defendant Boardwalk GP, LLC ("the GPGP"). *Id.* The GPGP was a Delaware limited liability company, so its internal affairs were governed by its limited liability company agreement. By the time of the events giving rise to this litigation, the operative version was the First Amended and Restated Limited Liability Company Agreement dated November 15, 2005. JX 235 (the "LLC Agreement" or "LLCA").

The sole member of the GPGP was defendant Boardwalk Pipelines Holding Corp. ("Holdings," or the "Sole Member"). *Id.* § 1.1 at 7. At all relevant times, Holdings was a wholly owned subsidiary of Loews. Through Holdings, Loews controlled the GPGP. Through the GPGP, Loews controlled the General Partner. Through the General Partner, Loews controlled Boardwalk and its subsidiaries.

In addition to having Holdings as its Sole Member, the GPGP had a board of directors (the "GPGP Board"). The LLC Agreement generally assigned authority over the business and affairs of the GPGP and the Partnership to the GPGP Board. PTO ¶ 76. The LLC Agreement granted the Sole Member "exclusive authority over the business and affairs of [the GPGP] that do not relate to management and control of [the Partnership]." LLCA § 5.6.

For the vast majority of the Partnership's existence as an MLP, the GPGP Board had eight members. Four were outside directors whose only affiliation with Boardwalk or Loews was their status as directors on the GPGP Board. The other four members were:

• Kenneth I. Siegel, Senior Vice President of Loews and Chairman of the GPGP Board;

• Andrew H. Tisch, the Co-Chairman of the board of directors of Loews, the Chairman of the Executive Committee of Loews, and member of the Office of the President of Loews.

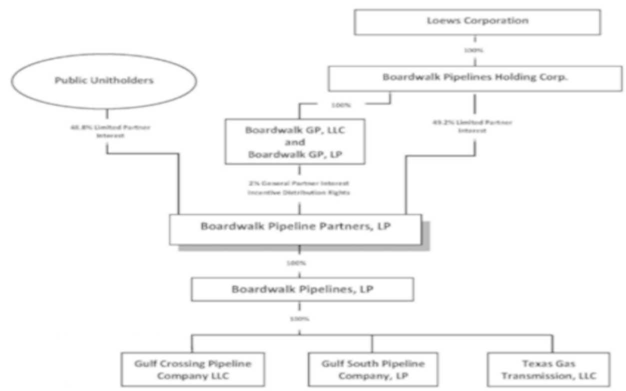
• Peter W. Keegan, a Senior Advisor to Loews; and

• Stanley C. Horton, the President and Chief Executive Officer of Boardwalk.

***10** During the period relevant to this litigation, the Holdings board of directors (the "Holdings Board") consisted of Siegel, Keegan, and Jane Wang, Vice President of Loews.

The different composition of the GPGP Board and the Holdings Board meant that if Holdings made a decision for the GPGP as its Sole Member, then Loews controlled the decision. By contrast, if the GPGP Board made the decision for the GPGP, then the outside directors would participate in the decision. If the four outside directors unanimously opposed the Loews and Boardwalk representatives, then they could prevent the GPGP from taking the action that Loews wanted.

The following diagram depicts Boardwalk's organizational structure and its principal pipeline subsidiaries.



2. The Call Right

The provision at the heart of this case is the Call Right, which granted the General Partner the right to acquire the common units that the General Partner and its affiliates did not already own as long as certain conditions were met. The Call Right came to be included in the Partnership Agreement because the 2005 Policy was contentious. It favored pipelines over shippers, and shippers challenged it immediately. *See, e.g.*, *ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945 (D.C. Cir. 2007) (addressing shipper challenge to 2005 Policy). Loews was concerned that FERC might change course. McMahon Dep. 62, 160–61.

Loews wanted a mechanism for taking Boardwalk private again if the 2005 Policy changed in a manner that was materially adverse to Boardwalk. *See* Rosenwasser Tr. 41–44; McMahon Tr. 480, 544–45. Rosenwasser recalled these matters vividly. He testified that Loews was not "going to go forward with [Boardwalk's IPO] unless [Rosenwasser and his team] were able to include a provision in [the Partnership Agreement] which would allow them quickly, easily and without dispute, to go private if there was an adverse change in that tax policy or the way it was implemented." Rosenwasser Dep. 34–35; *see id.* at 39 ("Loews ... wanted a mechanism that would allow them to go private in a simple, clear manner without dispute if, in fact, there was a change in FERC policy that would be adverse to maximum applicable rates."). He testified at trial that Loews told the underwriter for the IPO that it would not take Boardwalk public unless it could guard against the risk of "los[ing] any substantial portion of the tax allowance if there was a reversion to *Lakehead*." Rosenwasser Tr. 42. Early drafts of the Partnership Agreement referred to the call right as a "*Lakehead* call." PTO ¶ 109. Referring to the 2005 Policy, the IPO prospectus and Boardwalk's subsequent annual reports informed investors that "[i]f the FERC policy is reversed ... our general partner's call right may be triggered." JX 256 at 31; *accord* JX 285 at 11.

Critically, however, no one intended the Call Right to be triggered by a change that "wasn't substantive, wasn't meaningful." Rosenwasser Tr. 46. Loews "wanted an off-ramp if FERC reverse[d] its policy" in a way that materially threatened revenues. McMahon Tr. 480, 545. Rosenwasser and his team attempted to draft the Call Right to achieve that business objective. Rosenwasser Dep. 39. It was a "business point," not a "legal point." *Id.* at 40.

***11** In an effort to implement this business point, Rosenwasser included language stating that the General Partner could exercise the Call Right if three conditions were met. First, the General Partner and its affiliates had to own "more than 50% of the total Limited Partner Interests of all classes then Outstanding." PA § 15.1(b)(i). Second, the General Partner had to satisfy the Opinion Condition by receiving an "Opinion of Counsel" that Boardwalk's status as a pass-through entity for tax purposes "has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers." *Id.* § 15.1(b)(ii). Third, the General Partner had to satisfy the Acceptability Condition by determining that the Opinion was "acceptable to the General Partner." *Id.* § 1.1 at 24.

As long as these conditions were met, then the General Partner could decide whether to exercise the Call Right. When making that decision, the General Partner could act in its sole discretion, free of any fiduciary duty or express contractual standard, with the express right to consider its self-interest, and constrained only by its obligation to comply with the non-waivable implied covenant of good faith and fair dealing. *Id.* § 7.1(b)(iii).

The Partnership Agreement did not impose any timeline for obtaining the Opinion, but once the Opinion Condition was satisfied, the General Partner had ninety days to exercise the Call Right. *Id.* § 15.1(b). The Partnership Agreement did not require that independent counsel render the Opinion. The term "Opinion of Counsel" was not specific to the Opinion Condition and appeared in multiple provisions in the Partnership Agreement; the agreement defined it as "a written opinion of counsel (who may be regular counsel to the Partnership or the General Partner or any of its Affiliates)." *Id.* § 1.1 at 24.

If the General Partner exercised the Call Right, then the General Partner was obligated to send notice by mail to that effect to the limited partners. *Id.* § 15.1(c). The General Partner was then obligated to purchase all of the outstanding limited partner interests that it did not already own "at a purchase price ... equal to the average of the daily Closing Prices ... for the 180 consecutive Trading Days immediately prior to the date three days prior to the date that the notice described in Section 15.1(c) is mailed." *Id.* § 15.1(b) (the "Purchase Price").

3. The IPO

On November 8, 2005, Boardwalk offered common units to the public at a price of $19.50 per unit. JX 260 at 1. Until the General Partner acquired the public units at a price of $12.06 per unit on July 18, 2018, Boardwalk's common units traded on the New York Stock Exchange under the symbol "BWP."

During the intervening years, Loews caused Boardwalk to issue additional units at prices well above $12.06 per unit. Loews also sold units to the public in secondary offerings at values well above $12.06 per unit. The following table summarizes those offerings:

Announcement Date	Offering Type	Offer Size	Offer Price
08/16/2005	IPO	$292.5	$19.50
09/21/2006	Primary	$204.6	$29.65
03/19/2007	Primary	$292.0	$36.50
11/02/2007	Primary	$231.8	$30.90
06/09/2008	Primary	$253.0	$25.30
08/10/2009	Primary	$186.4	$23.00
02/17/10	Secondary	$345.2	$30.02
05/26/2011	Primary	$176.0	$29.33
01/19/2012	Primary	$253.5	$27.55
08/01/2012	Primary	$322.5	$27.80
10/03/2012	Primary	$301.9	$26.99
05/29/2013	Primary	$381.0	$30.12
Feb.–Apr. 2015	Primary	–	$16.19
07/18/2018	Call Right	–	$12.06

PDX 6 at 1 (footnotes omitted).

When Loews exercised the Call Right, public investors held approximately 49% of Boardwalk's common units. PTO ¶ 48. It is undisputed for purposes of this litigation that the General Partner and its affiliates held a sufficient percentage of the total limited partnership interests to satisfy the first condition for exercising the Call Right.

C. The *United Airlines* Decision

For purposes of the current litigation, the next significant development took place in 2016. The initial efforts by shippers to challenge the 2005 Policy failed when the DC Circuit held in 2007 that the 2005 Policy was "not unreasonable" and hence entitled to deference. *ExxonMobil*, 487 F.3d at 953. Nine years later, however, the shippers prevailed in *United Airlines, Inc. v. FERC*, 827 F.3d 122 (D.C. Cir. 2016).

***12** Despite its name, the *United Airlines* case was an appeal from FERC's determinations in a rate case involving SFPP. Advancing a different argument than the theory the DC Circuit had rejected in 2007, the shippers contended that by permitting MLP pipelines to claim an allowance for partner-level taxes, the 2005 Policy "permit[ted] [the] partners in a partnership pipeline to 'double recover' their taxes." *Id.* at 127.

FERC rejected that contention, but the DC Circuit endorsed it. In vacating the Commission's order and ruling in favor of the shippers, the DC Circuit cited the following undisputed facts:

> First, unlike a corporate pipeline, a partnership pipeline incurs no taxes, except those imputed from its partners, at the entity level. Second, the discounted cash flow return on equity determines the pre-tax investor return required to attract investment, irrespective of whether the regulated entity is a partnership or a corporate pipeline. Third, with a tax allowance, a partner in a partnership pipeline will receive a higher after-tax return than a shareholder in a corporate pipeline, at least in the short term before adjustments can occur in the investment market.

Id. at 136 (internal citations omitted). Based on these undisputed facts, the DC Circuit concluded that "granting a tax allowance to partnership pipelines results in inequitable returns for partners in those pipelines as compared to shareholders in corporate pipelines." *Id.* at 137. The DC Circuit remanded the case with instructions for the Commission to determine whether it could eliminate the double-recovery problem, such as by changing the calculation of the ROE. The DC Circuit also noted that "prior to *ExxonMobil*, FERC considered the possibility of eliminating all income tax allowances and setting rates based on pre-tax returns," and that none of the court's precedents "foreclos[ed] that option." *Id.*

In December 2016, FERC responded to the *United Airlines* decision by issuing a notice of inquiry requesting "comment[s] regarding the double-recovery concern." JX 579 ¶ 1. Before FERC announced the results of that inquiry, Congress enacted the Tax Cuts and Jobs Act (the "Tax Act"). Among other things, the Tax Act lowered the federal corporate income tax rate from 35% to 21%, effective January 1, 2018. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

D. The March 15 FERC Actions

At its regularly scheduled meeting on March 15, 2018, FERC took four interrelated actions to address the implications of the *United Airlines* decision and the Tax Act (the "March 15 FERC Actions"). In presenting the March 15 FERC Actions, the Commission explained that it was "addressing these issues concurrently" to "ensure[ ] administrative efficiencies by reducing the number of filings required of regulated entities." JX 554 at 49.

1. The Revised Policy

The first of the March 15 FERC Actions was the issuance of a revised policy statement on the treatment of income taxes. JX 579 (the "Revised Policy Statement" or "Revised Policy"). In the Revised Policy, FERC stated that it would no longer permit pipelines organized as MLPs to recover both an income tax allowance and a ROE determined by the discounted cash flow methodology in their cost-of-service calculations. *See id.* ¶ 8. FERC stated in a concurrently issued notice of proposed rulemaking that it would promulgate regulations to address the effects of the Revised Policy "on the rates of interstate natural gas pipelines organized as MLPs." *Id.*; *see* JX 580.

***13** During the March 15 meeting, in response to a question about when "FERC Jurisdictional Rates [would] actually change," FERC staff stated that "the NOPR anticipates that the deadlines for pipeline filings will be late summer or early fall [2018]. We obviously have to go to a final rule first." PTO ¶ 117. The Revised Policy thus had no impact on Boardwalk's rates. Court Report ¶¶ 102–12.

At the same time, FERC signaled that pipelines would have answers on the regulatory issues soon—in "late summer or early fall"—which would allow them to make anticipated regulatory filings. PTO ¶ 117. Boardwalk anticipated that FERC would address the March 15 FERC Actions further in connection with its regularly scheduled meeting on July 19, 2018. *See* JX 1152 at 2.

2. The Notice Of Proposed Rulemaking

The second of the March 15 FERC Actions was the issuance of a notice of proposed rulemaking titled *Interstate and Intrastate Natural Gas Pipelines; Rate Changes Relating to Federal Income Tax Rate* (the "NOPR"). JX 580. The NOPR was not an actual rule and did not have any immediate effect on Boardwalk or other industry participants. It was a notice of a proposed rule that invited comment.

In the NOPR, FERC proposed to require interstate natural gas pipelines to make a one-time informational filing on a proposed Form 501-G so that FERC could evaluate the impact of the Tax Act and the change in income tax policy on pipelines' revenue requirements. JX 580 ¶ 32. FERC explained that the purpose of the Form 501-G was to provide information "regarding the continued justness and reasonableness of the pipeline's rates after the income tax reduction and elimination of MLP income tax allowances." *Id.* ¶ 26. The Form 501-G therefore would call for "an abbreviated cost and revenue study in a format similar to the cost and revenue studies the Commission has attached to its orders initiating NGA section 5 rate investigations in recent years." *Id.* ¶ 32.

FERC proposed that when completing the Form 501-G, a pipeline would use data from its 2017 FERC Form No. 2, which provided information on the major components of its cost of service for that year. *Id.* Using that information, the pipeline would estimate (1) the percentage change in its cost of service resulting from the Tax Act's reduction of the corporate income tax from 35% to 21% and the Revised Policy's reduction of the corporate income tax allowance for MLPs from 35% to 0% and (2) the pipeline's ROE both before and after those developments. *Id.*; *see also* PTO ¶ 120. To derive the cost-of-service component associated with the return to equity investors, FERC proposed that pipelines use an ROE of 10.55%. JX 580 ¶ 34.

FERC intended for resulting calculations to indicate whether the pipeline's rate base could have decreased as a result of the elimination of the income tax allowance. The resulting calculations also would indicate whether, based on the pipeline's actual historical revenues, the pipeline was over-recovering its rate base in a manner that might warrant a rate case.

The NOPR proposed that a pipeline would have four options to consider in connection with its Form 501-G:

- The pipeline could make a limited filing under Section 4 of the NGA to reduce the pipeline's recourse rates to reflect a decrease in its revenue requirements.

- The pipeline could commit to file a general rate case under Section 4 of the NGA in the near future to establish new recourse rates.

***14** • The pipeline could file a statement explaining why a rate adjustment was not needed.

- The pipeline could take no action other than filing the Form 501-G.

PTO ¶ 121; JX 580 ¶¶ 41–51. If a pipeline chose the third or fourth option, the Commission anticipated that it would consider, based on information in the Form 501-G, whether to issue an order to show cause to the pipeline requiring a reduction in its rates. PTO ¶ 121.

FERC recognized that even with a lower tax rate and the elimination of the income tax allowance, "a rate reduction may not be justified for a significant number of pipelines." JX 580 ¶ 48. As an example, FERC noted that "a number of pipelines may currently have rates that do not fully recover their overall cost of service," such that a reduction in tax costs "may not cause their rates to be excessive." *Id.* Typically, a pipeline would be under-recovering its costs if it operated in a competitive market and hence had to offer discounted rates to shippers. *See* JX 1139 at 11. FERC also cited other possibilities that would obviate the need to adjust rates, such as "an existing rate settlement [that] provides for a rate moratorium" or the existence of contracts providing for negotiated rates. *See* JX 580 ¶¶ 45, 48–49.

3. The Notice Of Inquiry

The third of the March 15 FERC Actions was a notice of inquiry that sought industry comment on the effect of the Tax Act and the Revised Policy on recourse rates. In particular, FERC sought comment on how it should address ADIT. *See* JX 576 (the "ADIT NOI").

In requesting comment on ADIT, FERC distinguished between the "[t]reatment of ADIT for [p]artnerships" and the treatment of ADIT for other regulated entities. *Id.* ¶¶ 24–25. For partnerships, FERC specifically asked that "commenters ... address whether previously accumulated sums in ADIT should be eliminated altogether from cost of service or whether those previously accumulated sums should be placed in a regulatory liability account and returned to ratepayers." *Id.* ¶ 25.

4. The Order On Remand

The fourth and final of the March 15 FERC Actions was the issuance of an order implementing the *United Airlines* decision for the ongoing proceeding involving SFPP. JX 553 (the "Order on Remand"). The Order on Remand required SFPP to revise its rate filing consistent with the Revised Policy and prohibited SFPP from claiming an income tax allowance. *Id.* ¶¶ 28, 58(B). That was the only binding and immediately applicable component of the March 15 FERC Actions, and it did not affect Boardwalk.

Also on March 15, 2018, FERC initiated two proceedings under Section 5 of the NGA against interstate natural gas pipelines. FERC initiated one proceeding against Dominion Energy Overthrust Pipeline, a natural gas pipeline owned by an MLP, based on an estimated calculation that the pipeline achieved ROEs for calendar years 2015 and 2016 of 23.4% and 19.9%, respectively. The order initiating the proceeding noted that "[i]f Overthrust's ROEs for 2015 and 2016 were recalculated consistent with the Revised Policy Statement, its ROEs would have been 36.4 percent and 30.9 percent, respectively." PTO ¶ 133.

***15** FERC also initiated a proceeding against Midwestern Gas Transmission Company, a natural gas pipeline, based on an estimated calculation that Midwestern had achieved ROEs for calendar years 2015 and 2016 of 15.8% and 16.6%, respectively The order initiating the proceeding noted that "if the reduced 21 percent corporate income tax rate had been in effect during 2015 and 2016, Midwestern's ROE for those years would have been 19.2 percent and 20.2 percent, respectively." PTO ¶ 133.

E. The Reaction To The March 15 FERC Actions

The March 15 FERC Actions triggered a flurry of activity from industry participants. Over the next four months, shippers, pipelines, trade associations, and others filed thirteen requests for rehearing, 108 comments, sixteen reply comments, and numerous other submissions. *See* PDX 9 at 12; Court Tr. 858. Each participant sought to persuade FERC to adopt its preferred outcome. Matters were very much in flux.

The resulting uncertainty generated market reactions. The trading price of Boardwalk's units dropped by more than 7% from its closing price on March 14, 2018, the day before the March 15 FERC Actions. PTO ¶ 135; *see* JX 1802 at 1. The Alerian Index, which tracks an index of MLPs in the oil and gas industry, fell by 4.6%. Collectively, MLPs lost $15.8 billion in market capitalization. Plaintiff James McBride tweeted, "Blood in the street. Where's the buying opportunity?" JX 1839 at 3. Barry Sullivan, a respected FERC consultant who worked for Boardwalk, emailed its executives saying, "I hope you guys are still breathing. That was unbelievable. Sorry." JX 546 at 1.

Several MLPs issued press releases stating that they did not anticipate that the March 15 FERC Actions would have a material impact on their rates, primarily because their customers were locked into negotiated rate agreements. McMahon Tr. 498–99; Siegel 735–36; *see, e.g.*, JX 592 (Spectra Energy Partners press release stating that it "anticipates no immediate impact to its current gas pipeline cost of service rates as a result of the revised policy"). One industry analyst report stated that although "FERC dropped a bombshell on the industry," stock prices were rebounding "as companies issued statements saying minimal impact." JX 624 at 4, 6. Horton, Boardwalk's CEO, told Loews' senior management that the analyst report offered "a pretty good summary" of what had happened. *Id.* at 1.

F. Boardwalk's Initial Assessment: No Material Effect On Rates, But A Chance For Loews To Exercise The Call Right.

After the announcement of the March 15 FERC Actions, Horton instructed Ben Johnson, Boardwalk's Vice President of Rates and Tariffs, to conduct an expedited analysis of the possible impact on Boardwalk's three interstate pipelines.

JX 565 at 1. The day's events prompted questions that Boardwalk's management team needed to answer. Siegel and Thomas Hyland, an outside director on the GPGP Board, asked Jamie Buskill, Boardwalk's Chief Financial Officer, for his "thoughts on the economic impact on [Boardwalk]." JX 567 at 1; *see also* JX 548. Molly Whitaker, Boardwalk's Director of Investor Relations and Corporate Communications, fielded similar inquiries from approximately a dozen investors and analysts. JX 550 at 1.

To answer these questions, Johnson used an analysis that Boardwalk had performed in early February 2018 to project the effect of the March 15 FERC Actions on the rates that each of the three pipelines could charge. By that evening, he had preliminary answers.

***16** Johnson viewed Gulf Crossing as "relatively protected" from any impact on its rates. JX 572 at 1. Almost all of Gulf Crossing's contracted volumes were subject to negotiated rates, meaning that a change in cost-of-service-based rates would not affect the pipeline. *Id.* at 2. Johnson also viewed Gulf South as "relatively protected." *Id.* at 1. A majority of its contracts provided for negotiated or discounted rates, and Gulf South was also subject to a rate case moratorium until May 2023. *See* PTO ¶ 409; JX 604; JX 1139 at 6.

Texas Gas was the only pipeline that had potential exposure to a rate case, but it too had factors that would help in defending against any challenge to its rates. Among other things, Texas Gas served highly competitive markets, and a majority of its contracts with shippers provided for negotiated or discounted rates. *See* JX 1139 at 6. Assuming a rate case was filed, Johnson estimated that the downside impact of eliminating the income tax allowance would be about $20.5 million. *See* JX 572 at 1–2.

Importantly, Johnson characterized his estimate of the downside as a floor, because it "ignores any bounce from rate base increase associated with removal of ADIT." *Id.* Elaborating in a later email, he explained that "it's unclear on what they [FERC] would do with [Boardwalk's] current ADIT" balance, and he observed that FERC could decide that the ADIT balance should be "zeroed out because there's no income taxes (because there would be no difference between book and tax depreciation)." JX 602 at 1. Johnson thus recognized at the outset that the treatment of ADIT would be critical for understanding the implications of the March 15 FERC Actions. For purposes of his analysis, Johnson "assume[d] that [the ADIT balance] would just remain until it's amortized off." *Id.*

Having reached the conclusion that the March 15 FERC Actions would not have a materially adverse impact on the rates that Boardwalk's subsidiaries could charge, Boardwalk's management team noted that other MLP pipelines had issued press releases expressing similar views about their own rates. Boardwalk's management team worried that if Boardwalk did not issue a similar statement, then the market participants would infer the March 15 FERC Actions would have an adverse effect on Boardwalk's rates, which Boardwalk had determined not to be the case. *See* McMahon Tr. 498–99; Alpert Tr. 322.

Horton therefore instructed Michael McMahon, Boardwalk's General Counsel, to draft a short press release that described the extent to which Boardwalk's pipelines were protected from any impact on their rates. JX 568 at 1. In his first draft, McMahon pointed out that FERC had invited pipelines to "file statements explaining why an adjustment to rates to reflect the impact of the Commission's decisions is not required." JX 571 at 7. McMahon noted that this path seemed tailor-made for Boardwalk's pipelines. As he put it, "[t]his option recognizes the unique competitive circumstances of each pipeline, for example, essentially all of the contracts on our Gulf Crossing and a number of the contracts on Texas Gas are negotiated rate agreements and Gulf South is currently under a rate moratorium until 2023 ...." JX 571 at 7.

Buskill proposed making the release stronger by stating that the overall impact to Boardwalk and its rates would not be material. JX 571 at 1. McMahon agreed that "the elimination of the income tax allowance will not result in a material impact." *Id.* Neither Buskill nor McMahon addressed the possible upside of eliminating ADIT. *See id.*

***17** By late evening on March 15, 2018, Boardwalk management was satisfied with the language of the release. But as discussed below, the draft would go through a series of revisions once Loews' personnel got involved.

In the meantime, Buskill responded to the inquiries about the effect of the March 15 FERC Actions by explaining that they would not have a material impact on Boardwalk. During the evening of March 15, 2018, Buskill told Hyland, the outside director on the GPGP Board, that virtually all of the shippers at Gulf Crossing and Gulf South were under negotiated or discounted rate agreements, that Gulf South was under a rate moratorium until 2023, and that only about 20% of Texas Gas' revenues were from tariff rates. JX 548 at 1. Buskill concluded: "Based on our interpretation of the rules, we don't think it will have a material impact to Boardwalk." *Id.*

Buskill conveyed similar information to Siegel, who immediately forwarded the information to Jim Tisch, the CEO of Loews, and Ben Tisch, another senior officer of Loews. JX 566 at 1. The Loews executives quickly focused on ADIT. JX 601 at 2. At Ben Tisch's request, a Loews employee analyzed the March 15 FERC Actions and reported that "the loss of 100 percent of taxes in calculating allowed ROE's would be a flesh wound for the long haul pipes like ... [Boardwalk]." *Id.* at 1. But if FERC required that pipelines return their ADIT balances to ratepayers, then that "would be the a-bomb outcome" and would be "extremely painful." *Id.* The treatment of ADIT dominated the analysis.

1. A Chance To Exercise The Call Right

When the March 15 FERC Actions took place, Buskill and McMahon were each angling to succeed Horton as CEO of Boardwalk. Both immediately realized that the March 15 FERC Actions might give Loews the ability to exercise the Call Right. That course of action could be attractive to Loews because the Purchase Price was calculated using a trailing market average.

In addition to the stock drop resulting from the March 15 FERC Actions, there was reason to believe that Boardwalk's market price continued to reflect a shock that Boardwalk had delivered by slashing its distributions in 2014. As an asset class, common units in MLPs are a yield-based investment, and MLPs generally make regular quarterly distributions to their investors. In 2014, Boardwalk stunned investors by cutting its quarterly distribution from $0.5325 to $0.10 per unit, making Boardwalk one of the lowest yielding MLPs in the industry. Boardwalk's trading price fell from the low $30s to the low $10s almost overnight. The unit price never again approached its former levels. *See* Horton Dep. 52; PDX 11 at 9.

Between 2014 and 2017, Boardwalk spent $2.077 billion on capital expenditures, including $1.6 billion in growth capital expenditures. PTO ¶ 85–86. During the same period, Boardwalk distributed $405.1 million to unitholders. *Id.* ¶ 85. There is evidence that investors were unsure about how to value the growth capital expenditures. *See* PTO ¶ 87. [4]

4 As this court has observed in other settings, an advantageous time for a controller to acquire a controlled company is when the controlled company has invested capital in net-positive-value projects, but when minority investors have not yet received the benefit of those investments. *See, e.g.*, *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *36 (Del. Ch. Aug. 27, 2015); *Del. Open MRI Radiology Assocs., P.A. v. Kessler*, 898 A.2d 290, 315–16 (Del. Ch. 2006).

***18** On March 15, 2018, Buskill and McMahon each made a point of flagging the Call Right for Loews. Buskill emailed Siegel and described the opportunity presented by the Call Right as "compelling" because Loews could "buy back all units when the units are trading well below book value." JX 567 at 1. Siegel told Buskill that he "need[ed] to better understand the deferred taxes," namely ADIT. *Id.*

McMahon contacted Marc A. Alpert, Loews' Senior Vice President and General Counsel. He told Alpert that "FERC's actions might have triggered the call." McMahon Tr. 552; PTO ¶ 136–37. McMahon recommended that Alpert contact Rosenwasser, who had since joined Baker Botts LLP, to ask whether he could issue the Opinion that would enable the General Partner to exercise the Call Right. McMahon Tr. 552–53. McMahon told Alpert that while practicing at Vinson & Elkins, Rosenwasser was "one of the principal draftspersons of the [C]all [R]ight." Alpert Tr. 325, 330; *see* Rosenwasser Tr. 39–40; McMahon Tr. 503; McMahon Dep. 31–32.

Alpert liked the idea of hiring Baker Botts and Rosenwasser. Baker Botts had ten nationally ranked practice groups, including groups providing regulatory, litigation, and transactional advice to the oil and gas sector. JX 1498 at 149. Rosenwasser was highly regarded and considered the "[D]ean of the MLP Bar." Alpert Tr. 325. And although Rosenwasser was a principal drafter of the Call Right, Baker Botts as a firm had never done any work for Boardwalk, which Loews and Boardwalk viewed as a helpful fact. *See* Rosenwasser Tr. 54–55; Alpert Tr. 324–25; McMahon Tr. 503.

2. Alpert Calls Rosenwasser.

On March 16, 2018, Alpert called Rosenwasser. PTO ¶ 137. Rosenwasser's secretary transcribed Alpert's message as saying there was "something urgent that he needs to speak with you about." *Id.* At trial, Rosenwasser recalled a brief and measured conversation in which Alpert described the assignment as whether Baker Botts could advise one way or the other about whether it could give the Opinion. Rosenwasser recalled saying only that he would "look into it." Rosenwasser Tr. 55.

Consistent with an urgent and significant assignment, Rosenwasser quickly assembled a team within Baker Botts. He brought in a group of senior Baker Botts attorneys to act as an *ad hoc* opinion committee. Rosenwasser had to assemble an *ad hoc* opinion committee because Baker Botts does not typically utilize opinion committees and does not have a standing committee. Its members were:

• Andy Baker, the Chair of the firm;

• Mike Bengtson, the Chair of the firm's corporate practice group and a member of the Executive Committee;

• Michael Bresson, the leader of the firm's energy capital markets tax practice;

• Joshua Davidson, the leader of the firm's capital markets practice;

• Richard Husseini, a partner focused on tax litigation; and

• Julia Guttman, the firm's General Counsel.

To perform the substantive work, Rosenwasser recruited three other Baker Botts partners:

• Greg Wagner, a FERC practitioner who was representing shippers in their rate disputes with SFPP, including in the *United Airlines* case;

• Michael Swidler, a transactional partner and longtime colleague of Rosenwasser who previously had worked at Vinson & Elkins as part of the team that drafted the Call Right; and

• Seth Taube, a former federal prosecutor and SEC official whose practice includes securities and commercial litigation.

***19** Rosenwasser and his colleagues spent the weekend reviewing a package of documents from Alpert.

3. The Loews-Approved Press Release

Meanwhile, Loews weighed in on the press release about the March 15 FERC Actions. Loews delayed its publication and edited it heavily, admittedly with an eye to the potential exercise of the Call Right. Alpert Dep. 36 ("I certainly had [the Call Right] in my mind when I looked at the press release."). Boardwalk issued the Loews-approved draft on the morning of March 19.

Cognizant of the Call Right, Loews changed the wording of the release to address revenues rather than rates. Recall that the General Partner's ability to exercise the Call Right turned on whether a law firm could opine that Boardwalk's status as a pass-through entity for tax purposes "has or will reasonably likely in the future have a material adverse effect on the maximum applicable *rate* that can be charged to customers." PA § 15.1(b) (emphasis added). In changing the language of the press release, Loews focused on the fact that the language of the Call Right did not mention revenues.

The draft press release prepared by Boardwalk's management explained that the March 15 FERC Actions were unlikely to have a negative impact on Boardwalk's rates. *See* JX 607. Other pipeline companies likewise issued press releases that focused on rates. *See, e.g.*, JX 592 (Spectra Energy Press Release: "Any future impacts would only take effect upon the execution and settlement of a rate case. In the event of a rate case, all cost of service framework components would be taken into consideration which we expect to offset a significant portion of any impacts related to the new FERC policy.").

As prepared by Boardwalk's management, the draft press release contained three sentences identifying the factors FERC had cited as mitigating the need for any rate adjustment and explaining how they applied to Boardwalk's pipelines. Loews struck those statements. *See* JX 607 at 3. Loews also drafted the headline to focus on revenue rather than rates.

After the Loews edits, the press release read, "Boardwalk Does Not Expect FERC's Proposed Policy Revisions To Have A Material Impact On Revenues." JX 615. The body of the press release elaborated on the effect on revenues:

> Based on a preliminary assessment, Boardwalk does not expect FERC's proposed policy revisions to have a material impact on the company's revenues. All of the firm contracts on Boardwalk's Gulf Crossing Pipeline and the majority of contracts on Texas Gas Transmission are negotiated or discounted rate agreements, which are

> not ordinarily affected by FERC's policy revisions. Gulf South Pipeline currently has a rate moratorium in place with its customers until 2023. Boardwalk will continue to evaluate the potential impact these proceedings could have on its interstate pipelines, and the company plans to submit comments to FERC.

Id.

At his deposition, Rosenwasser tried to distance himself from the press release. He speculated that “somebody was pressured at Boardwalk to get something out quickly” and issued the press release “with just ... thoughts and without analysis.” Rosenwasser Dep. 97. This was not accurate: Rosenwasser's speculation notwithstanding, Boardwalk had analyzed the effect on its subsidiaries’ rates, and Loews was thinking about the Call Right when its personnel revised the language of the release. Implicitly recognizing that the release was problematic for the exercise of the Call Right, Rosenwasser testified adamantly that he “had nothing to do with this disclosure[ ]. And if [he] had, it wouldn't have said this.” Rosenwasser Dep. 95; *see also id.* at 95–98.

4. The Post-Press Release Call With Baker Botts

***20** Several hours after Boardwalk issued the Loews-approved press release, Alpert convened a call with Rosenwasser and other members of the Baker Botts team. Loews wanted answers to two questions. First, had the contents of the press release affected Baker Botts’ ability to issue the Opinion? Second, were the March 15 FERC Actions sufficiently concrete to enable Baker Botts to issue the Opinion?

The next day, Baker Botts answered both questions. On the press release, Loews got the answer it wanted. Baker Botts advised that, “[g]iven [the press release's] focus on [Boardwalk's] revenues, and not on the maximum applicable rate that can be charged by [Boardwalk's] interstate gas pipelines, we are not concerned that the release precludes any strategic analysis or action of the type that we were discussing.” JX 627 at 1. Loews’ edits had paid off, and Alpert quickly forwarded the response to members of Loews’ senior management. JX 632 at 1.

Baker Botts also addressed whether the March 15 FERC Actions constituted a sufficient triggering event. On this issue, the answer did not meet Loews’ expectations.

Wagner explained that there were “two FERC actions that directly affect the analysis: the Revised Policy and the Notice of Inquiry.” JX 626 at 1. Absent further regulatory developments, neither would have an effect on Boardwalk's rates:

> The Revised Policy Statement, in which FERC announced its new policy prohibiting MLP-owned gas pipelines from including an income tax allowance in their cost of service, is effective now as a statement of FERC policy. Standing alone, it does not require pipelines to take any action but it announces how FERC intends to treat the issue on a going-forward basis. The Revised Policy Statement will be implemented through the proposed regulations, which when adopted, will require all interstate gas pipelines to make informational filings revising their cost of service, which may lead to rate challenges. These regulations would be administrative in that they will not announce new policy. I expect that any litigated rate challenges would not be resolved and therefore result in decreased rates until 2020 at the soonest.
>
> The second action is the Notice of Inquiry in which FERC is seeking comment on how to address overfunded deferred tax balances held by MLP pipelines. Comments will be due in late May, 60 days after the notice is published in the Federal Register. Any policy emerging from this proceeding would have the potential to further reduce gas pipelines’ cost of service. Unlike the proposed rulemaking, FERC is simply gathering information and there is no proposed timetable for action. FERC may issue a Policy Statement on Deferred Taxes announcing a generally applicable policy or it may determine that it will address the issue in individual litigation. My best judgment is that FERC should act in this proceeding by the end of 2018. Any FERC decision is not likely to be self-implementing and would require additional proceedings to reflect the policy in pipeline rates.

Id. In simple terms, Wagner recognized that the March 15 FERC Actions did not have any immediate effect. The Revised Policy did not require any action, and nothing would happen until FERC issued regulations. The same was true for the ADIT NOI. Even then, there would not be any effect on rates absent litigated rate cases.

Four minutes later, Alpert requested a second call with Baker Botts. JX 626 at 1. During the call, Alpert criticized Wagner's analysis as having "[t]oo much nuance." JX 646 at 5. Alpert wanted a direct answer addressing when Loews could get the Opinion. *Id.* ("When do we can [sic] get [the] opinion? When [would it be] prudent to act?").

***21** Rosenwasser told Alpert what Loews wanted to hear. He said that the "most important thing has happened" so that "we're already there." JX 646 at 5. But because Wagner had provided a well-reasoned explanation supporting a different conclusion, Alpert asked Baker Botts to confirm Rosenwasser's view that "we're already there." *Id.* at 7 ("2x check that we think issuance of [the Revised Policy Statement] is appropriate triggering event for issuing opinion."). After the call ended, Alpert updated Loews' senior leadership. Copying Rosenwasser, Wagner, and Swidler, Alpert reported that Baker Botts would analyze whether the Revised Policy was a sufficient trigger "in the context of all the facts and the likelihood of future actions changing materially the outcome of the conclusions that would support any opinion of counsel." JX 625 at 1. Alpert also cautioned Loews' executives to "address [all emails on this matter] to me and cc others so we can best argue communications are privileged." *Id.*

G. Baker Botts Reframes The Analysis.

Alpert scheduled a follow-up call with Baker Botts and Boardwalk for March 29, 2018. That gave Baker Botts just over a week to take a position on rendering the Opinion. To get to the outcome Loews wanted, Rosenwasser crafted a syllogism.

1. Rosenwasser's Syllogism

Rosenwasser knew that the Call Right was intended to address a business problem. He was, after all, the one who drafted it. Rosenwasser Dep. 40 (characterizing Section 15.1(b) of the Partnership Agreement as "a business point ... not a legal point"). The Call Right sought to protect Loews against a regulatory change that would have a materially adverse effect on Boardwalk. The provision referred to rates because rates generate revenue. The Call Right was not intended to create a trapdoor that Loews could open based on a regulatory change that had no real-world effect. Rosenwasser Dep. 45 (describing the Call Right as not "easy to trigger" as indicated by the fact that the "[O]pinion takes lots of thought and it takes lots of analysis to make certain that the [O]pinion could be given").

But the Call Right's reference to "rates," combined with Loews' careful parsing of that distinction when editing the March 19 press release, gave Rosenwasser an opening. Rosenwasser decided to take the view that the Call Right was not concerned with the actual economic impact on Boardwalk; it was only concerned with the abstract concept of "maximum applicable rates." *See* JX 679 at 5, 8. If a regulatory change could have a materially adverse effect on the abstract concept of "maximum applicable rates," then the Call Right could be exercised. And because a tax allowance had been part of the cost-of-service calculation, a policy change eliminating the tax allowance could be said to lead ineluctably to a change in that abstract concept.

On March 21, 2018, Rosenwasser explained his approach to Wagner, who took contemporaneous notes. JX 637. Wagner's transcription memorializes the Rosenwasser syllogism:

1 – A pipeline charges COS [cost-of-service] rates

2 – COS includes ITA [income tax allowance]

[No] ITA → material effect

No examination of FERC actions/shipper actions

COS/over/under-recovery

Just saying [no] ITA = lower COS

= MAE on

max applicable rates

JX 639 at 1. As Wagner correctly and immediately perceived, Baker Botts was "[j]ust saying" that no income tax allowance meant a lower cost of service, which would equate to a material adverse effect on maximum applicable rates. *Id.*

For Baker Botts, the beauty of Rosenwasser's syllogism was that it did not require any type of predictive exercise about when an actual rate case might be brought or what the outcome of a full-blown, litigated, cost-of-service proceeding might be. *See* JX 639 at 1 ("No examination of FERC actions/shipper actions" or Boardwalk's "over/under-recovery" of its pipelines' costs of service). Indeed, the syllogism did not require any real factual analysis about the effect of the March 15 FERC Actions. The principal step involved elementary subtraction.

***22** To implement Rosenwasser's syllogism, Baker Botts asked Boardwalk "what would FERC allow them to charge" in a hypothetical world that assumed "there was a full mkt for services." JX 646 at 3. Swidler found reassurance for this approach in the fact that the Call Right did not contain any language addressing "the commercial conditions that might prevail in setting rates (e.g., whether or not the pipeline's capacity is in high demand)." JX 645 at 1.

Rosenwasser's syllogism did not account for ADIT. No one knew what would happen with ADIT. *See* JX 644 at 1 ("[G]iven the lack of clarity on FERC's eventual policy on this [ADIT] issue, [McMahon] had no estimates" concerning "the potential effect of a return of ADIT to ratepayers"). But Baker Botts knew that FERC's treatment of ADIT could "affect the rate impact on the pipelines substantially." JX 619 at 1. The known unknown of ADIT defeated Rosenwasser's syllogism, but Baker Botts went ahead anyway.

2. The March 29 Memorandum

In preparation for the scheduled meeting with Loews and Boardwalk on March 29, 2018, Baker Botts prepared a memorandum that worked through the issues that had to be resolved before Baker Botts could render the Opinion. JX 679 (the "March 29 Memorandum"). There were many, and Baker Botts resolved them all in Loews' favor.

One issue was the Call Right's use of the term "maximum applicable rates," which had no established meaning in FERC regulatory parlance. The FERC lexicon equates the terms "maximum rates," "tariff rates," "cost-of-service rates," and "recourse rates." Only in the context of its capacity release regulations had FERC used a similar phrase—"applicable maximum rate." PTO ¶ 89. An investor or a court might interpret the idiosyncratic insertion of the word "applicable" to refer to the actual rates applicable to a particular pipeline's customers, including discounted rates or negotiated rates. Without an established meaning, the term could be regarded as ambiguous, and under the doctrine of *contra proferentem*, a court applying Delaware law would interpret the term against the general partner and its affiliates and in favor of the limited partners.

To solve this problem, the March 29 Memorandum interpreted "maximum applicable rates" as synonymous with "the maximum rates Boardwalk can charge, as a legal matter, not as an economic matter." JX 679 at 5. Baker Botts asserted that the Call Right's drafters would not have used the words "maximum" and "can be charged to customers" if they had meant for the Call Right to focus on the rates that Boardwalk actually charged its customers. *Id.* at 5–6. Without explanation, the March 29 Memorandum concluded that the word "applicable" "certainly does not mean actual." *Id.* at 6.

To support its interpretation, Baker Botts looked to extrinsic evidence in the form of references in Boardwalk's Form S-1 from its IPO. That document indeed contained passages that seem to equate "maximum applicable rates" with recourse rates. *See* PTO ¶¶ 90–91. Other Boardwalk filings, such as its Form 10-Ks, use the term in similar ways. *See id.* ¶ 92. Baker Botts also found orders that FERC issued in rate cases involving Boardwalk, where Boardwalk seemed to have used the term as a substitute for recourse rates. *See* JX 637 at 1. Baker Botts could not identify any broader uses of the term. *Id.*

Another issue was the need for an analysis of Boardwalk's rates. One of the ostensible justifications for Rosenwasser's syllogism was that the legal opinion addressed a question of law that did not require predicting the outcome of a rate case. The March 29 Memorandum could not keep up that pretense. Recognizing that factual analysis was required, the March 29 Memorandum stated, "Boardwalk will need to prepare an analysis of each pipeline's regulatory cost of service" and counsel would need "certificates from Boardwalk's officers" so that counsel could rely on it. JX 679 at 6. Recognizing that the ratemaking principles would be implicated, the March 29 Memorandum stressed "[c]ounsel will need to review that analysis in detail to confirm that the analysis is being prepared consistent with counsel's understanding of federal regulatory rate making requirements." *Id.*

***23** Yet another problem was how to interpret the term "material adverse effect." If interpreted consistent with Delaware cases like *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14 (Del. Ch. 2001), and its progeny, then that standard would be difficult to meet. The Baker Botts team acknowledged that the drafters "did not want to make it easy" for there to be a sufficient effect. JX 679 at 7. But even though the term appeared in a partnership agreement governed by Delaware law, the Baker Botts team found "no reason to think the drafters of Section 15.1(b) intended to incorporate the meaning the Delaware courts have applied to merger and acquisition MAC clauses to the words 'material adverse effect.' " *Id.* Instead, Baker Botts planned to interpret the phrase by looking to federal securities law, where "something is material if an investor would consider it important in making an investment decision." *Id.*; *see id.* at 6 ("Those rates [that Boardwalk's subsidiaries charge] are regulated by federal law. The opinion requested therefore involves an analysis of federal law."). Baker Botts also asserted that the doctrine of *contra proferentem* would permit the Call Right to be interpreted in favor of its drafter—contrary to what the doctrine contemplates. *See id.* at 7. Once again, the March 29 Memorandum could not keep up the pretense that the analysis was purely a legal question. The memorandum concluded: "Materiality is not, however, a fundamentally [ ] legal concept. Therefore, in giving any opinion required by Section 15.1(b), counsel will need to rely heavily on Loews and Boardwalk." JX 679 at 7.

The March 29 Memorandum also flagged an issue raised by the Acceptability Condition: Who would determine on behalf of the General Partner whether the Opinion was "acceptable"? Would that determination be made by Holdings, the Sole Member of the GPGP, where all the decision-makers were Loews insiders, or would the decision be made by the GPGP Board, which included outside directors? JX 679 at 7–8. Baker Botts concluded that Holdings was the correct decision-maker. As Baker Botts saw it, because the General Partner could exercise the Call Right "at its option" and in its individual capacity, it did not make sense for there to be any constraint on the General Partner's ability to determine in its own interest that the Opinion was acceptable. JX 679 at 7–8.

3. The March 29 Meeting

On March 29, 2018, Rosenwasser and Wagner spoke with Alpert and McMahon as planned. They agreed on the outcome that favored Loews: The March 15 FERC Actions "met the procedural predicate" for the exercise of the Call Right. JX 688 at 1; *see id.* ("Policy Statement sets up factual predicate for [t]he P[artnership] [contract] [.]"). Even though the March 15 FERC Actions were not final, and despite the known unknown of ADIT, they decided that enough had happened for Baker Botts to proceed with the Opinion that could enable Loews to exercise the Call Right.

H. The Financial Data

To generate the Opinion, Baker Botts needed what the Opinion would refer to as "Financial Data." Johnson took charge of providing it. On April 4, 2018, Johnson reported that he had numbers that "should get us where we need to go." JX 713 at 1. He sent McMahon an email attaching two analyses for use by Baker Botts, a "Form 501-G Analysis" and a "Rate Model Analysis." JX 727 at 4.

The Form 501-G Analysis contained the information that Boardwalk would include in a Form 501-G filing if FERC adopted regulations consistent with the NOPR. The proposed Form 501-G contemplated that each pipeline would disclose its cost-of-service requirement for 2017 and how much revenue the pipeline actually collected. Each pipeline then would recalculate those figures using a tax allowance based on the lower tax rate of 21% established by the Tax Act and a hypothetical tax rate of 0% to reflect the absence of any tax allowance. JX 580 ¶ 32. The Form 501-G also included lines for amortization of ADIT, but it did not specify a methodology for treating ADIT. JX 558.

The following table summarizes Johnson's Form 501-G Analysis:

Form 501-G Analysis:

	35% Tax COS	21% Tax COS	0% Tax COS	35% COS Delta	35% COS % Change	21% COS Delta	21% COS % Change
Texas Gas Pipeline							
2017	$431.09	$406.47	$362.23	$68.86	15.97%	$44.24	10.88%
Gulf South Pipeline							
2017	$640.21	$601.93	$534.50	$105.71	16.51%	$67.43	11.20%
Gulf Crossing Pipeline							
2017	$275.50	$259.88	$232.30	$43.20	15.68%	$27.59	10.62%

JX 727 at 4. In reaching these results, Johnson assumed that each pipeline's ADIT balance would be returned to ratepayers through amortization over the life of each pipeline, an approach known as the "Reverse South Georgia Method." *Id.* at 1. At that time, FERC had not decided how to treat ADIT balances. One option, which pipelines favored, would be to eliminate the ADIT balance entirely. Another option, which shippers favored, would be to require a cash refund of the ADIT balance. Intermediate options involved amortizing the ADIT balance over various periods. The Baker Botts attorneys and Boardwalk executives knew that FERC could handle ADIT in a number of ways, each of which would result in a different outcome. Yet because they believed the Reverse South Georgia Method was the most likely, that was the only one they analyzed.

***24** The Form 501-G Analysis did not include the actual revenue calculations that the Form 501-G contemplated. If Johnson had performed them, they would have shown that both Gulf South and Gulf Crossing were under-recovering their cost of service, generating ROEs that would not warrant a rate case, and were in no danger of having their rates lowered. *See* JX 644 at 1. Boardwalk's actual Form 501-G submissions, filed in late 2018, confirmed that fact: Gulf South's ROE in 2017 was 4.9%, and Gulf Crossing's was 4.7%. Webb Report Ex. 16 at 6765 (Gulf Crossing ROE); *id.* Ex. 17 at 6770 (Gulf South's ROE). Texas Gas, on the other hand, faced some risk of a rate case, because its indicative ROE was 24.3%, and historically FERC would file a rate case if a pipeline's ROE was above 20%. JX 1064; Sullivan Dep. 168. Nevertheless, Wagner and Sullivan “share[d] the opinion that there is a low probability that Texas Gas would face a section 5 case in the next 1–2 years.” JX 1064 at 1. “Beyond that time frame,” they concluded, “there are too many variables to make a prediction with any confidence.” *Id.*

Johnson's Rate Model Analysis followed the same basic steps as the Form 501-G Analysis. JX 727 at 2. But unlike the Form 501-G Analysis, which used FERC's indicative ROE of 10.55%, Johnson performed the calculations in the Rate Model Analysis using an ROE of 12.0%. That decision increased the cost-of-service requirement. In his cover email, Johnson explained that his choice of an ROE of 12.0% was “[t]he biggest driver as to the difference in Cost of Service from the Form 501-G analysis.” JX 727 at 2. At trial, Johnson testified that he found that rate in an annual report issued by a shipper-side advocacy group that lobbies FERC to pursue rate cases against pipelines. Johnson Tr. 617, 658–59. It was not an unreasonable selection, but it also was not a pro-pipeline selection. It is, however, another indication that Loews and Boardwalk did not think that the March 15 FERC Actions necessarily would be implemented as proposed.

The following tables summarize the results of Johnson's Rate Model Analysis:

Rate Model Analysis:

	35% Tax COS	21% Tax COS	0% Tax COS	35% Tax Delta	35% Tax % Change	21% COS Delta	21% COS % Change
Texas Gas Pipeline-Overall System							
2017	$424.34	$393.66	$346.57	$77.77	18.33%	$47.09	11.96%
Gulf South Pipeline							
2017	$491.05	$457.04	$403.55	$87.50	17.82%	$53.49	11.70%
Gulf Crossing Pipeline							
2017	$220.29	$198.62	$167.60	$52.70	23.92%	$31.03	15.62%

	35% Tax Indicative Rate	21% Tax Indicative Rate	0% Tax Indicative Rate	35% Rate Delta	35% Rate % Change	21% Rate Delta	21% Rate % Change
Texas Gas Pipeline							
2017	$0.2337	$0.2168	$0.1909	$0.0428	18.33%	$0.0259	11.98%
Gulf South Pipeline							
2017	$0.3698	$0.3442	$0.3040	$0.0658	17.80%	$0.0402	11.68%
Gulf Crossing Pipeline							
2017	$0.3549	$0.3200	$0.2700	$0.0849	23.92%	$0.0500	15.62%

JX 727 at 4. The Rate Model Analysis thus resulted in a bigger percentage change than the Form 501-G Analysis.

Baker Botts used the Rate Model Analysis to render the Opinion. No one on the Boardwalk team prepared any sensitivity analysis using different treatments of ADIT or different ROE calculations. *See* Webb Report ¶¶ 128, 134–35; JX 1757 (Webb Rebuttal) ¶¶ 29–30.

Although Johnson claimed at trial to have followed all of the steps of cost-of-service ratemaking in his analysis, he plainly did not. The Rate Model Analysis presented a hypothetical cost-of-service calculation, subtracted the income tax allowance, and concluded that the new total was lower. FERC does not calculate rates by changing a single element in a cost-of-service calculation. Instead, FERC evaluates all elements of a pipeline's cost of service when calculating a pipeline's rates. Court Report ¶¶ 146–48; Webb Report ¶¶ 129–33.

Sullivan, the rate expert that Baker Botts hired to assist with the Opinion, testified that the Rate Model Analysis was “not a recourse rate calculation.” Sullivan Dep. 151. While Johnson attempted to justify his approach by contending that the Rate Model Analysis generated an “indicative rate” for each of Boardwalk's pipelines, Sullivan made clear that “an indicative rate doesn't mean anything.” *Id.* 168–69. Sullivan explained that

> ***25** [t]o really find out what the true rate reduction is, you have to do the billing determinant adjustments ... where you take into account how much of the billing determinants are discounted, how much are negotiated discounted rates, how much is [interruptible transportation], how much are firm recourse rates. You have to do all those calculations to properly calculate a rate reduction.

Id. at 120. The Rate Model Analysis did not do that. *Id.*

In his cover email circulating the Rate Model Analysis, Johnson explained the limitations of the exercise he conducted. JX 727 at 2. As pertinent here, he stated:

> In order to provide a comparable rate assessment for each of the assets to assist in business decision-making, we have provided indicative rates that are postage stamp (i.e., every shipper pays the same maximum rate for each molecule) and unadjusted

> (i.e., does not adjust the maximum tariff rate for any under-recoveries of cost associated with either discounted or negotiated rate capacity that is below the maximum tariff rate). This provides the cleanest approach to understanding the relative rate impact of changes in the income tax rate and income tax policy within each of the three pipes and removes any argument as to subjective adjustments to volumes tied to a calculated rate reflected on the summary.

Id.

In reality, Boardwalk's pipelines do not have just one rate. In April 2018, they had 167 total recourse rates on file with FERC.[5] Those rates covered nine different pipeline zones and incorporated forty-six different rate schedules. Webb Report ¶¶ 91–93. In the real world, the "postage stamp" approach does not work for assessing the rates charged by Boardwalk's subsidiaries.

5 Webb Report Ex. 1 at 8–26 (Texas Gas, 114 recourse rates); Webb Report Ex. 2 at 10–37 (Gulf South, 42 recourse rates); Webb Report Ex. 3 at 3–5 (Gulf Crossing, 11 recourse rates).

The abbreviated analysis that Johnson conducted contrasts with the voluminous record generated for a rate case. In their most recent rate cases, Texas Gas and Gulf South submitted hundreds of pages of complex calculations to determine cost-based recourse rates. *See* Johnson Tr. 652–53. In stark contrast, the Rate Model Analysis contained approximately five pages of calculations for each pipeline. *Id.* at 640. The Rate Model Analysis gave no consideration to issues of competition, discounting, or other adjustments that would affect the determination of recourse rates in a FERC rate case.[6] By assuming that a change in cost of service would translate directly into a change in recourse rates, the Rate Model Analysis ignored critical elements of rate design. Johnson effectively admitted as much. Johnson Tr. 648–49, 651–52.

6 When competition pressures a gas pipeline to provide services at a discount to applicable recourse rates, the pipeline is no longer recovering its full cost of service. In its next rate case, the portion of the pipeline's cost of service that would have been allocated to the discounted services is reduced, and the difference is reallocated to the pipeline's less price sensitive customers. Webb Report ¶ 177. That way, FERC permits the pipeline to raise its remaining undiscounted recourse rates so that it can recover its full cost of service. All three of Boardwalk's pipelines have emphasized in FERC filings that they face significant competition. The actual recourse rates of Texas Gas and Gulf South reflect that competition. Webb Report ¶ 95 (Texas Gas); *id.* ¶ 96 (Gulf South); *id.* Ex. 4 at 443; *id.* Ex. 6 at 626. Texas Gas and Gulf South earn less than a third of their revenue from recourse rates; Gulf Crossing earns essentially none. *Id.* ¶ 194. McMahon's statement that Gulf Crossing will be undersubscribed by the time its contracts expire in 2023 evidences a likelihood that discount adjustments will figure prominently in its next rate case. Finally, in transmittal letters attached to the Form 501-G filings that Boardwalk submitted on behalf of its pipelines in late 2018, Johnson identified significant and apparently increasing competition as a reason FERC should not require them to lower their rates. *See* Webb Report ¶ 198 & n.175.

***26** Perhaps most significantly, the Rate Model Analysis ignored the reality that rate changes are not self-implementing. Even if a pipeline's cost of service changes, recourse rates do not change unless and until there is a litigated rate case.[7] If a pipeline is unlikely to face a rate case, then it is all the more unlikely that its recourse rates will change.

7 Wagner Dep. 77–79; Sullivan Dep. 79–80; *see* McMahon Tr. 507–08, 512–13.

The Rate Model Analysis made no effort to incorporate the risk of a rate case. It easily could have. The NOPR contemplated using the Form 501-G to assess the need for a rate case. FERC also identified factors that could obviate the need to change a pipeline's rates, all of which applied to Boardwalk's subsidiaries. Gulf South and Gulf Crossing faced no risk of a rate case in the foreseeable future. For Texas Gulf, the rate case risk was low through April 2020; beyond that, it was impossible to predict the likelihood of a rate case "with any confidence."[8] Yet the Rate Model Analysis implicitly assumed a 100% likelihood that all three pipelines would face a rate case immediately, lose the rate case, and each have their rates reduced by an amount determined by singe-issue ratemaking.

8 *See* JX 1064 (Wagner advising Loews that Texas Gas had a low rate-case risk for “the next 1–2 years”); *see* Wagner Tr. 245, 248 (Wagner testifying that there was some risk of a rate case at Texas Gas due to its ROE, but that because of FERC's workload, a rate case was unlikely in the next one to two years); Johnson Tr. 632–34 (testifying that Texas Gas faced some risk of a rate case); *see also* JX 1807 at 6 (Wagner noting that Sullivan believed FERC would use an ROE of 20–30% to screen for rate cases). The defendants’ FERC expert testified at trial that Texas Gas would have an ROE of between 17.5% and 24.3%, which was high enough to create some risk of a rate case. *See* Kelly Tr. 1104. The plaintiffs’ rate expert agreed that FERC historically pursued rate cases when pipelines had ROEs in this range. Webb Tr. 1007–08.

I. Alpert Adds Skadden To The Team.

Shortly after hiring Baker Botts, Alpert hired Skadden, Arps, Slate, Meagher & Flom LLP (“Skadden”) to supplement the legal team. Alpert had considerable experience working with Skadden, and the firm had a deep bench in FERC matters, extensive experience with MLPs, and expertise in Delaware law. Rosenwasser Tr. 61–62; Alpert Tr. 326–27. Richard Grossman, a corporate partner, led the Skadden team. Jennifer Voss, a litigation partner in Skadden's Delaware office, provided advice on Delaware issues.

Alpert hired Skadden after Rosenwasser suggested that bringing in another law firm to advise on whether the Opinion was acceptable might further protect Loews from liability. *See* JX 975 at 1. The Partnership Agreement contains language exculpating the General Partner and its Affiliates from monetary liability unless it engages in fraud, bad faith acts, or willful misconduct. PA § 7.8(a). The Partnership Agreement also states that the General Partner will be “conclusively presumed” to have acted in good faith if it “reli[ed] upon the advice or opinion [of legal counsel] (including an Opinion of Counsel).” *Id.* § 7.10(b). Rosenwasser and Alpert thought that if Skadden advised the General Partner that Baker Botts was qualified to render the Opinion and that the Opinion was acceptable, then those additional protections would apply.[9] At the time, Alpert also thought that Skadden would handle any litigation challenging the exercise of the Call Right. *See* Alpert Tr. 445–46; JX 1136. He later would decide not to use Skadden for any litigation after Skadden balked at giving Alpert the advice he wanted.

9 Rosenwasser Tr. 61; Alpert Tr. 325–26, 407; JX 1100 (Skadden engagement letter dated April 23, 2018).

***27** The first issue that Skadden looked at was Baker Botts’ assertion that Holdings was the proper entity to decide whether the Opinion was “acceptable to the General Partner.” *See* JX 679 at 7–8. Rosenwasser had struggled with this question, which the Partnership Agreement did not plainly address. *See* JX 596 (Rosenwasser's handwritten notes on the Partnership Agreement); Rosenwasser Dep. 65. By late March, Rosenwasser had taken the position that Holdings, rather than the GPGP Board, would determine acceptability. *See* JX 679 at 8. On March 27, Alpert suggested that Skadden “confirm” that “the redemption was the sole decision of the [General Partner]—such that the [GPGP] [B]oard will not need to act.” JX 669 at 1.

Instead of confirming Rosenwasser's position, Voss reached the exact opposite conclusion. In an insightful internal email that carefully worked through the issues, she expressed the view that “the MLP Agreement likely requires that the [GPGP] Board make the determination to accept the Opinion of Counsel. Or, at a minimum, it is ambiguous.” JX 747 at 1.

Skadden subsequently prepared a memorandum for Alpert, where Skadden framed its concerns in more lawyerly and less direct language. Skadden began by noting that the Call Right

> is atypical and, to the best of our knowledge, notwithstanding the many MLP cases (and MLP contract terms) that have been litigated, no Delaware court has interpreted such a provision.... [I]t's also fair to say that courts generally dislike the interpretive difficulties often inherent in MLP agreements.... And, here, we think that any “question marks” or ambiguities likely would be decided

against the "sophisticated drafter" and not the minority unitholders.

JX 773 at 1. Skadden also flagged arguments that a plaintiff could make about the circumstances surrounding the exercise of the Call Right, such as "purported efforts to depress the price of the units prior to the exercise of the right by, for example, increasing capital expenditure" or "purported partnership 'admissions' about the 'lack of materiality' of the FERC's March 15 policy statement." *Id.*

Setting aside those issues, Skadden agreed with Baker Botts that Holdings had the right to exercise the Call Right in its individual capacity. But Skadden perceived that to be a different question than who had the ability to determine whether the conditions for exercising the Call Right were met. Skadden noted the following:

- "[T]he 'right to purchase' ... does not seem to arise unless and until certain preconditions exist, including acceptance by the General Partner of a specified 'Opinion of Counsel.' " *Id.* at 2.
- "A plaintiff could argue that this Opinion of Counsel must be acceptable to the General Partner in its capacity as general partner and not in its individual capacity." *Id.*
- "[T]he words 'exercisable at its option' (indicating 'individual capacity') do not appear in the 'precondition' portion of the provision." *Id.*
- "At a minimum, the matter is arguably ambiguous." *Id.*

Skadden also discussed the structure of the Partnership Agreement. Skadden observed that if the Acceptability Condition existed to benefit the General Partner in its individual capacity, then it followed that an affiliate of the self-interested General Partner could determine acceptability. But if the Acceptability Condition was intended to introduce some check on the quality of the Opinion for the benefit of the limited partners, then enabling the self-interested General Partner to make the decision did not make sense. It was "akin to permitting the fox to guard the henhouse." *Id.* at 3. Instead, "the added 'layer' of [GPGP] Board involvement serves a purpose and must occur before the right to call arises." *Id.* Skadden reiterated that "at a minimum, there is arguable ambiguity here." *Id.* To address the resulting litigation risk, Skadden recommended that the GPGP Board determine whether the Acceptability Condition had been met. *Id.* at 2. Skadden also recommended that the outside directors on the GPGP Board participate in and not abstain from the determination. *Id.* at 4.

***28** Skadden plastered its analysis with caveats about its views being "preliminary" and "for discussion purposes only." *Id.* at 1. Skadden also downplayed its internal conclusion regarding ambiguity by adding the adjective "arguable" in the memorandum it provided to Alpert. *Id.* at 2. But the overall tenor of Skadden's memo was clear, and Skadden presented its advice with the understanding that Loews would rely on it.

Loews begrudgingly did just that. Alpert and McMahon found Skadden's recommendation "frustrating" and viewed the firm as a "pain in the ass." *See* JX 874 at 1 (Layne handwritten notes); Layne Dep. 111–12. But consistent with Skadden's reasoned analysis, Loews initially decided to have the GPGP Board make the acceptability determination. *See* JX 948 at 2; JX 979 at 1.

J. Baker Botts Struggles With The Material Adverse Effect Inquiry.

By the second week of April 2018, Baker Botts was struggling with the need to conclude that the March 15 FERC Actions would have an effect that was both material and adverse. They wanted Skadden's help. *See* JX 770 at 1; JX 772. But as a matter of firm policy, Skadden does not render opinions on whether an event constitutes a material adverse effect, and Grossman was not willing to give Baker Botts any analysis that might be construed as expressing an opinion on it. *See* JX 771 at 1.

For its part, Skadden was skeptical about the claim that a 10–15% change in a maximum applicable rate could be deemed in the abstract to qualify as a material adverse effect. JX 772 at 1. The Skadden attorneys believed that an 11% change in the maximum applicable rate was "likely insufficient" under Delaware law, although they acknowledged that the duration of the change would be a pertinent consideration. *See id.* The Skadden attorneys did not think anyone could assess whether a change in the range of 10–15% constituted a material adverse effect without delving into the facts. *Id.*

Alpert wanted Grossman to support Baker Botts. But during a call with Alpert, Grossman held the line on not providing any analysis that might be construed as an opinion on the existence of a material adverse effect. Alpert emailed his colleague, Tom Watson, that Grossman was "pissing [him] off." JX 798 at 1. Watson's response was more telling:

> Yes, these calls are getting really annoying. Too many lawyers doing nothing but muddying the waters on what is a clear question (to me). If people think the language says that the relevant test is what is the real world effect, then we have an issue. I think it's crystal clear that we're talking hypothetical future max FERC rates.

Id. In other words, Watson understood that the material adverse effect analysis only worked under Rosenwasser's syllogism based on "hypothetical future max FERC rates." Under Rosenwasser's syllogism, the answer was baked into the assumptions. But in the real world, the March 15 FERC Actions did not have any meaningful effect, much less a material and adverse effect.

Grossman ultimately agreed to provide Baker Botts with a description of the key cases "so that they did not miss a key case or an important factor looked at by the Delaware courts." JX 777 at 1. Grossman also had Mike Naeve, a Skadden partner and former FERC Commissioner, speak with Wagner, Alpert, and McMahon about the various issues presented by the Opinion. *See* JX 790 at 2. Going into a call on April 10, 2018, Naeve had doubts about what "maximum applicable rates" meant. But after talking it over with the group, he thought that "recourse rates" was a more reasonable reading of "maximum applicable rates" than "the maximum rate that can be charged a specific customer under a negotiated or discounted rate agreement." *Id.* To get Naeve "more comfortable" with the Baker Botts position, Wagner sent Naeve over 500 pages culled from Boardwalk's Form S-1 and the FERC orders involving Boardwalk's pipelines that used the term "maximum applicable rates" as a synonym for recourse rates. *Id.*

***29** After speaking with the Baker Botts team, Naeve identified a number of issues surrounding the material adverse effect analysis in discussions with Grossman and other Skadden partners. Naeve immediately flagged the question of whether any of Boardwalk's pipelines actually faced a risk of a rate case. As Naeve explained,

> [t]he risk that a customer will ask for a new rate case and that FERC will agree to grant that request will depend on whether there is substantial evidence that a new rate case will result in materially lower rates. A reduction in the revenue requirement to take out taxes would suggest lower rates, but it is possible that any reduction might be offset by other factors such as recent facility investments expenditures or changes in allowed ROE.

JX 800 at 1. In other words, Naeve recognized that whether the March 15 FERC Actions would have a material adverse effect on recourse rates depended on both the risk of a rate case *and* on the full ratemaking exercise that would take place in a rate case. It was much more than just a function of Rosenwasser's syllogism and its subtraction of a tax allowance.

Naeve and his Skadden colleagues also discussed whether the inquiry into a material adverse effect needed to account for Boardwalk's existing contracts for negotiated rates and discounted rates or any rate-case moratoriums at its pipelines. *See* JX 800 at 2. Those were real-world factors with real-world impacts, and FERC had cited them as reasons why a change in rates might not be warranted. But Baker Botts had no intention of taking those issues into account. Baker Botts instead was taking the position that

> because pipelines are long-lived assets, and because the relevant language refers to the potential for material adverse rate effects in the future, their analysis need not be affected by discounts or moratoria that will be lifted within the next several years.

JX 800 at 2.

K. Baker Botts Works Towards A "Preliminary" Opinion.

Rosenwasser wanted to be in a position to provide Loews with a "preliminary" version of the Opinion by the end of April 2018. *See* JX 1956. The preliminary version would turn out to be an all-but-signed version that Baker Botts could render formally if and when Loews requested it.

Rosenwasser and his drafting team prepared an initial draft of the Opinion dated April 4, 2018. *See* JX 726 (the "April 4 Draft"). Like the preliminary Opinion and the final Opinion, the April 4 Draft was a non-explained opinion that identified background information, flagged assumptions, and stated a conclusion, but did not provide reasoning or cite authority to support the conclusion.

Throughout April, Rosenwasser and his drafting team worked with the senior Baker Botts lawyers comprising the *ad hoc* opinion committee. The senior lawyers raised a number of concerns that highlight how difficult it was for Baker Botts to reach the outcome necessary to render the Opinion.

A persistent problem was the meaning of "maximum applicable rates." The April 4 Draft simply stated that it addressed "maximum applicable rates" without explaining how Baker Botts interpreted that term. JX 726 at 2. The next significant draft, dated April 17, 2018, sought to address the ambiguity inherent in the term by stating,

> Based on the wording of Section 15.l(b)(ii) and supported by disclosure in the Registration Statement and discussions with representatives of the Partnership who assisted in preparing the Registration Statement, it is our judgment that ... we should not consider the impact of negotiated rates, discounted rates, contractual rates, settlement rates, market-based rates, rate moratoria, or other market-related factors when interpreting the term "maximum applicable rates that can be charged to customers."

***30** JX 935 at 2. That language telegraphed all the market-based, real-world considerations that Baker Botts was leaving out, and subsequent drafts continued to dispense with any analysis of the real-world impact of facts that would affect the actual "maximum applicable rates that can be charged to customers." Rosenwasser continued to claim that the Opinion would not look at real-world effects, which he characterized as "speculation about real market conditions and their impact on rates." JX 879 at 1.

Another persistent problem was that the March 15 FERC Actions would not have any effect on Boardwalk's recourse rates unless those rates changed through a rate case. The April 4 Draft addressed that issue head on by expressly assuming that Boardwalk's pipelines would file rate cases and take any other actions necessary to permit them to charge the reduced recourse rates that would generate a material adverse effect. *See* JX 726 at 2 ("[W]e have requested that the Partnership assume that the Subsidiaries will file rate cases and take any other appropriate and legal action to be permitted to charge the maximum rates permitted under the applicable cost of service rules and regulations regardless of competitive conditions or any other non-legal factor."). But by including this explicit assumption, the April 4 Draft both highlighted the role of rate-case risk and openly assumed that Boardwalk and its subsidiaries would act contrary to their own interests. By April 17, Baker Botts had deleted this language and substituted an assumption that Boardwalk's pipelines would charge customers their new recourse rates, without addressing how those rates would come about. The new assumption reached the same result, but without advertising the counterintuitive premise. *See* JX 935 (omitting reference to Boardwalk's subsidiaries filing rate cases).

Yet another problem was the fact that the March 15 FERC Actions were not final, could be revised significantly, and required clarification. The April 4 Draft contained language recognizing that reality, while assuming that the March 15 FERC Actions would not be revised. *See* JX 726 at 2 (acknowledging that "[i]mportant details of implementing the Revised Policy require clarification"). By April 17, Baker Botts had eliminated that acknowledgment of uncertainty. *See* JX 935 at 2. That draft instead sought to strengthen the assumption that the March 15 FERC Actions would not be revised, would be implemented as written, and would be applied by FERC in individual regulatory proceedings. *See id.* Subsequent drafts took the same approach. *See id.*

The senior Baker Botts lawyers also flagged other issues with the language of the Call Right. One debate concerned the reference to Boardwalk's "status as an association not taxable as a corporation." *See* JX 1958 at 1, 8; *see also* JX 878 at 2; JX 939 at 1. That phrase seemed to refer to Boardwalk's status as an entity taxed as a partnership, but that created an issue for the Opinion because the Revised Policy did not affect all entities taxed as partnerships. It was thus difficult to say that Boardwalk's status as an entity taxed as a partnership had a causal effect on the rates it could charge. *See* JX 1958 at 1; JX 1957 at 5.

The senior Baker Botts lawyers also questioned whether Baker Botts should be giving an opinion under Delaware law about the existence of a material adverse effect. *See* JX 878 at 4. The April 4 Draft only addressed federal law, and it did not contain any discussion of the term "material adverse effect." *See* JX 726 at 2.

***31** Once Baker Botts came to grips with the fact that the existence of a material adverse effect under the Partnership Agreement was a question of Delaware law, the firm was out of its depth. Baker Botts generally rendered enforceability opinions under the Delaware Revised Uniform Limited Partnership Act, but that was it. The firm did not render opinions more broadly on Delaware issues. *See* JX 878 at 4. By April 17, the draft included language which noted that the term "material adverse effect" was "not defined in the Partnership Agreement" and stated that Baker Botts had considered "what we believe to be relevant law." JX 935 at 3. As Grossman had anticipated, the senior Baker Botts lawyers wanted to rely on Skadden's work product on this issue. *See* JX 878 at 4–5; JX 892 at 2.

The senior Baker Botts lawyers also wanted reassurance on the Financial Data. The April 4 Draft referred only to information provided by the Partnership about its "cost of service ..., and the related maximum rates that can be charged." JX 726 at 2. By April 17, the draft contained language discussing the Financial Data and containing assumptions that it was "prepared in a reasonable manner and in good faith." JX 935 at 3. By April 19, the extent of the assumptions regarding the Financial Data had grown further. *See* JX 1005 at 3.

Rosenwasser was concerned that the Financial Data alone might not be enough. He sought to bolster the case for a material adverse effect by asking Johnson to expand his analysis beyond the Financial Data to include projections for 2020 and add "DCF, EBIDTA, and EBIT (Operating Income) comparisons." *See* JX 775 at 1; *see also* JX 797. He thus sought to include the real-world effects of changed rates when considering their effect on Boardwalk, despite persisting in refusing to consider real-world effects when evaluating whether the March 15 FERC Actions would have any effect on rates.

During this timeframe, Johnson simplified the presentation of the Financial Data by dropping the scenarios that involved a tax rate of 35%. JX 775 at 3–4; JX 785 at 1–2. A version of the Financial Data from April 10 presented the information as follows:

Form 501-G Analysis:

	21% Tax COS	0% Tax COS	21% COS Delta	21% COS % Change
Texas Gas Pipeline				
2017	$406.47	$362.23	$44.24	10.88%
Gulf South Pipeline				
2017	$601.93	$534.50	$67.43	11.20%
Gulf Crossing Pipeline				
2017	$259.88	$232.30	$27.59	10.62%

Rate Model Analysis:

	21% Tax COS	0% Tax COS	21% COS Delta	21% COS % Change
Texas Gas Pipeline-Overall System				
2017	$386.21	$339.12	$47.09	12.19%
Gulf South Pipeline				
2017	$457.04	$403.55	$53.49	11.70%
Gulf Crossing Pipeline				
2017	$198.62	$167.60	$31.03	15.62%

	21% Tax Indicative Rate	0% Tax Indicative Rate	21% Rate Delta	21% Rate % Change
Texas Gas Pipeline				
2017	$0.2129	$0.1871	$0.0258	12.12%
Gulf South Pipeline				
2017	$0.3442	$0.3040	$0.0402	11.68%
Gulf Crossing Pipeline				
2017	$0.3200	$0.2700	$0.0500	15.62%

JX 775 at 3–4; JX 785 at 1–2. Compared to the April 4 figures, the percentages for Texas Gas in the Rate Model Analysis had crept up from 11.96% (cost of service) and 11.91% (indicative rate) to 12.19% (cost of service) and 12.12% (indicative rate). Otherwise, the figures remained the same as in the information Johnson had provided on April 4.

By this point, however, Boardwalk's management team was preparing comments in response to the ADIT NOI and was focused on the implications of ADIT. Horton expressed concern that the Financial Data gave up Boardwalk's argument that "the [Revised Policy] essenti8ally [sic] eliminates ADIT," meaning that Boardwalk's pipelines "do not have a reduction of rate base." JX 797 at 1. He wanted to caveat Johnson's analysis to make clear "that it does not include any impact from adjusting the ADIT balances to account for the reduction or the elimination of income taxes." *Id.*

***32** Like Boardwalk's management, the Baker Botts lawyers knew that the treatment of ADIT would have a significant effect on the Financial Data. Wagner was representing the shippers on remand in the *United Airlines* case, so he understood that different industry participants were arguing for different outcomes.

The Baker Botts team had retained Sullivan as a rate expert, [10] and Wagner asked Sullivan to examine how the Financial Data treated ADIT:

> It seems to us that different assumptions on how to handle that issue could affect the calculations. Have they assumed that they will flow back the ADIT over the remaining life of the assets (with the corresponding reversals of the reduction to rate base)? Or is there another method used here?

JX 868 at 2. Sullivan reported that Johnson was using the Reverse South Georgia Method, which Sullivan thought was appropriate. *See* JX 868 at 1. Boardwalk's executives and the Baker Botts lawyers thought that was the most likely regulatory outcome. But they also understood that the approach FERC took on ADIT would have a big effect. Wagner's handwritten notes show him regularly wrestling with the uncertainty generated by how FERC would treat ADIT. *See* JX 646 at 8; JX 1400 at 1; JX 1807 at 3–4 ("[T]he effect on ADIT is unknown & unknowable."). In one set of notes, he commented, "Will want to run scenarios on ADIT flowback." JX 1807 at 12. Another set of notes stated: "ADIT NOI – Policy Statement w/ no immediate effect. 501-G filings do not acct for ADIT. No idea what they'll do w/ ADIT. If there's litigation coming from 501-Gs, ADIT policy will prob factor in there." JX 1216 at 3.

10 Sullivan had thirty-eight years of experience working in the oil and gas industry, including twenty-five years working at FERC, and he had testified in FERC proceedings more than fifty times. PTO ¶ 154; JX 1498 at 151. His expertise is unchallenged.

After conducting further review of the Financial Data, Sullivan advised Wagner that "the spreadsheet work done by Boardwalk appropriately represents *the cost of service* for each Boardwalk interstate pipeline, the federal income tax impact at 21%, and the potential reduction in the cost of service for each pipeline if FERC reduces the income tax allowance to 0." JX 960 at 2 (emphasis added). Wagner did not think that a statement about a cost of service analysis was sufficient. He asked Sullivan to let him know "[o]nce you're able to state definitively that you agree with their *rate* analyses." *Id.* (emphasis added).

On April 18, 2018, Sullivan told Wagner that he had finished his review. He did not provide the representation that Wagner wanted. Instead, Sullivan stated:

> I have confirmed that Boardwalk has properly used the correct financial and accounting entries in the calculated *cost of service* for each of its pipelines. In my expert judgment Boardwalk's spreadsheets provide an accurate presentation of the *cost of service* impact of the January 2018 federal income tax change from 35% to 21%. Boardwalk's spreadsheets also provide an accurate presentation of the *cost of service* impact of the potential reduction in the *cost of service* for each pipeline if FERC eliminates the federal income tax allowance for MLP owned interstate pipelines as proposed in Docket No. PL17-1.

JX 960 at 1 (emphases added). In his deposition, Sullivan explained persuasively that the Financial Data did not attempt to engage with principles of rate design and did not address the risk of a rate case. *See* Sullivan Dep. 101, 126, 149, 150–51.

***33** In a separate call with Loews, Sullivan addressed the risk of a rate case at Texas Gulf, where the Financial Data indicated an ROE of approximately 24.3% after the elimination of the tax allowance and using the Reverse South Georgia Method for ADIT. Although returns at that level had caused FERC to initiate rate cases in the past, Sullivan thought that resource constraints on the agency meant that the probability was low that Texas Gas would face a rate case in the next one to two years. JX 1064 at 1. The likelihood of a shipper filing a rate case was also low. *See id.* No one thought that the risk of a rate case at Gulf Crossing or Gulf South was worth discussing.

Sullivan's work confirmed what everyone knew. In the real world, any potential effect on Boardwalk's rates could not be understood without a FERC determination regarding ADIT.

And even if FERC implemented the March 15 FERC Actions, the regulations would not have a material adverse effect on Boardwalk's rates because there was no risk of a rate case at Gulf Crossing or Gulf South and only a low risk of a rate case at Texas Gas. The March 15 FERC Actions only had an effect in the hypothetical world of Rosenwasser's syllogism, and only if supported by a coterie of assumptions necessary to generate the result that Loews wanted.

L. Baker Botts Calls On Richards Layton.

As noted previously, the senior Baker Botts lawyers wanted to be able to rely on Skadden's work product for purposes of the material adverse effect issue. *See* JX 878 at 4–5; JX 892 at 2. When they received Skadden's description of the Delaware cases, it fell short of their expectations. *See* JX 913 at 1 (Baker Botts attorney David Kirkland telling Rosenwasser, "I was expecting more analysis than this"); *see also* JX 936 at 1. Rather than analyzing the Call Right, Skadden's memorandum explicitly disclaimed any intent to do so. JX 900 at 2.

Seeking to reassure his partners that Baker Botts still should render the Opinion, Rosenwasser reported that Loews only would exercise the Call Right if Skadden advised that Baker Botts' Opinion met the Acceptability Condition. JX 913 at 1. Rosenwasser's partners wanted that condition built into the Opinion, so the Baker Botts attorneys added language to the preliminary draft which stated that Baker Botts' Opinion was "based on," and its delivery "conditioned on," the fact that "other counsel has advised [the General Partner] that [its] reliance on this opinion when delivered should provide the benefits set forth in Section 7.10(b) of the Partnership Agreement." JX 1955 at 6 (draft from April 17, 2018); JX 1959 at 7 (draft from April 18, 2018). Perhaps anticipating pushback from Skadden, Baker Botts subsequently eliminated the "based on" and "conditioned on" language. *See* JX 1960 (draft from April 19, 2018).

The senior Baker Botts lawyers also wanted reassurance on the analysis of a "material adverse effect." And Baker Botts was on a deadline, because Loews had made clear that it wanted an indication from Baker Botts that it could deliver the Opinion by Friday, April 20, 2018. Rosenwasser knew that Boardwalk and Loews had quarterly security filings to make and that Loews' CEO, Jim Tisch, was planning to hold board meetings before the end of month to approve those filings. Rosenwasser understood that Tisch wanted to know where Baker Botts stood going into those meetings. *See* JX 914 at 1.

To satisfy his partners, Rosenwasser contacted Srinivas Raju, a partner at Richards, Layton & Finger, P.C. *See* JX 957 at 1; JX 975 at 1. In a call on Wednesday, April 18, 2018, Rosenwasser told Raju that a FERC rate expert had modeled a "decrease of 12.19% on top line revenue" for Texas Gas, an "11.70% decrease" for Gulf South, and a "15.62% decrease" for Gulf Crossing. JX 975 at 1; *see also id.* ("top line revenue impact – excess of 10% impact"). In reality, those figures referred to the percentage changes in cost of service and indicative rates under the Rate Model Analysis that Johnson prepared. JX 775 at 3; JX 785 at 2. Those figures would only translate into a comparable effect on topline revenue if Boardwalk's subsidiaries charged recourse rates for a high percentage of their volumes. They did not.

***34** Rosenwasser also told Raju that the FERC rate expert had projected that EBIT would decrease by 21–22% and distributable cash flow would decrease by "closer to 25%." JX 975 at 1; *see also id.* ("21% decline in net income" and "even higher in distribution"). Sullivan had not addressed the effect on EBIT or distributable cash flow. Sullivan Dep. 140–42 (discussing final Financial Data in JX 1398); *see also id.* at 141 (Q: "Did you offer an opinion regarding the calculation of DCF, EBITDA or EBIT?"; A: "I do not believe I did specifically cite to EBITDA, EBIT or the DCF."). Rosenwasser told Raju about those factors because he wanted to be able to consider real-world effects on Boardwalk's business, as well as real-world stock market reactions, when determining whether a material adverse effect had occurred. [11] Yet he continued to want to ignore the real-world reasons why the March 15 FERC Actions would not have any material effect on the rates that Boardwalk's pipelines could charge.

11 Rosenwasser's back-up memorandum offers further insight into what he wanted to consider to reach a conclusion that the effect on Boardwalk was "not immaterial." PTO ¶ 161. There, he wrote:

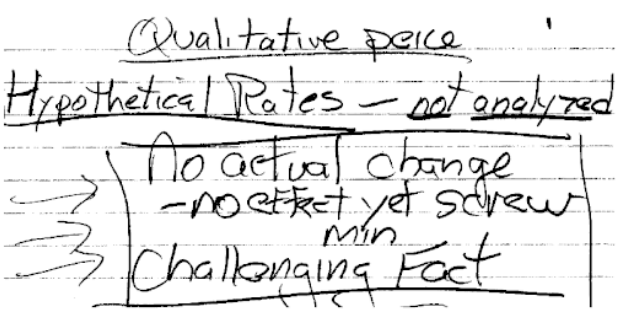
> The fact that so many regulated pipelines have requested that the FERC reconsider the Revised Policy is an indication they considered the changes caused by the Revised Policy are not immaterial. The magnitude of the adverse effect that the Revised Policy had on the trading market for many MLPs that own regulated pipelines is an indication that the matter is not immaterial. The fact that several MLPs that owned regulated pipelines have indicated that they are converting

> to corporate tax status is an indication that the matter is not immaterial.
>
> *Id.*

Having provided these representations, Rosenwasser asked Raju to consider whether "material adverse effect" is "only measured based on the effects on the 'maximum rate' or is ... measured by the effect on the business as a result of the decline in the maximum rate." JX 975 at 1; *see also* JX 957 at 2. He also asked whether Richards Layton could support the assertion that an adverse effect in "excess of 10%" would be sufficient under Delaware law. JX 1502 at 21.

Less than twenty-four hours later, Raju and his team gave advice orally to Baker Botts via teleconference. JX 956 at 1. Raju advised that the "[b]etter [r]eading" was to "look [at] rates more, not effects." JX 1007 at 1. He also cautioned that a Delaware court would "construe ambig[uity] ag[ai]nst [the] drafter." *Id.*

In response, the Baker Botts team clarified that their rate expert had not analyzed the Revised Policy's effect on Boardwalk's rates. Instead, the analysis considered "Hypothetical Rates." JX 1007 at 1. Notes taken by a Baker Botts partner reveal that everyone focused on the core issue: There would be "no actual change—no effect yet screw min[ority]." *Id.* That was obviously a "challenging fact." *Id.*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Turning to the magnitude of the change in rates that would be necessary for a material adverse effect, Raju advised that he would have a "hard time saying [12% in perpetuity is] not material." *Id.* at 2. Raju noted that there was "not a lot of precedent" and, in any event, "no cases against us" because "MAC cases [are] different" and the rate change was assumed to have an effect in "perpetuity." *Id.*

Raju agreed to put his advice into an email. But he cautioned that it would be caveated by "assumptions and carve-outs" and say "[n]othing stronger" than that existence of a material adverse effect based on a change of 12–13% to rates in perpetuity represented the "better argument." JX 975 at 1. Raju also stressed that Baker Botts could not reference his advice in the Opinion. *Id.*; *see* Raju Dep. 113–14.

Raju's advice reassured Rosenwasser's partners. After the call, Rosenwasser emailed Raju, telling him "[y]ou are so good." JX 1003 at 1. Baker Botts sent Richards Layton a copy of their preliminary opinion. The next day, Raju told Baker Botts, "We stand by what was discussed on the call yesterday, and nothing in the draft opinion changes our thinking." JX 1031 at 1.

M. Baker Botts Makes Clear That It Can Deliver The Opinion.

***35** As noted, Loews had been pushing Baker Botts to provide an indication that it could deliver the Opinion, and Loews wanted an answer by Friday, April 20, 2018. *See* JX 914 at 1. After his call with Raju, Rosenwasser told Alpert and Siegel that there was "no show stopper yet," but that Baker Botts still needed to secure internal approvals. *See* JX 1006 at 1. Alpert and Siegel were not pleased. *Id.*

The internal approval that Rosenwasser needed was signoff from the firm's chairman, Andy Baker. Baker could not provide the signoff by Friday because he was in the United Kingdom attending his daughter's wedding. Rosenwasser told Loews that because of Baker's absence, Baker Botts would not be able to get his signoff until Monday. JX 1019 at 2. That did not sit well with Loews. Siegel wanted to know why Baker Botts had not raised this issue earlier, since "[t]hey must have known for weeks that Baker would be in London." *Id.* Jim Tisch wanted Alpert to ask Rosenwasser "why they didn't anticipate this problem, and whether this is an indication that there may be a problem with the opinion committee." JX 1020 at 1.

Alpert told Tisch and Siegel that Rosenwasser was just "trying to be emotionally intelligent with his partners in an effort to obtain the desired result." *Id.* at 1. But he nevertheless pressed Rosenwasser "to make absolutely sure" that there was no way to reach Baker on April 20. JX 1033 at 3. On April 20, 2018, at 6:47 a.m., Alpert asked Rosenwasser for a call that morning. JX 1059. One hour later, at 7:51 a.m., Alpert sent a follow-up email. He told Rosenwasser that "[y]our timing affects many things, especially our disclosure, [Siegel's] conversations with board members and Loews special board meeting being held next week." JX 1033 at 3. He also conveyed that the senior Loews executives did not understand why no one anticipated the issues created by Baker's absence. *Id.*

Eleven minutes after the second email, Rosenwasser emailed his partners, telling them that Tisch "need[ed] board support for his plans" and "need[ed] to tell [the] board this afternoon" about whether Baker Botts could issue the Opinion. JX 1032 at 1. In response to Rosenwasser's email, Baker Botts attorneys David Kirkland and Mike Bengtson separately considered whether to try to reach Baker. *Id.* Kirkland told Bengtson that he had "already been lobbied by Mike R[osenwasser] this morning to let him give Jim T[isch] the thumbs up this morning." *Id.*

Rosenwasser's lobbying was successful. Around 11:00 a.m., Rosenwasser emailed Alpert that "we are still working but believe at this point that we will be able to give the General Partner the Opinion of Counsel if and when requested." JX 1065.

At 12:09 p.m., Rosenwasser sent Alpert a draft of the Opinion. JX 1045 at 1 (the "Preliminary Opinion"). [12] The Preliminary Opinion was in substantially the same form as the final Opinion delivered more than two months later on June 29. *Compare* JX 1045 (Preliminary Opinion) *with* JX 1522 (Opinion).

12 At his deposition, Rosenwasser denied that Baker Botts provided Loews any commitment on April 20. Instead, he claimed that Baker Botts gave Loews an indication that it was "more likely than not" that Baker Botts could deliver the Opinion. Rosenwasser Dep. 122, 129, 257–82. That testimony was not credible. Baker Botts made clear that it was prepared to deliver the Opinion if asked. *See* JX 1234 at 2; Grossman Dep. 76–77. Loews did not want to receive the formal Opinion at the end of April because it would create a disclosure issue and start a ninety-day clock for Loews to exercise the Call Right. Loews wanted to control the timing of the issuance of the Opinion, which would start the clock for exercising the Call Right.

N. Skadden Makes Clear That It Will Say That The Opinion Is Acceptable.

***36** After securing a "thumbs up" from Baker Botts, Alpert sought confirmation from Skadden that, if and when asked, it would advise the GPGP Board that the Opinion was "acceptable." Alpert anticipated that Skadden's advice would protect the GPGP Board when determining that the Opinion was acceptable for purposes of the Acceptability Condition. Everything would be buttoned down.

After receiving the draft from Baker Botts, Alpert forwarded it to Grossman and asked for an answer by the afternoon of Tuesday, April 24 "at the latest." JX 1121 at 1. Skadden objected to the language in the draft stating that other counsel "has advised you that your reliance on this opinion when delivered should provide the benefits set forth in Section 7.10(b) of the Partnership Agreement." JX 1056 at 5. Skadden had feared that Baker Botts would try to rely on its work, and the Skadden attorneys viewed this language as a backdoor attempt to do that. *See* JX 1094 at 1. Skadden asked to strike language. JX 1126 at 1.

Alpert was furious, and he "threatened to fire Skadden." JX 1116 ("I told Skadden tell me today if [they] can't get there or I'll hire other counsel."). Alpert told Rosenwasser he was "in no mood to negotiate with [Skadden]" and that he had "senior management back-up to move to another firm if [Skadden] is not reasonable." JX 1113 at 1. In an email to Skadden, Alpert made his expectations "absolutely clear." *Id.*

> I thought we were absolutely clear on the following, but if not, we need to be. I need to know that if we ask for the opinion from Baker Botts, that Skadden can and will advise the [GPGP] [B]oard that based on Baker Bott's [sic] experience, the diligence and process they conducted, the wording of the opinion and other factors, it is reasonable for the board to accept the Baker Botts opinion.

Id. at 1–2.

Skadden relented. Alpert told his colleagues that Skadden "fell into line," but that he "[r]eally had to beat on them." JX 1136 at 1. Alpert had planned to use Skadden for any litigation challenging the exercise of the Call Right. Now he decided that he would "look to other firms re potential litigation." *Id.*

O. Boardwalk's Public Comments On The NOPR

While Baker Botts was working on a legal opinion that treated the NOPR and other March 15 FERC Actions as final, Boardwalk's management team filed public comments on the NOPR, consistent with the fact that it was not final. It was the eventual regulations, not the NOPR, that would matter. Indeed, Naeve, the former FERC commissioner, noted that "If I were Baker Botts I would prefer to wait until FERC acts on the comments." JX 1076 at 1.

On April 25, 2018, Boardwalk filed its public comments on the NOPR. JX 1139. Rosenwasser printed out a physical copy of the comments and made handwritten annotations. *See* JX 1130. A section that addressed the treatment of ADIT caught his attention, and he underlined and double-starred key text:

> Until the Commission provides a final decision on the treatment of ADIT, Boardwalk cannot correctly assess the impact of the Revised Policy Statement and ADIT on its pipelines' costs of service, and any response in the Form No. 501-G will be misleading and inaccurate.

Id. at 14. That, of course, was exactly what Baker Botts was doing in the Opinion—purporting to correctly assess the impact of FERC's actions on its pipelines' costs of service. And Baker Botts was relying on a Rate Model Analysis that largely paralleled the Form 501-G analysis, which Boardwalk said "will be misleading and inaccurate" unless and until FERC had addressed ADIT. And Baker Botts was going further. Baker Botts was not just addressing cost of service. Under Rosenwasser's syllogism, Baker Botts was claiming that eliminating one component of the cost of service—the income tax allowance—would have a material adverse effect on maximum applicable rates.

***37** When Skadden saw the comments the next day, Voss focused on the same passage. She noted dryly, "this seems to be relatively unhelpful." JX 1207 at 2. Another Skadden attorney asked if the comment "could be problematic." *Id.* at 1.

The passage that Rosenwasser double starred appeared within the following larger section that Rosenwasser annotated:

> **2. The Commission Must Align the Timing of Its Actions Under This NOPR and the ADIT NOI.**
>
> Contemporaneous with the NOPR, the Commission has issued the ADIT NOI, which seeks comment on how the Commission should address changes related to ADIT as a result of the Revised Policy Statement. ADIT is a critical issue in analyzing a pipeline's maximum recourse rates. Although ADIT is a *non-cash* item—merely the function of the timing difference between book depreciation and tax depreciation—certain shippers have and will continue to argue that ADIT should be treated in a manner that results in a large and immediate *cash* refund from the pipelines. Significant dollars and the validity of certain portions of the Form No. 501-G are at stake. The Commission should not sideline the ADIT issue while it attempts to rush the Form No. 501-G NOPR to be ready for decision by its July meeting.
>
> ADIT is a key element of the proposed Form No. 501-G, and the ADIT NOI raises a number of questions fundamental to the treatment of this rate component under the Revised Policy Statement. For example, will the Commission adhere to normalization methodologies? The uncertainty surrounding how to handle ADIT is particularly problematic for an MLP like Boardwalk, which, as a result of the Revised Policy Statement, owns pipelines that are no longer allowed to collect income taxes in their rates but still have large ADIT balances on their FERC books. Boardwalk intends to address these and other questions in more detail in response to the ADIT NOI.
>
> Until the Commission provides a final decision on the treatment of ADIT, Boardwalk cannot correctly assess the impact of the Revised Policy Statement and ADIT on its pipelines' costs of service, and any response in the Form No. 501-G will be misleading and inaccurate.
>
> The comment date for the ADIT NOI is not until May 21, 2018 (approximately thirty days *after* comments are due in this NOPR proceeding), and the date of final Commission action on the ADIT NOI is unknown. It is improper for the Commission to require the industry to complete a new form, a key element of which is directly tied to the cost of service intended to be addressed by the Form No. 501-G, and which is still under review. Without resolution of the ADIT issues, the Form No. 501-G will be misleading and inaccurate, and will substantially hamper a pipeline's ability to have meaningful settlement discussions with its customers, since the calculation of a key element of rate base will be subject to change. Pipelines may also be discouraged from selecting the option to file a limited section 4 rate case with the potential to face additional risk regarding ADIT in a subsequent proceeding which would render that proposed option in the NOPR moot. The Commission must resolve the issues raised in the ADIT NOI at the same time or before it issues a final rule in this proceeding to ensure that pipelines have the necessary information to complete the Form No. 501-G accurately, select the appropriate filing option, and/or to engage in meaningful settlement discussions with their customers.

***38** JX 1130 at 13–15 (underlining and annotations in original) (footnotes omitted). [13]

13 At trial, Rosenwasser claimed that he was not "reading it that closely" and that he starred or double-starred passages so that he could "go back and read it again." Rosenwasser Tr. 82. That testimony was not credible. Rosenwasser underlined, starred, and double-starred aspects of Boardwalk's comments because they fatally undermined the syllogism that drove the Opinion. Revealing that he was reading the comments for problematic language, Rosenwasser wrote "nothing bad here" next to a passage reciting the procedural history of the ADIT NOI. JX 1130 at 9.

In this passage, Boardwalk explained that without a determination on ADIT, matters were so unsettled that pipelines could not even have meaningful discussions with shippers about rates. Yet Baker Botts was claiming for purposes of its Opinion that matters were so settled that the firm could opine as a matter of law that the March 15 FERC Actions would have a material adverse effect on Boardwalk's recourse rates.

Other aspects of the comments were equally problematic for purposes of the Opinion. For example:

• Boardwalk pointed out that the Policy Statement was "not a binding rule" and that FERC had not justified its application. JX 1139 at 2. The Opinion treated the Policy Statement as a binding rule. Rosenwasser drew a line next to this paragraph, and also made an unintelligible note. JX 1130 at 2.

• Boardwalk objected to FERC instructing pipelines to complete the Form 501-G that evaluated changes in cost-of-service requirements based solely on changes in income taxes, then using the revised cost-of-service requirements to identify an "Indicative Rate Reduction." Boardwalk explained that using that procedure to establish rates constituted improper "single-issue rulemaking." JX 1139 at 12, 30–31; *see* JX 1296 at 9. The Rate Model Analysis on which the Opinion depended took the same approach that Boardwalk criticized.

• Boardwalk made clear that the Commission's treatment of ADIT was not known and that different outcomes were possible. *See* JX 1139 at 13–14. Yet the Rate Model Analysis operated as if the treatment of ADIT under the Reverse South Georgia Method was a known fact.

• Boardwalk asserted that its "fixed negotiated rate agreements—almost all of which expressly state that they will apply 'without regard' to the pipeline's maximum or minimum applicable rates—should not be affected by any potential impact to recourse rates." JX 1139 at 16. The Opinion ignored the existence of Boardwalk's fixed negotiated rate agreements.

• Boardwalk asserted that there is no impact on Gulf South's revenue requirements due to the rate case moratorium that extended through May 1, 2023. JX 1139 at 20. The Opinion ignored the existence of the rate moratorium and assumed a rate impact at Gulf South.

What Boardwalk conspicuously did *not* argue in its comments was that FERC should eliminate the ADIT balance entirely as a natural consequence of removing the income tax allowance. Boardwalk instead argued that FERC should instruct pipelines to amortize the ADIT balances over the remaining depreciation life of the asset, using the Reverse South Georgia Method. That was the method that Boardwalk was using in the Rate Model Analysis, and it was where Boardwalk management and Sullivan thought FERC ultimately would come out.

***39** Many other pipelines, however, argued explicitly that FERC should eliminate the ADIT balance entirely. PTO ¶ 337. Shippers generally took the opposite side of the issue, arguing that FERC should require pipelines to pay a cash refund of the ADIT balance or require amortization on an accelerated schedule. *Id.* ¶ 339.

P. Loews Prepares To Make The Potential Exercise Disclosures.

Well before Baker Botts gave Loews the "thumbs up" that it could issue the Opinion if and when asked, Loews took a number of steps in anticipation of exercising the Call Right.

One task involved preparing the disclosures that Boardwalk and Loews would issue in their quarterly reports on their respective Form 10-Qs, assuming Baker Botts gave the anticipated "thumbs up." Those discussions involved Loews, Boardwalk, Baker Botts, and Skadden, as well as Loews' outside securities counsel Davis Polk & Wardell LLP, and lawyers from Vinson & Elkins. *Id.* ¶ 229.

The evolution of Boardwalk's Form 10-Q reveals at least two things. First, there was a widespread understanding that the March 15 FERC Actions were not final, that their effects could not be predicted, and that they would not be likely to have a material adverse impact on Boardwalk. Second, despite that widespread understanding, Loews pushed the disclosures in a contrary direction that would facilitate the exercise of the Call Right.

On April 4, 2018, Baker Botts sent Loews a first draft of the Boardwalk Form 10-Q. *Id.* ¶ 230. The draft contained relatively nuanced disclosures about the March 15 FERC Actions, including that "[i]mportant details of implementing the new policy statement require clarification and the Company will continue to assess the financial impacts as more information becomes available." *Id.* Similar statements about the lack of finality surrounding the March 15 FERC Actions did not appear in the final Form 10-Q.

On April 4, 2018, Vinson & Elkins sent Boardwalk a first draft of the Form 10-Q. *Id.* ¶ 232. Like the Baker Botts draft, it flagged that the March 15 FERC Actions were not final and noted that "[r]equests for rehearing or clarification of the Revised Policy Statement may change the outcome of the FERC's decision on these requests." *Id.* It stated that as a result, the "impacts that such changes may have on the rates we can charge for natural gas transportation and storage services are unknown at this time." *Id.* The draft likewise observed that the NOPR proposed a new rule, that rule was not final, and that, as a consequence, "[a]t this time, we cannot predict the outcome of the NOPR, but adoption of the regulation in its proposed form could impact the rates we are permitted to charge our customers." *Id.* ¶ 233. The Vinson & Elkins draft also recognized that the treatment of ADIT was an open issue and that there was no necessary connection between the elimination of the income tax allowance and a change in the treatment of ADIT and a reduction in rates, explaining that "[a]lthough changes in these two tax related components may decrease, other components in the cost-of-service rate calculation may increase and result in a newly calculated cost-of-service rate that is the same as or greater than the prior cost-of-service rate ...." *Id.* ¶ 236. Similar statements did not appear in the final Form 10-Q.

On April 10, 2018, McMahon circulated his draft, using the Vinson & Elkins draft as a starting point. *Id.* ¶ 237.

***40** • McMahon retained the statement that "requests for rehearing or clarification of the Revised Policy Statement may change the outcome of the FERC's decision on this issue" and stated that the "ultimate outcome regarding the Revised Policy Statement could impact the maximum rates we are permitted to charge." *Id.* ¶ 238.

• McMahon retained the statement that "any potential impacts from final rules or policy statements issued following the NOI on the rates we can charge for transportation services are unknown at this time." *Id.* ¶ 239.

• McMahon added language stating that Boardwalk "cannot predict the outcome of the NOPR, but adoption of the regulation in its proposed form could ultimately impact the rates we are permitted to charge our customers." *Id.* ¶ 240.

The Boardwalk draft was thus relatively neutral and balanced.

Later on April 10, 2018, Alpert circulated Loews' comments, which took a different approach.

• The Loews draft stated, "we do not expect the FERC to reverse [the Revised Policy Statement] or otherwise revise the policy in a manner favorable to master limited partnerships." *Id.* ¶ 245.

• Loews deleted the language stating that "[a]t this time, we cannot predict the outcome of the NOPR, but adoption of the regulation in its proposed form could ultimately impact the rates we are permitted to charge our customers." *Id.* ¶ 246.

• Loews added language stating, "[a]s we do not expect FERC's Revised Policy Statement to be reversed or modified in a manner favorable to master limited partnerships, we believe that our status as a pass-through entity for tax purposes will reasonably likely in the future have a material adverse effect on the maximum applicable rates" that Boardwalk's subsidiaries could charge. *Id.* ¶ 247.

• Loews added language stating, "[i]n addition, the ultimate outcomes of the NOI and NOPR may have further material adverse effects." *Id.*

Viewed charitably, Loews sought to characterize events in a way that would facilitate Loews' exercise of the Call Right.

McMahon and Horton objected to aspects of the Loews draft. Horton believed that Loews' language resulted in Boardwalk "rendering an opinion on the materiality issue." *Id.* ¶ 249. McMahon regarded the draft as tilted in favor of Loews. *Id.*

A push and pull ensued over the disclosures. *See id.* ¶¶ 250–64. Loews took a particular interest in eliminating the language which stated that "[a]lthough changes in these two tax-related components may decrease, other components in the cost of service rate calculation may increase and could result in a newly calculated cost of service rate that is the same as or greater than the prior cost of service rate." *See id.* ¶ 254. Loews also pushed for language focusing on the effects on Boardwalk's rates, rather than on revenue or other aspects of Boardwalk's business. *See id.* ¶¶ 263–64.

In addition to editing Boardwalk's disclosures, Loews analyzed the effect of the disclosures on the trading price of Boardwalk's common units with the assistance of investment bankers from Barclays. *See id.* ¶¶ 271–74. The analyses projected a short-term bump in the trading price, followed by a steady decline over time. *See* JX 822; JX 882; JX 915; *see also* JX 1051 at 3. Barclays attributed the decline in part to "[u]ncertainty regarding timeline" and the "[p]robability Loews doesn't" exercise the Call Right. JX 915 at 15–16. Because the lower trading price would feed back into the formula for the Call Right, Loews would pay a lower exercise price the longer it waited.

***41** Loews also began lining up the members of the GPGP Board to make the determination that the Opinion was acceptable. In the leadup to a meeting of the GPGP Board on April 26, 2018, Siegel contacted each director. *See* Siegel Dep. 232–34; Alpert Dep. 172. Siegel reported that Loews had "retained Baker Botts to determine whether it can give the opinion." JX 1069 at 2; *see also* Alpert Dep. 90. He also explained that although Holdings would determine whether to exercise the Call Right, "the [GPGP] Board would be required to make a narrow determination as to whether the opinion is an acceptable opinion." JX 1069 at 2. The outside directors had a "hostile reaction" and asked "shouldn't we have independent counsel[?]" JX 874 at 5; *see* Layne Dep. 160.

Alpert and Siegel had approached the GPGP Board based on Skadden's advice in the hope of eliminating any litigation risk posed by the uncertainty over which decision-maker would make the acceptability determination. With the solution creating additional problems, Loews reversed course. *See* JX 874 at 5 ("→ Alpert's view – getting board involved was to take an issue off the table = probably not going to the directors, & L[oews] will exercise").

Around April 27, 2018, Alpert asked Richards Layton to "take a fresh look" at whether the GPGP Board's involvement was necessary. Alpert Dep. 224; JX 1340 at 5. Alpert did not tell Richards Layton about Skadden's prior advice or the GPGP Board's reaction. Raju Tr. 809, 843. The question of who would determine the acceptability of the Opinion would play out over the ensuing days.

Q. Boardwalk And Loews Issue The Potential Exercise Disclosures.

On April 30, 2018, Boardwalk and Loews each filed their Form 10-Qs. PTO ¶ 222. As discussed in the prior section, Boardwalk and Loews coordinated their filings in advance to ensure that the disclosures were consistent. *See id.*

After the push-and-pull of the prior month, Boardwalk's Form 10-Q contained disclosures regarding the March 15 FERC Actions that were largely consistent with the initial press release Boardwalk had issued on March 18, 2018. The Form 10-Q stated:

> While we are continuing to review FERC's Revised Policy Statement, [Notice of Inquiry,] and NOPR, based on a preliminary assessment, we do not expect them to have a material impact on our revenues in the near term. All of the firm contracts on Gulf Crossing and the majority of contracts on Texas Gas Transmission, LLC are negotiated or discounted rate agreements, which are not ordinarily affected by FERC's policy revisions. Gulf South currently has a rate moratorium in place with its customers until 2023, which we believe will be unaffected by these actions.

JX 1201 at 40. The only addition was the reference to the absence of any material effect on revenue "in the near term." Boardwalk's initial press release had not limited the absence of a material impact to the near term, and the record does not suggest any additional analysis that would have shortened the time horizon of any effect. In reality, Boardwalk did not anticipate any material impact on revenue for the foreseeable future.

Despite this reassuring language, the Form 10-Q went on to disclose that in light of FERC's actions, Boardwalk's General Partner was evaluating the potential exercise of the Call Right (the "Potential Exercise Disclosures"). *See* JX 1201 at 40–42, 48. The Form 10-Q stated flatly: "***[O]ur general partner has a call right that may become exercisable because of recent FERC action. Any such transaction or exercise may require you to dispose of your common units at an undesirable time or price, and may be taxable to you.***" *Id.* at 48. Continuing, the Form 10-Q explained:

> [A]s has been described in our SEC filings since our initial public offering, our general partner has the right under our partnership agreement to call and purchase all of our common units if (i) it and its affiliates own more than 50% in the aggregate of our outstanding common units and (ii) it receives an opinion of legal counsel to the effect that our being a pass-through entity for tax purposes has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers by our subsidiaries that are regulated interstate natural gas pipelines. Because our general partner and its affiliates hold more than 50% of our outstanding common units, this call right would become exercisable if our general partner receives the specified opinion of legal counsel.
>
> ***42** The magnitude of the effect of the FERC's Revised Policy Statement may result in our general partner being able to exercise this call right. Any exercise by our general partner of its call right is permitted to be made in our general partner's individual, rather than representative, capacity; meaning that under the terms of our partnership agreement our general partner is entitled to exercise such right free of any fiduciary duty or obligation to any limited partner and it is not required to act in good faith or pursuant to any other standard imposed by our partnership agreement. Any decision by our general partner to exercise such call right will be made by [Holdings], the sole member of [GPGP], rather than by our Board.... *We have been informed by [Holdings] that it is analyzing the FERC's recent actions and seriously considering its purchase right under our partnership agreement in connection therewith.*

Id. at 48 (emphasis added).

In its Form 10-Q, Loews made similar disclosures. PTO ¶ 223. In addition to issuing its Form 10-Q, Loews amended its previously filed Schedule 13-D to state as follows:

> In light of the FERC announcement, the General Partner is analyzing the FERC's recent actions and seriously considering its purchase right under the Limited Partnership Agreement in connection therewith. The exercise of the purchase right would be subject to the approval of the Board of Directors of Loews. There is no assurance that the Loews Board will authorize the purchase or that the pre-conditions to the exercise of the purchase right under the Limited Partnership Agreement will be satisfied, and even if such preconditions are met, there is no assurance that there will be a determination by the General Partner to exercise the purchase right discussed herein or the timing thereof.

Id. ¶ 224.

Later on April 30, 2018, Boardwalk held an earnings call. *Id.* ¶ 225. During the call, Horton explained the formula for calculating the exercise price for the Call Right. *Id.* ¶ 226. He noted that the decision on the Call Right was for Loews to make and stated that "given where we are in this process, we need to rely on the disclosures and the relevant SEC filings and are unable to answer questions concerning the decision-making process or the possible timing of any such decision." *Id.* ¶ 227.

Loews made similar statements during its earnings call later that day. Jim Tisch informed investors that the FERC actions "may result in Loews being able to exercise a call right under the terms of the Boardwalk partnership agreement." *Id.* ¶ 228. He added:

> We at Loews are exploring all our options regarding these developments. Although we expect to be able to make a decision sometime this year, no decisions have yet been made. As you can imagine, we'll have to let our documents speak for themselves since

> we are constrained from answering any questions on this topic.

Id.

The initial market reaction to the announcements tracked the bump that Barclays anticipated. Boardwalk's units had closed at price of $11.04 per unit on April 27, 2018, the last trading day before the Potential Exercise Disclosures. *Id.* ¶ 277. On the day of the disclosures, Boardwalk's units traded up to a high of $12.70, before trading down to close at $11.37. *Id.*; JX 1774 at 2. Internally, Barclays bankers observed that the units were "up ~8.3% right now - firmly within the 7–10% estimate to which we guided." JX 1174 at 1.

After the initial market reaction, however, the implications of the Call Right began to sink in. On May 1, 2018, U.S. Capital Advisors downgraded Boardwalk "to Hold from Buy" and reduced its price target from $20 to $11. JX 1222 at 1. The report explained that any purchase by Loews "would be at a formula-derived price, which, if a deal were consummated, would likely result in limited upside on the price of BWP units." *Id.* at 2. McMahon was impressed by the analysis: "[a]mazing how good they are." *Id.* at 1. Alpert circulated the note to Loews management. JX 1232.

***43** Subjected to the overhang of the pricing formula, Boardwalk's trading price declined steadily. The units closed at $10.94 on May 1, then at $10.88 on May 2. On May 3, the price fell to $10.01. On May 4, it fell to $9.56. On May 7, the units closed at $9.26. PTO ¶ 277.

Fund managers and traders working for Bandera Partners LLC, one of the plaintiffs, initially viewed the price trend as a buying opportunity. On May 8, 2018, a fund manager emailed a colleague that "we should buy heavily at this price." *Id.* ¶ 278. On May 9, the colleague reported that "we bought with both hands today ... [and] we will likely get more stock tomorrow." *Id.*

But as investors began to understand the effect of the Call Right, they became outraged. TAM Capital Management published an open letter criticizing Loews. *See* JX 1915. After seeing that letter, the Bandera representatives began drilling down into the mechanics of the Call Right. *See* PTO ¶ 279.

On May 6, 2018, Deutsche Bank explained the "Prisoner's Dilemma" that Loews had created. JX 1270 at 2.

> Stakeholders could expect no higher price for shares of BWP than $11.50 unless Loews chose voluntarily to tender at a higher share price (or chose not exercise at all). Given that the probable "best" the stakeholders could do seemed to be around $11.50 in August 2017, there seemed to be little incentive to hold onto BWP shares above that price. And so the stock has begun to fall. However, as the stock falls, so too does the 180-average price for which Loews can demand tender. This has engendered a real-time game theory practice known as "the prisoner's dilemma." By this logic, the stakeholders assume the worst of their fellow stakeholders and aim to sell first in order to arguably ... get a better price than those who wait. This has created a pile-on where stakeholders are willing to part with their shares below what some might argue is fair value. And no shareholder has the incentive to pay more than this price if Loews has the option to tender below that price level.

Id.

On May 10, 2018, Barclays issued a research report that expressed concern about the potential exercise of the Call Right. The report noted that

> [w]hile the FERC actions could change the max rates the pipelines could charge, we note that Gulf Crossing is 100% negotiated rates while cost of service only makes up ~25% on Gulf South and Texas Gas, making it a bit difficult to see how [Boardwalk's] cash flows would be materially impacted later on as the

> FERC changes primarily impact cost of service contracts.

PTO ¶ 284. Barclays suggested that Loews appeared was using a "loophole" in the Partnership Agreement "to buy in the assets for what we believe is an extremely attractive price." *Id.* The report explained that

> the more appropriate thing for Loews to have done, if they were going to indeed buy in [Boardwalk], was to get the legal opinion and then just announce it would be buying in the MLP rather than just tease the market that they were "seriously considering" it, putting pressure on the stock and in essence, trying to time the potential purchase at a time that would be most favorable to them.

Id.

Loews' management did not like the report, particularly since Loews had used Barclays for advice on the Call Right. Siegel contacted Gary Posternack, Head of Global M&A at Barclays, to express his "dissatisfaction" with the report. *Id.* ¶ 285. Posternack emailed Jes Staley, Barclay's then-CEO, with a heads up that he might be "getting a call in the next day from Jim Tisch at Loews, who is very upset about some equity research commentary that our analyst put out. I should brief you before you speak." *Id.* The call ultimately did not take place.

***44** On May 15, 2018, with Boardwalk's trading price continuing to fall, JP Morgan issued an analyst report that described it as "fundamentally undervalued at this juncture." *Id.* ¶ 288. JP Morgan expressed the view that Loews should exercise the Call Right "at least at the ~$13/unit 180 trading VWAP leading up to the April 30 announcement should the company seek to avoid the perception of securities manipulation." *Id.* ¶ 289. JP Morgan subsequently issued a clarification stating that its report included "certain wording [which] could have inadvertently been construed as implying a legal conclusion." *Id.* ¶ 290.

By May 21, 2018, Bandera's views about Loews' actions had changed. Bandera issued a public letter addressed to Loews asserting that its actions had caused a "catastrophic collapse in the market price of Boardwalk's units" and that the "[t]he units' 180 consecutive trading day average, which sets the purchase price, is considerably lower than it would have been without this announcement." *Id.* ¶ 291. Bandera also cited Boardwalk's decision in 2014 to cut its distributions and the implications for the unit price:

> We believe that you, as stewards of Boardwalk's capital, made a tough but wise decision to slash the partnership's cash distribution, and invest substantial funds into the existing base of assets. While these strategic actions depressed unit prices, they were implemented to drive meaningful long-term returns for investors. We estimate that Boardwalk has raised over $3 billion from its limited partners to execute this long-term strategy. The benefits of these investments should accrue to all of the partnership's investors, not just Loews. This is why we believe the best outcome for unitholders would be for Loews to pass on its purchase right altogether. If Loews does exercise its option, we think that, at a minimum, it must do so only at a fair price and in accordance with straightforward procedures that accord with unitholders' reasonable expectations of fairness.

Id. ¶ 293.

R. Loews Ties Off The Acceptability Issue.

While the Potential Exercise Disclosures were having their effect on the market, Loews was tying off the loose ends created when the outside members of the GPGP Board had a hostile reaction to determining whether the Opinion satisfied the Acceptability Condition. In response to Alpert's appeal for expedited advice, Richards Layton had advised orally that it felt the "far better view" was that Holdings had the authority to make both the acceptability determination and the exercise decision. Raju Tr. 809, 842. Richards Layton "did not know Skadden had been asked to analyze this issue until after [Richards Layton] had given [its] oral advice to Loews." *Id.* at 809. It was only after Richards Layton provided this advice that Alpert sent over Skadden's analysis. *See* JX 1197. He then asked Richards Layton to speak with Skadden to see "if they can get on the same page." Alpert Dep. 224. When the firms connected on May 1, Skadden's "main point" was that "there is ambiguity and ambiguity is construed against the General Partner." JX 1228 at 1.

On May 1, 2018, Richards Layton sent Alpert an email memorializing their advice. JX 1225. The email stated that "[w]hile there is some ambiguity and arguments can certainly be made to the contrary, we think that the *better view* is that the [acceptability determination] is within the sole authority of the Sole Member [Holdings] pursuant to Section 5.6 of the LLC Agreement." *Id.* at 2–3 (emphasis added). The email included the following caveat:

> [I]f the Board of Directors is approached and declines to determine that the Opinion of Counsel is acceptable and the Section 15.1(b) call right is exercised by the Sole Member anyway, *that would be a difficult fact to overcome in any future litigation* regarding the exercise of the Section 15.1(b) call right.

***45** *Id.* at 3 (emphasis added). It was not until discovery in this litigation that Richards Layton learned that Loews had approached the GPGP Board and that the outside directors had reacted negatively to making the determination. *See* Raju Tr. 843.

Less than two hours after receiving the email, Alpert drafted and circulated new talking points for Siegel to deliver to the GPGP directors. JX 1213 at 1. Alpert's talking points represented that "*[w]e and outside counsel agree* that the documents provide that [Holdings'] authority to exercise the call right *includes* the ability to determine that the opinion of counsel is acceptable." *Id.* at 2 (emphasis added). That description did not match Skadden's view, so when the Skadden lawyers saw the talking points, they struck the "[w]e and outside counsel agree" and substituted "[w]e believe the better reading ... is." *See* JX 1863; 1864 at 1. At first, Alpert accepted the change. *See* JX 1852; 1853. But five minutes later, he reintroduced the reference to "outside counsel" and added: "—as we are confident that the sole member has the ability and authority to make the determination of an acceptable opinion." *See* JX 1850; 1851 at 1. Alpert sent the revisions to Baker Botts and Richards Layton but not to Skadden. *See* JX 1850.

That evening, Alpert, McMahon, Rosenwasser, Layne, and Richards Layton had a call "to get on the same page" about the acceptability determination. *See* McMahon Tr. 576–77; JX 1237 at 1. Alpert told Richards Layton that its email was too "measured" and did not reflect the strength of their oral advice. Alpert Dep. 214. After the call, Richards Layton sent Alpert a revised email saying that it was the "far better view" that Holdings could make the acceptability determination, but otherwise maintained its comments about ambiguity. *See* JX 1265 at 4.

Siegel then held follow-up calls with the members of the GPGP Board and told them that their involvement was not required after all. PTO ¶ 323; Siegel Dep. 235–36. The reversal of position worried the outside directors, who requested "a board call to discuss the partnership agreement and [their] obligations under that agreement." PTO ¶ 325; JX 1319 at 1.

On May 14, 2018, the GPGP Board met telephonically. JX 1318; *see also* JX 1435 at 1. Instead of having Skadden or Richards Layton lead the discussion, Alpert tapped Layne of Vinson & Elkins. Alpert knew Layne "was of the firm view ... even stronger than Rosenwasser, that the proper entity was the sole member, [Holdings]." Alpert Tr. 394. Unlike Skadden and Richards Layton, Layne never prepared a written analysis of the acceptability issue, and contemporaneous documents suggest that when presenting to the Board, he lumped together the question of authority to exercise with the determination of acceptability. [14]

14 Documents created on or around May 14 suggest that Layne only discussed who had the authority to exercise the Call Right and did not separately address the question of acceptability. *See* JX 1325 at 1; JX 1331 at 2; JX 1343 at 1; JX 1812 at 1. Two weeks later, Layne, McMahon, and trial lawyers at Vinson & Elkins and Foley & Lardner LLP signed off on minutes which only documented Layne addressing the Call Right's

exercise. JX 1435 at 1, 3. It was not until May 31, 2018, that McMahon revised the minutes to add a reference to the question of acceptability. JX 1444 at 1, 3. In pertinent part, McMahon revised the minutes to read, "Layne stated that if the 15.1(b) right is exercised, the outside directors would not approve that decision *or the appropriateness of the Opinion of Counsel.*" *Id.* at 3 (emphasis added). In his cover email, McMahon explained that "some changes" were "suggested by certain of the outside directors," and requested that Layne and the litigators call him if they "ha[d] any questions about them." JX 1444 at 1. Layne testified that he told the GPGP Board that, "under the LLC [A]greement, the board of directors did *not* have authority with respect to exercise of the call *or acceptability* of the opinion." Layne Dep. 216 (emphasis added).

***46** In any event, the GPGP's outside directors were "pleased that they did not have to be part of this very awkward process." Siegel Tr. 739. With the GPGP Board out of the picture and Baker Botts and Skadden prepared to deliver their opinions when asked, Loews was ready to exercise the Call Right.

S. The ADIT Issue Gets Worse.

With Loews preparing to exercise the Call Right, the uncertainty regarding the known unknown of ADIT grew worse. On May 14, 2018, SFPP submitted a compliance filing in response to the Order on Remand that FERC had issued in response to the *United Airlines* decision. The Order on Remand had directed SFPP to revise its filings in accordance with the Revised Policy. SFPP not only removed the income tax allowance, but also eliminated ADIT. *See* JX 1330 at 185–86. If SFPP had treated ADIT correctly, then the result would be a boon for Boardwalk, but fatal to the Opinion.

Loews, Boardwalk, and their advisors immediately focused on this development. *See* Johnson Tr. 684. Baker Botts was particularly attuned to the news, because Wagner was representing BP West Coast Products LLC and ExxonMobil Oil Corporation in the proceedings involving SFPP and filed a submission on their behalf that opposed SFPP's filing. *See* Wagner Tr. 304–05; Wagner Dep. 387–89; JX 1465 at 37.

The ADIT NOI process was also unfolding. Between May 21 and June 20, sixty industry participants filed comments, reply comments, or both in FERC's ongoing NOI proceeding. Court Report ¶ 74. The vast majority of comments from shippers and organizations aligned with their interests took the position that ADIT balances should be refunded or amortized on an accelerated basis. The vast majority of comments from pipelines and organizations aligned with their interests took the position that ADIT balances should be eliminated. *See* Webb Rebuttal ¶ 40 n.46 & Ex. 25; JX 1549 ¶ 9.

Van Ness Feldman and Vinson & Elkins, two of Boardwalk's go-to law firms, argued in favor of eliminating the ADIT balances on behalf of multiple pipeline clients. *See*, *e.g.*, JX 1382 at 2, 18–23; JX 1460 at 4, 6–7, 18. They did not make that argument on behalf of Boardwalk, even though its subsidiaries had accumulated ADIT balances totaling at least $750 million. *See* JX 644 at 1. The reality was that Boardwalk could not advocate publicly to eliminate its ADIT balance without undercutting the Rate Model Analysis and the assumptions driving the Opinion. Instead, Boardwalk publicly advocated for a middle ground—either the Reverse South Georgia Method or the Average Rate Assumption Method. JX 1388 at 11 (NOI Comments).

Privately, however, Boardwalk wanted FERC to eliminate ADIT. *See* JX 797 at 1 (Boardwalk not wanting to "give up [the] argument" that "the Policy Statement essenti8ally [sic] eliminates ADIT"). To advance that position, Boardwalk management lobbied FERC through the Interstate Natural Gas Association of America ("INGAA"). *See* JX 1457 (INGAA NOI Comments) at 7; Horton Dep. 183. Boardwalk has been a member of INGAA for almost three decades. McMahon Tr. 565–66. McMahon, Boardwalk's general counsel, is the Chairman of INGAA's Legal and Rates Committee, serves on INGAA's Board of Directors, and served as the Chair of INGAA's Board of Directors in 2016. *See* McMahon Dep. 23–24. Johnson also serves on INGAA's Legal and Rates Committee, along with two other Boardwalk executives. *See* Johnson Dep. 78; McMahon Tr. 566–67. Attorneys at Van Ness Feldman reviewed the comments, and the defendants' privilege log reveals Boardwalk executives and Van Ness Feldman were heavily involved. McMahon Tr. 572–73; McMahon Dep. 29–30; JX 1881 (Privilege Log) at Rows 3527–44, 3565–76, 3580–83. [15]

15 Despite this evidence, at their depositions and at trial, McMahon and Johnson attempted to distance themselves from INGAA's comments. *See* McMahon Dep. 30–31; Johnson Dep. 183–84.

***47** McMahon and Johnson also met with FERC staff on June 12, 2018, "as part of a group from [INGAA]" to discuss "Taxes and ADIT." JX 1680 at 45; JX 1464 at 1. McMahon and Johnson had helped INGAA prepare a supporting presentation, but FERC ended up prohibiting the discussion of ADIT at the last minute. *See* JX 1463 at 1; JX 1471 at 2. The presentation nevertheless made a compelling case that ADIT represented "a cost-free form of financial capital," was "not a loan from customers but from the federal government," and should be handled in accordance with IRS normalization rules, all of which were premises for the argument that ADIT balances should be eliminated. *See* JX 1476 at 6–8.

Even though it was obvious that ADIT was an unsettled issue, and even though everyone knew that different outcomes for ADIT were possible, Baker Botts did not update its analysis. No one prepared sensitivity analyses for different outcomes regarding ADIT. The Preliminary Opinion provided the answer Loews wanted, and developments in the real world were not going to change that.

T. This Litigation And The Original Settlement

On May 24, 2018, two holders of common units (the "Original Plaintiffs") filed this action and moved for expedited proceedings. The Original Plaintiffs wanted to prevent the General Partner from exercising the Call Right using a 180-day measurement window that included trading days that had been affected by the Potential Exercise Disclosures. The defendants opposed the motion, arguing that the dispute was not ripe because the General Partner had not yet elected to exercise the Call Right.

Five days after the action was filed, the court held a hearing on the motion to expedite. The court agreed with the defendants and denied the motion.

Having defeated the motion to expedite on the theory that the claims were not yet ripe, defense counsel contacted the lawyers for the Original Plaintiffs the very next day to explore settling the non-justiciable claims. A settlement in this litigation would give the defendants the ultimate protection: a global release of claims relating to the exercise of the Call Right.

The lawyers for the Original Plaintiffs understood that Loews wanted to exercise the Call Right. They offered up a settlement, including a global release, if Loews did what it wanted to do. As part of the negotiations with the defendants, lead counsel made precisely that argument, telling defense counsel, "Your clients want to make this purchase. Getting a release on a deal they want to make anyway is actually an amazing outcome for them." Dkt. 56 Ex. 1.

The Original Plaintiffs initially proposed settling if the General Partner agreed to exercise the Call Right using June 1, 2018, as the end date for the 180-day measurement period, which would have included twenty-four trading days after the issuance of the Potential Exercise Disclosures in the calculation of the Purchase Price. The defendants countered with an end date of September 1, 2018, which would have included sixty-four trading days after the issuance of the Potential Exercise Disclosures in the calculation.

On June 11, 2018, eighteen days after the lawsuit was filed, the parties agreed that Loews would exercise the Call Right on or before June 29, 2018. The resulting period included forty-four affected days in the pricing formula. Using that end date, the formula yielded a Purchase Price of $12.06 per unit.

On June 22, 2018, the parties informed the court by email that they had reached an agreement in principle and asked the court to review the settlement papers *in camera.* JX 1487. The court rejected that request as seeking a non-public advisory opinion. Dkt. 26.

That night, the parties filed a stipulation of settlement. JX 1496 (the "Original Settlement"). Under its terms, the defendants would receive a global release as long as the General Partner exercised the Call Right on or before June 29, 2018—the day that Barclays had projected Loews might exercise. *Id.* at 15–16; JX 915 at 15. That date was optimal for the defendants because it ensured that purchases under the Call Right would close before FERC's regularly scheduled meeting on July 19, when FERC was expected to make additional announcements regarding the subject matter of the March 15 FERC Actions. *See* PA § 15.1(c) (governing timing of exercise, notice and purchase date); JX 793 at 1 ("[T]he Commission indicated its desire to issue an order on the [NOPR] in its July meeting which will take place on July 19."). The Original Settlement contemplated a fee award for plaintiffs' counsel "in an amount not to exceed $1.8 million." JX 1496 at 20.

U. Baker Botts Renders The Opinion.

***48** Believing that they had secured a settlement that would extinguish and release any challenges to the exercise of the Call Right, Loews asked its advisors to finalize their work product. *See* JX 1489 at 1 (Richards Layton email thread reporting that "Loews is likely to settle its litigation this evening and is likely to exercise the purchase right on Friday").

On June 29, 2018, Baker Botts delivered the Opinion. JX 1522. It was substantially unchanged from the Preliminary Opinion that Baker Botts had provided on April 29.

The Opinion resembled a closing opinion in that it expressed a conclusion, without supporting reasoning or citations to legal authority. The Opinion did not reference a single case or statute, much less provide any discussion or application. The Opinion thus proceeded as if Baker Botts were opining on a routine issue, such as the due formation of an entity, its good standing, or its authority to enter into an agreement.

As is customary in a closing opinion, the Opinion began by listing the materials that Baker Botts had consulted. The Opinion next provided its conclusion, consisting of the following statement:

> On the basis of the foregoing, and subject to the assumptions, limitations, and qualifications set forth herein, we are of the opinion that the status of the Partnership as an association not taxable as a corporation and not otherwise subject to an entity-level tax for federal, state or local income tax purposes has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers by subsidiaries of the Partnership that are regulated interstate natural gas pipelines (the "**Subsidiaries**").

Id. at 2.

The Opinion then provided two paragraphs summarizing the Financial Data. Those paragraphs stated:

> In rendering this opinion, we have requested and received from the Partnership cost, rate and other financial information, including projections, estimates and pro forma information ("**Financial Data**") relating to the Partnership and the Subsidiaries, which we have relied upon. We have been assisted in our review of the Financial Data by a consultant engaged by us with expertise in the calculation of the cost of service of regulated interstate natural gas pipelines. The Financial Data includes a calculation of the estimated cost of service of each of the Subsidiaries under two scenarios. In preparing Financial Data pertaining to both scenarios, the Partnership made several assumptions, including that each Subsidiary would charge all its customers the maximum applicable rate, and as a result, each Subsidiary would recover its entire cost of service. The first scenario included in the cost of service of each Subsidiary an income tax allowance derived from the current federal, state and local income tax rates. The second scenario excluded an income tax allowance from the cost of service of each Subsidiary. We have participated in conferences with officers and other representatives of the Partnership, [the General Partner] and [the GPGP] in which the Financial Data, as well as other matters, were discussed. The purpose of our engagement, however, was not to establish or confirm the accuracy of factual matters or the reasonableness of projections, estimates or pro forma information provided to us or reviewed by us. Therefore, we have assumed that the Financial Data is correct in all material respects, that all calculations were performed accurately in all material respects and that the Financial Data was prepared in a reasonable manner and in good faith.

***49** With regard to the Financial Data, in rendering our opinion referred to above, we relied substantially on the fact that the Financial Data indicated that the removal of the income tax allowance derived from the current federal, state and local income tax rates from the cost of service of the Subsidiaries would result, in the case of each Subsidiary, in an estimated reduction in excess of ten percent in the maximum applicable rates that can be charged to the customers of each of the Subsidiaries on a long-term basis. The Financial Data included a "Rate Model Analysis for 2017," which compared an estimate of (a) the maximum applicable rate that each Subsidiary could charge its customers, based on the development of a system wide rate for each Subsidiary and assuming each Subsidiary could include an income tax allowance derived from the current federal, state and local income tax rates in its cost of service with (b) the maximum applicable rate that each Subsidiary could charge its customers, based on the development of a system wide rate for each Subsidiary and assuming that each Subsidiary could not include any income tax allowance in its cost of service. The Rate

> Model Analysis indicates that elimination of an income tax allowance from the cost of service would result in an estimated 12.12% decline in the maximum applicable rate for Texas Gas Transmission, LLC, an estimated 11.68% decline in the maximum applicable rate for Gulf South Pipeline Company, LP, and an estimated 15.62% decline in the maximum applicable rate for Gulf Crossing Pipeline Company LLC. We also took notice that, because these reductions in the maximum applicable rates would not be offset by any reduction in costs incurred by the Subsidiaries, the reductions in the maximum applicable rates would have a substantially larger percentage impact on the earnings before interest and taxes and on the cash available for distribution of each of the Subsidiaries assuming each Subsidiary could actually charge and collect its maximum applicable rate.

Id. at 3.

The remainder of the Opinion consisted of a series of assumptions. *Id.* at 3–5. They included the following:

- "[T]he Revised Policy will not be revised, reversed, overturned, vacated, modified or abrogated in any relevant manner by any court or administrative or executive body, including the FERC, or by an act of Congress;" and

- "[T]he Revised Policy will be applied to individual FERC regulatory proceedings involving the Subsidiaries in accordance with its terms ...."

Id. at 4.

This section of the Opinion also included descriptions of how Baker Botts interpreted the terms "maximum applicable rate" and "material adverse effect." On the issue of "maximum applicable rate," the Opinion stated:

> Based on the wording of Section 15.l(b)(ii) of the Partnership Agreement, other provisions of the Partnership Agreement and support in the Registration Statement (particularly the final prospectus included therein), in rendering the opinion set forth above, we have, in using our judgment, interpreted the words (a) "maximum applicable rate that can be charged to customers by subsidiaries that are regulated interstate natural gas pipelines of the Partnership," to mean the recourse rates of the Subsidiaries now and in the future as that term is used by the FERC in its regulations, rulings and decisions, and (b) "status as an association not taxable as a corporation," to mean status as an entity not taxable as a corporation.

Id. at 4.

On the issue of "material adverse effect," the Opinion stated:

> The term "material adverse effect" as used in Section 15.1(b)(ii) of the Partnership Agreement is not defined in the Partnership Agreement or in the Delaware Revised Uniform Limited Partnership Act. In rendering the opinion set forth above, we have considered Delaware case law construing such term. Our analysis leads us to the conclusion that there is no case directly applicable to this situation and no bright-line test regarding what is a "material adverse effect," although the case law has provided us some guidance.

Id. at 4.

Baker Botts limited its Opinion to "applicable federal law of the United States, the Delaware Revised Uniform Limited Partnership Act, the Delaware Limited Liability Company Act, and, only to the extent relevant, in our judgment, to the opinion set forth above, Delaware law as it applies to the interpretation of contracts." *Id.* at 5. A non-Delaware law firm thus rendered a non-explained opinion on the existence of a material adverse effect, a subject on which both a Delaware law firm (Richards Layton) and a national law firm with a Delaware office (Skadden) would not opine.

On the same day that Baker Botts rendered the Opinion, the firm's rate expert—Sullivan—testified in a proceeding before FERC that it was impossible to assess the effects of changing the income tax allowance without a determination on the treatment of ADIT. Webb. Tr. 949.

V. The General Partner Exercises The Call Right.

After receiving the Opinion, Loews management recommended that Loews cause the General Partner to exercise the Call Right. *See* JX 1515 at 2; JX 1523 at 2–3. In their "Updated Base Case," management estimated that the transaction would generate more than $1.5 billion in

"Value Creation" for Loews. JX 1515 at 9. After discussion, the Loews board of directors adopted resolutions authorizing Holdings to exercise the Call Right on behalf of the General Partner. JX 1523 at 4.

***50** The Holdings Board met afterwards. *See* JX 1509. Skadden made a presentation concluding that "it would be within the reasonable judgment of [Holdings] to find that" the Opinion was acceptable. JX 1518 at 23. Comprised of three Loews insiders, the Holdings Board approved resolutions deeming the Opinion acceptable and exercising the Call Right. *See* JX 1509 at 5–9.

Later that day, Boardwalk announced that the General Partner had elected to purchase all outstanding units at a price of $12.06 per common unit, for approximately $1.5 billion in total consideration. JX 1526 at 1. Ten days later, on July 18, 2018, the transaction closed on schedule. *See* JX 1547 at 2.

W. FERC Makes Its Determinations.

Hours after the closing, FERC issued an order on rehearing of the Revised Policy and a final rule in response to the NOPR. JX 1549 (the "Order on Rehearing"); JX 1546 (the "Final Rule"). In the Order on Rehearing, FERC reiterated that its policy would not automatically permit MLP pipelines to recover an income tax allowance in their cost of service, but MLPs would not be precluded from arguing in a rate case that they were entitled to an income tax allowance based on an evidentiary record. JX 1549 ¶ 8.

Critically, FERC stated that MLPs that were no longer entitled to an income tax allowance could eliminate their overfunded ADIT balances without returning the balances to rate payers (whether by refund or amortization). *See id.* ¶ 10. The Commission based its ADIT decision on the arguments raised by pipeline-side commenters in the NOI docket and INGAA's presentation to FERC staff. *Id.* ¶ 13.

In its Final Rule, FERC adopted the procedures proposed in the NOPR with certain modifications, required all interstate natural gas pipelines to file a Form 501-G, provided options for each pipeline to address the recovery of tax costs (including filing a statement explaining why an adjustment to rates was not needed), and reiterated that a rate reduction might not be justified for a significant number of pipelines for several reasons. *See* JX 1546. Consistent with the Order on Rehearing, FERC "modifie[d] the proposed Form 501-G so that, if a pass-through entity state[d] that it d[id] not pay taxes, the form w[ould] not only eliminate its income tax allowance *but also eliminate ADIT.*" *Id.* ¶ 132 (emphasis added). The Commission reasoned that doing otherwise would violate the prohibition against retroactive ratemaking. *Id.* ¶¶ 133–34. The DC Circuit ultimately agreed that returning ADIT to shippers would violate the prohibition against retroactive ratemaking. *SFPP*, 967 F.3d at 801 (dismissing shippers' contrary arguments as "non-starters").

The Final Rule meant there would be no effect on Boardwalk's recourse rates. When one of his colleagues who had worked on the Opinion commented that the news "sounds pretty good for MLPs," Rosenwasser responded: "Seems all mitigates adverse effect without changing policy. Loews buy in of [B]oardwalk closed day before order came out." JX 1569 at 1.

Johnson circulated the news within Boardwalk. One of the executives responded, "Maybe I wish we were still publically [sic] traded..... [sic]." JX 1532 at 1.

On August 3, 2018, Wagner sent McMahon a summary of FERC's actions, copying Rosenwasser and Alpert. Confirming that the March 15 FERC Actions had opened the door to changes in ADIT, he explained that "FERC's March 2018 Revised Policy Statement created an issue of first impression by prohibiting MLP-owned pipelines from collecting a tax allowance, which raised the issue of how to treat the ADIT." JX 1578 at 1. He also confirmed the effect of the Order on Rehearing: "FERC announced that MLP-owned pipelines may reduce the balance to zero without providing any refunds or rate reductions. *This has the net effect of reducing the pipeline's exposure to rate reductions.*" *Id.* (emphasis added).

X. The Current Plaintiffs Pursue The Litigation.

***51** The current plaintiffs objected to the Original Settlement. On September 28, 2018, the court declined to approve the Original Settlement. Because the current plaintiffs had prevailed on their objections, the court permitted them to take over the litigation.

The court subsequently certified a plaintiffs' class consisting of:

> Any natural person or entity who held Boardwalk limited partnership units on July 18, 2018 and whose units were purchased on that date by Boardwalk

> GP, LP, together with their heirs, assigns, transferees, and successors in interest, but excluding Defendants, their successors in interest and assigns, and any natural person or entity that is a director, officer or affiliate of any of the foregoing

Dkt. 194 ¶ 1. The case proceeded through discovery and to trial.

II. LEGAL ANALYSIS

The plaintiffs proved that the General Partner breached the Partnership Agreement by exercising the Call Right without first satisfying the Opinion Condition or the Acceptability Condition. By acting manipulatively and opportunistically, the General Partner engaged in willful misconduct when it exercised the Call Right, and the exculpatory provisions in the Partnership Agreement therefore do not protect the General Partner from liability. This decision does not reach the plaintiffs' other claims.

A. Governing Principles Of Contract Law

The plaintiffs' principal claim asserts that the General Partner breached the Partnership Agreement, which is a contract governed by Delaware law. Delaware law therefore governs the claim for breach of the Partnership Agreement.

Under Delaware law, the elements of a breach of contract claim are (i) a contractual obligation, (ii) a breach of that obligation by the defendant; and (iii) causally related harm to the plaintiffs. *WaveDivision Hldgs. v. Millennium Digit. Media Sys., L.L.C.*, 2010 WL 3706624, at *13 (Del. Ch. Sept. 17, 2010). No one disputes the status of the Partnership Agreement as a binding contract. No one disputes that the General Partner exercised the Call Right and acquired the publicly held units, thereby causing the resulting effects on the plaintiffs. The central issue is the question of breach. If the General Partner breached the Partnership Agreement, then the court must determine the quantum of harm, which also logically will serve as the measure of damages.

To determine the scope of a contractual obligation, "the role of a court is to effectuate the parties' intent." *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 739 (Del. 2006). "If a writing is plain and clear on its face, *i.e.*, its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent." *City Investing Co. Liquidating Tr. v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993). A writing is plain and clear on its face "[w]hen the plain, common, and ordinary meaning of the words lends itself to only one reasonable interpretation...." *Sassano v. CIBC World Mkts. Corp.*, 948 A.2d 453, 462 (Del. Ch. 2008). When a writing is plain and clear, the court "will give priority to the parties' intentions as reflected in the four corners of the agreement, construing the agreement as a whole and giving effect to all its provisions." *In re Viking Pump, Inc.*, 148 A.3d 633, 648 (Del. 2016) (internal quotations omitted).

***52** A writing that is ambiguous is not plain and clear on its face, and the text of the agreement therefore cannot be the exclusive source of contractual meaning. "[A] contract is ambiguous only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings." *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). "A contract is not rendered ambiguous simply because the parties do not agree upon its proper construction." *Id.*

If the language of a contract is ambiguous, then a court may look beyond the contract itself to determine the parties' shared intent. Under appropriate circumstances, extrinsic evidence sheds light on "the expectations of contracting parties" and can "reveal[ ] ... the way contract terms were articulated by those parties." *SI Mgmt. L.P. v. Wininger*, 707 A.2d 37, 43 (Del. 1998). Because its purpose is to elucidate "the expectations of contracting parties," extrinsic evidence is only relevant when it "can speak to the intent of *all* parties to a contract." *Id.* "Thus, it is proper to consider extrinsic evidence of bilateral negotiations when there is an ambiguous contract that was the product of those negotiations ...." *Id.* It follows that if there have not been "bilateral negotiations," then "extrinsic evidence is irrelevant to the intent of *all* parties at the time they entered into the agreement." *Id.* at 43–44.

A partnership agreement for an MLP is not the product of bilateral negotiations; the limited partners do not negotiate the agreement's terms. Extrinsic evidence therefore cannot speak to the intent of all parties to the agreement. In that setting, Delaware courts apply the doctrine of *contra proferentem* and "construe ambiguous provisions of the partnership agreement against the general partner." Martin I. Lubaroff et al., *Lubaroff & Altman on Delaware Limited Partnerships* § 14.02[B], at

14-39 (2d ed. 2021 Supp.); *see Dieckman v. Regency GP LP*, 155 A.3d 358, 366 n.18 (Del. 2017); *Norton v. K-Sea Transp. P'rs L.P.*, 67 A.3d 354, 360 (Del. 2013). In addition to recognizing that extrinsic evidence is unhelpful in that setting, the doctrine of *contra proferentem* "protects the reasonable expectations of people who join a partnership or other entity after it was formed and must rely on the face of the [entity] agreement to understand their rights and obligations when making the decision to join." *Stockman v. Heartland Indus. P'rs, L.P.*, 2009 WL 2096213, at *5 (Del. Ch. July 14, 2009).

B. The Failure To Satisfy The Opinion Condition

Before the General Partner could exercise the Call Right, the General Partner had to satisfy the Opinion Condition. For that condition to be satisfied, the General Partner had to receive "an Opinion of Counsel that the Partnership's status as an association not taxable as a corporation and not otherwise subject to an entity-level tax for federal, state or local income tax purposes has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers." PA § 15.1(b)(ii). If the General Partner exercised the Call Right without satisfying the Opinion Condition, then the exercise of the Call Right breached the Partnership Agreement. The General Partner obtained the Opinion, but the plaintiffs proved at trial that the Opinion was not a *bona fide* "Opinion of Counsel" that could satisfy the Opinion Condition. The General Partner therefore breached the Partnership Agreement.

***53** When parties to a contract agree that the delivery of an opinion of counsel is necessary to satisfy a condition precedent, "it is [counsel]'s subjective good-faith determination that is the condition precedent." *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2016 WL 3576682, at *11 (Del. Ch. June 24, 2016), *aff'd*, 159 A.3d 264 (Del. 2017). Counsel renders on opinion in subjective good faith by applying expertise to the facts in an exercise of professional judgment. *Id.*

Beyond that foundational principle, Delaware decisions have not expounded on what it means for an opinion giver to act in subjective good faith. In a related setting, the Delaware Supreme Court has held that a general partner violated the implied covenant of good faith and fair dealing by relying on an opinion "that did not fulfill its basic function." *Gerber v. Enter. Prod. Hldgs., LLC*, 67 A.3d 400, 422 (Del. 2013), *overruled on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013). That holding implies that an opinion giver cannot render an opinion in good faith if the opinion giver knows that the opinion does not fulfill its basic function.

Authorities on the rendering of closing opinions confirm related and self-evident propositions about what it means for an opinion giver to render an opinion in good faith.[16] For example, an opinion giver plainly must have competence in the particular area of law. *See* Glazer et al., *supra*, § 2.7.1 at 61–62. An opinion giver who knowingly lacks competence in the area of law and nevertheless proceeds is not acting in good faith. In that setting, the opinion giver must look elsewhere for the relevant experience, and an opinion giver who lacks the competence to opine on an area of law may rely on an opinion from counsel with competence in that area. *See id.*; TriBar Report, *supra*, § 5.1 at 637–39.

16 *See, e.g.*, Restatement (Third) of the Law Governing Lawyers §§ 50, 51, 95, Westlaw (Am. L. Inst. database updated Oct. 2021) [hereinafter Restatement]; Donald W. Glazer et al., *Glazer & FitzGibbon on Legal Opinions* (2d ed. 2001); Legal Ops. Comm. of the ABA Section of Bus. L., *Legal Opinion Principles*, 53 Bus. Law. 831 (1998) [hereinafter Opinion Principles]; TriBar Op. Comm., *Third-Party "Closing" Opinions: A Report of the Tribar Opinion Committee*, 53 Bus. Law. 591 (1998) [hereinafter TriBar Report] *see also* Legal Ops. Comm. of the ABA Section of Bus. L., *Third-Party Legal Opinion Report, Including the Legal Opinion Accord, of the Section of Business Law, American Bar Association*, 47 Bus. Law. 167 (1991) [hereinafter ABA Accord]. As stated in the text, this decision regards the principles it articulates as self-evident manifestations of what it means for an opinion giver to act in subjective good faith. This decision cites the authorities as providing illustrative support for those principles.

These principles apply equally to the rendering of opinions on matters of Delaware entity law, where it is nevertheless customary for sophisticated law firms to provide third-party closing opinions on routine matters, such as due formation. Glazer et al., *supra*, § 2.7.1 at 94.

> Non-Delaware lawyers, however, normally do not render opinions on more difficult questions of Delaware

corporation law or on questions arising under Delaware commercial law. In those circumstances, they usually rely on an opinion of Delaware counsel or deal with the issue in some other way, for example by relying on an express assumption.

***54** *Id.* § 2.7.3 at 64–65. Although the quoted passage discusses Delaware corporate law, those same principles apply to opinions involving other types of Delaware entities. *See id.* § 2.7.3 at 65.

It is also self-evident that an opinion giver must act in good faith when establishing the factual basis for an opinion, including when making assumptions. Legal opinions "do not address the law in the abstract. Rather, they apply the law to real companies in real transactions." *Id.* § 4.1 at 82. Legal opinions accordingly "require grounding in the facts as well as the law." *Id.* The opinion giver usually will have firsthand knowledge of some of the facts necessary to render the opinion, but rarely will the opinion giver have firsthand knowledge of all of the necessary facts. [17]

17 *See* Glazer et al., *supra*, § 4.1, at 83, 85–86; Opinion Principles, *supra*, § III.A at 833; Tribar Report*, supra*, §§ 2.1.1 to .1.2 at 608–09.

To establish the factual basis for an opinion, the opinion giver can rely in good faith on factual information provided by others. [18] An opinion giver cannot act in good faith by relying on information known to be untrue or which has been provided under circumstances that would make reliance unreasonable. [19] For example, an opinion giver could not rely in good faith on information if the opinion giver knew that the person providing the information had not done the work required to support it. *See* Glazer et al., *supra*, § 4.2.3.6 at 105. An opinion giver also could not rely in good faith on factual representations that effectively establish the legal conclusion being expressed. *See* Opinion Principles, *supra*, § III.C at 833. If the factual representations are "tantamount to the legal conclusions being expressed," then the opinion giver is regurgitating facts, not giving an opinion in good faith. *See id.*

18 *See* Glazer et al., *supra*, § 4.1 at 83; Restatement, *supra*, § 95 cmt. c.

19 *See* Glazer et al., *supra*, §§ 4.1, 4.2.3 at 83, 95–96; Restatement, *supra*, § 95 cmt. c.; Opinion Principles, *supra*, §§ I.F, III.A at 832–33; TriBar Report, *supra*, § 2.1.4 at 610.

In lieu of factual representations, an opinion giver may establish the factual predicate for an opinion by making assumptions that certain facts are true. *See* Glazer et al., *supra*, §§ 4.1, 4.3.1 at 83, 109; Restatement, *supra*, § 95 cmt. c. Whether the opinion giver can make an assumption in good faith depends on the nature of the opinion. If an assumption or set of assumptions effectively establishes the legal conclusion being expressed, then the opinion giver cannot properly rely on those assumptions, as doing so vitiates the opinion. *See* Opinion Principles, *supra*, §§ III.C–D at 833; ABA Accord, *supra*, ¶ 4.6 at 189–90. As with factual representations, if the assumptions establish the legal conclusions being expressed, then the opinion giver is simply making assumptions, not giving an opinion in good faith.

Although an opinion giver cannot rely on factual information known to be untrue, an opinion giver can base an opinion in good faith on an assumption that is contrary to existing fact. The flexibility to rely on a counterfactual assumption enables an opinion giver to render an opinion based on facts that do not exist on the date of the opinion but that the giver and recipient are confident will exist in the future. *See* Glazer et al., *supra*, § 4.3.6 at 119. For example, an opinion giver might assume that stock will be duly authorized after the closing of a transaction once necessary filings are made. *Id.* Or the opinion giver may use counterfactual assumptions to address situations that are not expected to arise, but which the recipient wants the opinion giver to address, such as the possibility that the law of a particular jurisdiction may govern the transaction. *Id.*

***55** To rely in good faith on a counterfactual assumption, the opinion giver must identify the assumption explicitly. The opinion giver cannot rely in good faith on an unstated factual assumption that is known to be untrue. *See* Glazer et al., *supra*, § 4.3.4 at 115; Restatement, *supra*, § 95 cmt. c; TriBar Report, *supra*, § 2.3(c) at 616.

In this case, the Opinion Condition limited the ability of the opinion giver to rely on assumptions. To satisfy the Opinion Condition, the opinion giver had to conclude that Boardwalk's status as a pass-through entity for tax purposes "has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers." PA § 15.1(b)(ii). The Opinion Condition required an opinion about an actual event ("has ... a material adverse effect") or a future event ("will reasonably likely in the future have a material adverse effect"). The opinion giver thus was not being asked to opine on a counterfactual event. To render that Opinion, the opinion giver could make good faith *predictions* about what would happen in the future, but the opinion giver could not *assume* what would happen in the future. In particular, the opinion giver could not construct a set of assumptions about the existence of future facts that would generate the conclusion that the Opinion Condition required.

The plaintiffs proved that the Opinion did not reflect a good faith effort to discern the actual facts and apply professional judgment. Instead, Baker Botts made a series of counterfactual assumptions that were designed to generate the conclusion that Baker Botts wanted to reach. Baker Botts then deployed those assumptions as part of a syllogism that turned on elementary subtraction. In the process, Baker Botts stretched its analysis in myriad other ways. The Opinion was a contrived effort to reach the result that the General Partner wanted.

1. The Assumptions

In the Opinion, Baker Botts made a series of counterfactual assumptions. One was explicit. The rest were not. Baker Botts did not make those assumptions legitimately because its client asked for a hypothetical opinion about a set of alternative facts. Instead, Baker Botts made those assumptions because Baker Botts knew they were the only way that the firm could purport to reach the outcome that its client wanted. By making those assumptions, Baker Botts did not address whether an event had occurred that "has or will reasonably likely in the future have a material adverse effect." Baker Botts addressed an imaginary scenario that was never reasonably likely to come to pass.

a. Counterfactual Assumption: The Revised Policy Was Final.

To facilitate the exercise of the Call Right, Baker Botts assumed that the Revised Policy was final such that FERC had "revers[ed] its prior policy of allowing interstate natural gas pipelines owned by publicly traded partnerships ... to include an income tax allowance in their cost of service." JX 1522 at 1. Baker Botts also assumed that "the Revised Policy will be applied to individual FERC regulatory proceedings involving the Subsidiaries in accordance with its terms and will not be directly or indirectly revised to allow any of the Subsidiaries to recover an income tax allowance in its cost-of-service rates." *Id.* at 4. Those assumptions were contrary to known facts.

***56** An agency's statement of policy "is not finally determinative of the issues or rights to which it is addressed," but rather, only "announces the agency's tentative intentions for the future." *Pac. Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Circ. 1974); *see Consol. Edison Co. of NY, Inc. v. FERC*, 315 F.3d 316, 323 (D.C. Cir. 2003) (" 'Policy statements' differ from substantive rules that carry the 'force of law,' because they lack 'present binding effect' on the agency." (quoting *Interstate Nat. Gas Ass'n v. FERC*, 285 F.3d 18, 59 (D.C. Cir. 2002))). Because of these attributes, "when [an] agency applies [a general statement of] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued." *Pac. Gas*, 506 F.2d at 38.

Those principles of law applied with greater force to the Revised Policy, which was subject to further regulatory proceedings. Court Tr. 861. FERC stated in the concurrently issued NOPR that it intended to promulgate regulations to address the effects of the Revised Policy "on the rates of interstate natural gas pipelines organized as MLPs." JX 579 ¶ 8. When announcing the March 15 FERC Actions, Commission personnel responded to a question asking when "FERC Jurisdictional Rates [would] actually change," by saying that "the NOPR anticipates that the deadlines for pipeline filings will be late summer or early fall [2018]. *We obviously have to go to a final rule first.*" PTO ¶ 117 (emphasis added). Absent a final rule and the filing of a rate case, jurisdictional rates, i.e. recourse rates, would not change.

Over the next four months, Boardwalk joined other pipelines, shippers, trade associations, and other industry participants in seeking to change the Revised Policy. Collectively, they filed thirteen requests for rehearing, 108 comments, sixteen reply comments, and numerous other submissions in response to the March 15 FERC Actions. *See* PDX 9 at 12; Court Tr. 858. And while the regulatory process was unfolding, members of Congress were "grill[ing]" the FERC commissioners about whether they were pursuing an appropriate policy. *See* JX 1076 at 1. The regulatory situation was in flux, and no one could predict where matters would end up. *See* JX 1525 at 67 (Sullivan testifying that "FERC's income tax allowance policy for 'pass through entities' is still being determined").

Baker Botts understood that reality, and Wagner explained those facts to Alpert in an email on March 20, 2018. JX 626. Wagner observed that "[s]tanding alone, [the Revised Policy] does not require pipelines to take any action." *Id.* at 1. He noted that by issuing the NOPR, FERC had made clear that it would implement the policy through regulations. *Id.* He added that if the final regulations called for the contemplated Form 501(g) filing, then those filings "*may* lead to rate challenges," but that those challenges would not be resolved until 2020 at the earliest. *Id.* (emphasis added). Alpert, however, pushed Baker Botts to take the position that the March 15 FERC Actions were sufficiently final to render the Opinion. In a call that Alpert convened shortly after receiving Wagner's email, Rosenwasser told Alpert what Loews wanted to hear. Rosenwasser agreed that the "most important thing has happened" and that "we're already there." JX 646 at 5.

Rosenwasser knew that was not true. He knew about and understood Wagner's analysis. Later, he acknowledged in his backup memorandum that "FERC could choose in its discretion to change the Revised Policy." JX 1502 at 10. In the April 4 Draft, Baker Botts recognized that "[i]mportant details of implementing the Revised Policy require clarification, and as a result our understanding regarding the implementation of the Revised Policy could prove to be incorrect." *See* JX 1949 at 2. That candid language did not appear in the final Opinion.

***57** Boardwalk's executives did not believe that the Revised Policy was final. In Boardwalk's comments on the NOPR, they pointed out that the Revised Policy "is not a binding rule." JX 1139 at 2. They asked FERC to modify the Revised Policy by "eliminat[ing] issues related to the MLP income tax allowance from the proposed rule," and they asserted that the Revised Policy was "arbitrary and capricious and not the product of reasoned decisionmaking." *Id.* They also cautioned that any determination by the Commission to implement the Revised Policy needed to take into account the related issue of ADIT. *Id.* at 5.

Rosenwasser reviewed and marked up Boardwalk's comments on the NOPR, and he double-starred Boardwalk's statement that "[u]ntil the Commission provides a final decision on the treatment of ADIT, Boardwalk cannot correctly assess the impact of the Revised Policy Statement and ADIT on its pipelines' costs of service." JX 1138 at 14. That was exactly what Baker Botts was purporting to do in the Opinion. And Baker Botts was going further by assuming that the Revised Policy was final not only for the purpose of determining Boardwalk's cost of service but also for purposes of assessing an effect on rates.

If Baker Botts had been asked to render an opinion for a client about what might happen in the hypothetical event that the Revised Policy became final, then these assumptions would not have been problematic. But the Opinion Condition required that Baker Botts express a legal opinion based on a set of facts: whether there had been a regulatory development that "has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers." The assumption that a sufficient trigger had happened drove the result.

In finding that Baker Botts improperly assumed that the Revised Policy was final, this decision clarifies an aspect of its ruling on the defendants' motion to dismiss, which the defendants invoke to support their arguments. In the complaint, the plaintiffs asserted that Baker Botts "relied on assumptions that Defendants knew to be false," including the assumption that the Revised Policy would not be changed, and argued that "the defendants purportedly 'knew on June 29, 2018[,] that FERC's March 15 Proposed [sic] Policy Statement would soon be 'revised, reversed, [or] modified.' " *Bandera Master Fund LP v. Boardwalk Pipeline Pr's, LP*, 2019 WL 4927053, at *20 (Del. Ch. Oct. 7, 2019). The court rejected that allegation, explaining:

> This assumption was not false. FERC did not revise, reverse, or modify the Revised Policy Statement. FERC issued an order on July 18, 2018, in which it declined to reconsider the Revised Policy Statement and reaffirmed that FERC "will generally not permit MLP pipelines ... to recover an income tax allowance in their cost of service." The Final Rule addressed other aspects of FERC's new rate-setting policies, including the treatment of ADIT balances, but it did not revise, reverse, or modify the Revised Policy Statement.
>
> The plaintiffs' allegations do not support a reasonable inference that Baker Botts failed to exercise its independent judgment when it assumed that the Revised Policy Statement would not be revised, reversed, or modified. The motion to dismiss this aspect of Count II is granted.

Id. at *20 (citations omitted). The court understood the plaintiffs' argument at the motion to dismiss stage to be that the defendants *knew* that the Revised Policy in fact would be changed, rendering the assumption false. Because the Revised

Policy was not changed, that allegation could not support a claim on which relief can be granted.

***58** The trial record establishes that when Baker Botts rendered the Opinion, Baker Botts and the defendants knew that the policy *could be changed.* The policy on the tax allowance was not changed, but the related decision on the treatment of ADIT was so substantial as to operate as a change. By assuming that the policy was final when issued on March 15, Baker Botts accelerated the date when it could render the Opinion. That decision meant that Loews did not have to wait until the terms of the Revised Policy and the related treatment of ADIT were known. Instead, Loews could exercise the Call Right during a period of maximum market uncertainty, thereby benefitting itself.

The record presented at trial demonstrates that the Revised Policy was not final. The fact that the lawyers who wanted the General Partner to be able to exercise the Call Right convinced themselves over time that the Revised Policy was sufficiently final to render the Opinion—and testified to that belief at trial [20] —does not mean that it was final. The Opinion started from a counterfactual premise that Baker Botts knew was untrue.

20 *See* Rosenwasser Tr. 65; Wagner Tr. 207; Alpert Tr. 335; McMahon Tr. 525.

b. Counterfactual Assumption: Recourse Rates Would Change Without A Rate Case.

To facilitate the exercise of the Call Right, Baker Botts assumed that the rates that Boardwalk's subsidiaries could charge would change to the subsidiaries' detriment without a rate case. Unlike its first assumption, Baker Botts did not make this second assumption explicitly. Without that unstated counterfactual assumption, Baker Botts could not have rendered the Opinion.

To satisfy the Opinion Condition, Baker Botts had to conclude in good faith that Boardwalk's status as a pass-through entity for tax purposes "has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers." PA § 15.1(b)(ii). A threshold question was the meaning of "maximum applicable rates."

If "maximum applicable rates" meant the real-world rates applicable to the shippers who purchased capacity on the subsidiaries' pipelines, then the March 15 FERC Actions—even if they became final—would not have a meaningful effect, because the majority of the shippers on Boardwalk's pipelines paid negotiated or discounted rates. As discussed in greater detail below, Baker Botts sidestepped that issue by interpreting "maximum applicable rates" to mean "recourse rates." But that solution created another problem: Recourse rates do not change without a rate case. Assessing whether there would be a material adverse effect on recourse rates therefore required evaluating the risk that someone would bring a rate case against one of Boardwalk's Subsidiaries. *See* JX 1138 at 2; JX 1307 at 7; Court Tr. 860. It also required assessing whether Boardwalk's rates would change if a rate case was brought. *See* Court Tr. 861–65.

Baker Botts assumed away these issues. The Opinion did not address either the risk that someone would bring a rate case or the risk that Boardwalk's rates would change as a result of a rate case. Instead, the Opinion implicitly made the counterfactual assumption that each of Boardwalk's subsidiaries would be involved in a rate case and lose. *See* Court Report ¶¶ 113–14.

The April 4 Draft made that assumption openly, stating: "[W]e have requested that the Partnership assume that the Subsidiaries will file rate cases and take any other appropriate and legal action to be permitted to charge the maximum rates permitted under the applicable cost of service rules and regulations regardless of competitive conditions or any other non-legal factor." *See* JX 1949 at 2. The April 4 Draft thus made clear that Baker Botts was assuming that the subsidiaries would act contrary to their own interests, file rate cases seeking to lower their rates, and eschew any arguments that might enable them to maintain or raise their rates.

***59** The Opinion dropped the clear language from the April 4 Draft and omitted any reference to rate cases. In its place, the Opinion substituted the more laconic assumption "that each Subsidiary would charge all of its customers the maximum applicable rate." JX 1522 at 3. That outcome only could happen if someone filed rate cases in which Boardwalk's subsidiaries lost. The assumption from the April 4 Draft thus remained, but was now unstated. *See* Wagner Tr. 273–74; *see also* Rosenwasser Tr. 91.

Two of Boardwalk's subsidiaries did not face any rate case risk, and a third faced only low risk. *See* JX 571 at 7; JX 1064;

JX 1521 at 16. When issuing the NOPR, FERC made clear that many pipelines had characteristics that would obviate the need for a rate adjustment, including (i) rate moratoria, (ii) negotiated rates, or (iii) under-recovery of costs. *See* JX 580 ¶¶ 45, 48–49. Typically, a pipeline under-recovers its costs because it operates in a competitive market and must offer discounted rates to capture business. *See* JX 1139 at 11.

Those criteria mapped onto Boardwalk's pipelines. *See* JX 571 at 1.

- Virtually all of Gulf Crossing's contracted volumes were subject to negotiated rates. PTO ¶ 139; JX 572 at 2–3. Gulf Crossing also operated in highly competitive markets, was under-recovering its cost of service and would be "highly under-subscribed" as its negotiated-rate contracts rolled off. *See* JX 644 at 1; JX 676 at 8.

- A majority of Gulf South's contracts provided for negotiated or discounted rates. Gulf South was also subject to a rate case moratorium until May 2023. And Gulf South operated in highly competitive markets and thus was under-recovering its cost of service. *See* PTO ¶ 139; JX 604 at 1; JX 644 at 1; JX 676 at 8; JX 1139 at 6; JX 1521 at 16.

- A majority of Texas Gas' contracts with shippers provided for negotiated or discounted rates. See JX 1139 at 6. Only 20% of its volumes were shipped at recourse rates and potentially subject to any effect. *See* JX 548 at 1. It too served highly competitive markets. *Id.*

Loews, Boardwalk and their advisors concluded there was "[n]o expected near-term rate case risk for Gulf South or Gulf Crossing" and that over the long-term, rate case risk was minimal because "current RoE [was] likely to be below allowable RoE." JX 1521 at 16; *see* Wagner Tr. 269. After some initial concern about the rate case risk at Texas Gas, Baker Botts and its rate expert assured Loews that the rate case risk at Texas Gas was "low" through April 2020. JX 1064 at 1. Beyond that, Baker Botts and its rate expert believed it was impossible to "make a prediction with any confidence." *Id.*; *see* JX 1078.

The Opinion rested on an unstated counterfactual assumption about the inevitability of an adverse decision in a rate case. If Baker Botts had been asked to render an opinion for a client about what might happen in a hypothetical world where all three subsidiaries faced rate cases and lost, then an opinion based on explicit assumptions to that effect would have been acceptable. But the Opinion Condition required that Baker Botts express a legal opinion about whether Boardwalk's status as a pass-through entity for federal tax purposes has or "will reasonably likely in the future have a material adverse effect on maximum applicable rates." Rendering that opinion required assessing the risk of a material adverse effect on rates, not making the unstated counterfactual assumption that each subsidiary would face and lose a rate case.

c. Counterfactual Assumption: Hypothetical Indicative Rates Are The Same As Recourse Rates.

***60** To facilitate the exercise of the Call Right, Baker Botts made yet another counterfactual assumption: Recourse rates are the same as hypothetical indicative rates. Like the second counterfactual assumption, the third assumption was unstated.

As discussed previously, the Opinion Condition required that the Opinion address whether there has been or will reasonably likely be a material adverse effect on the "maximum applicable rate that can be charged to customers" The Partnership Agreement did not define "maximum applicable rate," and FERC has not defined it either. *See* Court Report ¶¶ 152–55; Rosenwasser Dep. 365. None of defendants' advisors, nor their FERC expert in this litigation, identified a FERC order or ruling that defined or explained that phrase. *See* Court Report ¶¶ 157–69; JX 1756 (Court Rebuttal) ¶¶ 11–17. At trial, Rosenwasser conceded that the meaning of "maximum applicable rate" was a "key" question his team "had to grapple with." Rosenwasser Tr. 64.

Multiple law firms generated analyses of the phrase, in part because Baker Botts was unable to identify any settled meaning of the term in its first attempt. *See* JX 637 (email from Baker Botts interpreting the term); JX 781 at 1 (same); JX 800 at 2 (notes from Skadden interpreting the term); JX 1375 (memorandum from Baker Botts interpreting the term); JX 1437 (email from Van Ness Feldman interpreting the term). Naeve, the Skadden partner and former FERC Commissioner, believed that the phrase reasonably could mean either (1) "the maximum rate applicable to customers taking into consideration discounted contracts that have been filed at FERC," or (2) "the maximum rate contained in the tariff which the pipeline could have charged and is free to charge other customers[.]" [21] Layne, the Vinson & Elkins transactional partner, similarly observed that there were multiple reasonable interpretations. [22]

21 JX 800 at 2. Naeve discussed this concern with Alpert. *See id.*; Alpert Tr. 421. When Grossman raised the same point, Alpert was furious. *See* JX 798 at 1 ("Rich is pissing me off."). Baker Botts had to send Skadden a copy of Boardwalk's Form S-1 to "get [them] more comfortable" with the interpretation that Baker Botts needed to use. *See* JX 790 at 2. Baker Botts thus turned to extrinsic evidence to support its reading of "maximum applicable rates."

22 *See* JX 733 at 1 ("One interpretation is that that means the maximum rates that could be charged, assuming the customers were paying maximum cost of service rates. On the other hand, because of the discounts, market based rates and negotiated rates (and presumably the possibility of all this getting changed by FERC again), REVENUE won't take a hit ... even though theoretical maximum rates (if we could charge them) would be materially adversely effected [sic].").

The Opinion implicitly conceded that the term "maximum applicable rates" was ambiguous. Rather than asserting that the claim had a plain meaning, Baker Botts stated that

> we have, *in using our judgment*, interpreted the words ... "maximum applicable rate that can be charged to customers by subsidiaries that are regulated interstate natural gas pipelines of the Partnership," to mean the recourse rates of the Subsidiaries now and in the future as that term is used by the FERC in its regulations, rulings and decisions ....

***61** JX 1522 at 4 (emphasis added).

Everyone knew that a Delaware court would apply the doctrine of *contra proferentem* and construe ambiguous language against the General Partner and in favor of the minority unitholders. Yet to reach the conclusion that the phrase meant "recourse rates," Baker Botts declined to apply the doctrine of *contra proferentem* and looked to two sources of extrinsic evidence: (i) Boardwalk's own use of the phrase in its public filings, and (ii) FERC's use of the phrase in orders in proceedings involving Boardwalk, where FERC was commenting on Boardwalk's filings.

If Baker Botts had reached that interpretive judgment, assessed each pipeline's risk of a rate case, relied on a full ratemaking analysis, and rendered opinions about the reasonably likely effect on recourse rates, then Baker Botts' decision to interpret "maximum applicable rates" as "recourse rates" would not have fatally undermined the Opinion. Although relying on extrinsic evidence to interpret ambiguous language runs contrary to how Delaware courts interpret MLP agreements, the Delaware Supreme Court has looked on occasion to the surrounding transactional context, including by considering language in an issuer's public filings, to give meaning to a disputed phrase. *See, e.g.*, *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1189 (Del. 2010). Baker Botts thus could have reached a reasoned conclusion that it was appropriate under the circumstances to consider extrinsic evidence in the form of Boardwalk's Form S-1, and Baker Botts could have concluded in good faith, based on that broader transactional context, that when drafting the Call Right, Rosenwasser meant to refer to recourse rates. In other words, to the extent that extrinsic evidence and judgment enter the picture, reading "maximum applicable rates" to mean recourse rates is a more persuasive reading than other possibilities.

But Baker Botts did not do those things. Baker Botts made an unstated assumption that resulted in the Opinion not actually interpreting the phrase "maximum applicable rate" as "recourse rates." Baker Botts instead considered the highest rates that FERC would allow Boardwalk to charge in a hypothetical world that assumed there was a full market for the pipelines' services. JX 646 at 3. As Wagner wrote in his contemporaneous notes: " 'Max hypothetical rate.' This is not the recourse rate." JX 646 at 4. Other contemporaneous writings refer to the rates that Baker Botts examined as "indicative rates," "theoretical maximum rates," and "maximum hypothetical rates." *See* JX 727 at 2 ("indicative rates"); JX 733 at 1 ("theoretical maximum rates"); JX 798 ("[I]t's crystal clear that we're talking hypothetical future max FERC rates."); JX 1007 at 1 ("hypothetical rates").

In reality, the Opinion examined indicative rates, and Baker Botts' conclusion rested on the unstated counterfactual assumption that indicative rates were the same as recourse rates. If Baker Botts had been asked to render an opinion for a client about what might happen to "hypothetical future max FERC rates," then equating indicative rates with recourse rates would not have been problematic. The Opinion Condition, however, did not turn on "hypothetical future max FERC rates." The Opinion Condition required that Baker Botts express a legal opinion about whether Boardwalk's status as a pass-through entity for tax purposes "has or will reasonably likely in the future have a material adverse effect on maximum applicable rates." Once Baker Botts expressly assumed that "maximum applicable rates" were the same as "recourse rates," Baker Botts had to stick with that assumption. Instead, Baker Botts made an additional, unstated, and counterfactual assumption that recourse rates were the same as "hypothetical future max FERC rates."

d. Counterfactual Assumption: The Treatment Of ADIT Was Known.

***62** To facilitate the exercise of the Call Right, Baker Botts made a fourth counterfactual assumption. Like the second and third assumptions, it too was implicit. This time, Baker Botts assumed that the open question of how FERC would treat ADIT was a known fact *and* that FERC would use the Reverse South Georgia Method. In reality, no one knew how FERC would treat ADIT, and it was impossible to determine what effect the March 15 FERC Actions would have on rates without knowing how FERC would treat ADIT.

In the March 15 FERC Actions, FERC made clear that the treatment of ADIT was an open issue. The ADIT NOI sought industry input on that very question. *See* JX 576 ¶ 25. FERC staff specifically flagged whether an MLP's accumulated ADIT balance should be eliminated from cost of service or whether those previously accumulated sums should be placed in a regulatory liability account and returned to ratepayers. *See id.*

Boardwalk understood that the treatment of ADIT was an open issue. In Johnson's initial analysis of the impact of the March 15 FERC Actions, he characterized his estimate of the downside as a floor, because it "ignores any bounce from rate base increase associated with removal of ADIT." JX 572 at 1–2. Elaborating in a later email, he explained that "it's unclear on what they [FERC] would do with [Boardwalk's] current ADIT" balance. JX 602 at 1. He further observed that FERC could decide that the ADIT balance should be "zeroed out because there's no income taxes (because there would be no difference between book and tax depreciation)." *Id.*

When the Loews executives examined Johnson's analysis, they likewise recognized that ADIT was the critical issue. JX 601 at 2. A Loews employee determined that losing the income tax allowance was "a flesh wound for the long haul pipes like ... [Boardwalk]." *Id.* at 1. But if FERC required that pipelines return their ADIT balances to ratepayers, then that "would be the a-bomb outcome" and would be "extremely painful." *Id.*

Baker Botts knew that the future treatment of ADIT was an open issue. Just four days into Baker Botts' engagement, Wagner acknowledged that "FERC has not stated how to treat ADIT balances" and "[t]his can affect the rate impact on the pipelines substantially." JX 619 at 1. Wagner explained to Alpert in an email on March 20, 2018, that the ADIT NOI did not have a time frame for resolution but could be resolved by the end of 2018. JX 626 at 1. He noted that any regulation was "not likely to be self-implementing and would require additional proceedings to affect pipeline rates." *Id.*

During a call on March 22, 2018, Boardwalk executives and Baker Botts lawyers discussed whether they could estimate the effect of ADIT, concluding that they had "[n]o idea [because we] don't know rules." JX 646 at 1; *see* JX 644 at 1 (noting the "lack of clarity on FERC's eventual policy on" the treatment of ADIT and characterizing any possible effects as "highly speculative at this point"); JX 740 at 1 ("[W]e may want to see the results under a few different scenarios."); JX 868 at 2 ("[D]ifferent assumptions on how to handle [the ADIT] issue could affect the calculations."); *see also* JX 1525 at 67 (Sullivan testifying that FERC was still determining "how [ADIT] balances will be treated"). The Loews executives likewise understood that they did not have the answer on ADIT. *See* JX 567; JX 601 at 1–2.

A chorus of defense witnesses testified at trial that they believed that FERC would instruct pipelines to amortize ADIT using the Reverse South Georgia Method. [23] That was indeed one reasonable method, and the witnesses' testimony about their belief seemed convincing. The problem is that the Reverse South Georgia Method was only one possibility, and no one knew what FERC actually would do.

23 *See* Rosenwasser Tr. 78; Wagner Tr. 217–18, 223; Alpert Tr. 347; McMahon Tr. 497, 517; Johnson Tr. 619.

***63** Without knowing how FERC would treat ADIT, it was impossible to determine what effects the March 15 FERC Actions would have. In its public comments on the NOPR, Boardwalk emphasized that, "[u]ntil the Commission provides a final decision on the treatment of ADIT, Boardwalk cannot correctly assess the impact of the Revised Policy Statement and ADIT on its pipelines' costs of service ...." JX 1130 at 14. Skadden understood what that meant for the Opinion. In a model of understatement, Voss described the language as "relatively unhelpful." JX 1164 at 1. Rosenwasser also knew the language posed a problem. In his personal notes on Boardwalk's NOPR comments, Rosenwasser underlined the text and double-starred it. *See* JX 1138 at 14.

Boardwalk's comment was more than just unhelpful. It established that Baker Botts had no basis for the Opinion.

The Opinion thus rested on the unstated counterfactual assumption that the treatment of ADIT was known and would follow the Reverse South Georgia Method. If Baker Botts had been asked to render an opinion for a client about what the effect on rates would be if FERC required amortization of ADIT using the Reverse South Georgia Method, then making that counterfactual assumption would have been fine. But the Opinion Condition required an opinion based on fact. Instead, Baker Botts assumed its way to a conclusion that a sufficient regulatory development had occurred.

2. The Factual Inputs

The foregoing assumptions formed the basis for Rosenwasser's syllogism. That exercise dictated the result of the Opinion by deploying elementary subtraction. Baker Botts then obtained information from Boardwalk to make the syllogism work.

a. Rosenwasser's Syllogism

As described in the Factual Background, Rosenwasser developed his syllogism so that Baker Botts could render the Opinion. Rosenwasser knew that the Call Right was intended to address a business issue by protecting Loews against a regulatory change that would have a materially adverse effect on Boardwalk. Rosenwasser Dep. 39–40. Rates were relevant because they led to revenue. McMahon Tr. 545. The Call Right was not intended to create a regulatory trapdoor that could be triggered by a change that "wasn't substantive, wasn't meaningful." Rosenwasser Tr. 46. In fact, Rosenwasser did not believe that "rates" were what the Call Right was designed to protect. JX 1502 at 34 ("Rates themselves are not what is being protected. It must be the entities charging the rates."). The Call Right was intended to provide Loews with an "off-ramp" if FERC changed its policy in a way that materially threatened Boardwalk as an entity. McMahon Tr. 480, 545.

That understanding comported with how Delaware cases approach the concept of a material adverse effect. Determining whether a material adverse effect is reasonably likely to occur involves forecasting, not fantasizing. "There must be some showing that there is a basis in law and in fact for the serious adverse consequences prophesied by the party claiming the MAE." *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *65 (Del. Ch. Oct. 1, 2018) (quoting *Frontier Oil v. Holly Corp.*, 2005 WL 1039027, at *36 n.224 (Del. Ch. Apr. 29, 2005)), *aff'd*, 198 A.3d 724 (Del. 2018). Simply "proclaiming that bad things can happen" is insufficient to establishing that a material adverse effect is reasonably likely to occur. *See Frontier Oil*, 2005 WL 1039027, at *36 n.224.

The March 15 FERC Actions were not reasonably likely to have a material adverse effect on Boardwalk. The Boardwalk management team determined immediately that the March 15 FERC Actions were not reasonably likely to have a material adverse effect on Boardwalk's revenue. *See* JX 615 at 1; JX 733 at 1. The March 15 FERC Actions also were not reasonably likely to have a material adverse effect on recourse rates. Two of Boardwalk's pipelines had characteristics which meant that if the March 15 FERC Actions became final, they would not face a rate proceeding. For the third pipeline—Texas Gas—the risk of a rate proceeding was low, and any effect on revenue would be small.

***64** To deliver the Opinion, Rosenwasser needed to shift from the real world into an imaginary one. He therefore took the position that the Call Right was not concerned with the actual economic impact; it was only concerned with the abstract concept of "maximum applicable rates." *See* JX 645 at 1; JX 679 at 5, 8. If a regulatory policy affected that abstract concept, then the Call Right could be exercised. And because a tax allowance had been built into the cost-of-service calculation, a policy change eliminating the allowance would lead ineluctably to a change in the maximum applicable rate, as Baker Botts was defining that term. When Wagner heard Rosenwasser's reasoning, he immediately understood what they were doing: "Just saying" that eliminating the tax allowance led to a lower cost of service and therefore a material adverse effect. JX 639.

The resulting syllogism turned on elementary subtraction, and it was fundamentally flawed. Boardwalk knew that. During a discussion of the March 15 FERC Actions, Jonathon Taylor from the FERC Office of General Counsel foreshadowed what would become Rosenwasser's syllogism when he explained that "when a tax expense decreases, so does the cost of service." JX 588 at 22. At the time, McMahon and his outside counsel ridiculed that line of reasoning. McMahon wrote to Gregory Junge, a regulatory lawyer: "That was a priceless statement[.] [T]axes go down[.] COS goes down[.] This is going to be a train wreck." JX 575 at 2. Junge responded: "That is ... just [the] type of 1:1 thinking that we were trying to explain is not the case." *Id.* And in its comments to FERC on the NOPR, Boardwalk rejected that simplistic approach. Boardwalk asserted that it was "misleading" to equate a change in the cost of service stemming from the removal of the income tax allowance with a "rate reduction," because a cost-of-service change has "little bearing" on whether or not a rate reduction will occur. JX 1138 at 30 (NOPR Comments). If FERC tried it, then it would violate its policy against single-issue ratemaking. JX 1307 at 7; *see* Johnson Tr. 663.

Grasping for grounds to confirm that this approach was nevertheless justified, Rosenwasser relied on the fact that the Opinion called for a legal opinion from counsel, not a factual opinion from some other type of professional like a rate expert or an investment banker. *See* JX 646 at 3 ("This is a legal opinion, independent of what's happening in mkt. Not a primarily factual analysis."); *see also* JX 686 at 1; Rosenwasser Tr. 49–51. That is nonsensical; the notion that the Partnership Agreement called for a legal opinion did not mean that the opinion could ignore facts. Lawyers (and law-trained judges) apply the law to facts. Legal opinions turn on facts. *See* Glazer et al., *supra*, § 4.1 at 82.

Not surprisingly, Rosenwasser and Baker Botts could not maintain the pretense that the Opinion did not require considering real-world facts. Uncertain about whether it could opine that the effect on indicative rates was sufficiently material and adverse, Baker Botts wanted to consider other indications of materiality, such as the effect that a comparable reduction in revenue would have on Boardwalk's EBIT, EBIDTA, and distributable cash flow. *See* PTO ¶ 182; JX 775 at 1. Rosenwasser sought reassurance from Richards Layton that Baker Botts could consider these other effects, but Richards Layton advised the "[b]etter [r]eading" was to "look [at] rates more, not effects." JX 1007 at 1. Even then, Baker Botts referred to the pass-through effect in the Opinion, stating that

> [w]e also took notice that, because these reductions in the maximum applicable rates would not be offset by any reduction in costs incurred by the Subsidiaries, the reductions in the maximum applicable rates would have a substantially larger percentage impact on the earnings before interest and taxes and on the cash available for distribution of each of the Subsidiaries assuming each Subsidiary could actually charge and collect its maximum applicable rate.

***65** JX 1522 at 3. Baker Botts thus considered real-world effects when doing so helped reach the result that its client wanted, but not when doing so might cut in the opposite direction.

Rosenwasser's syllogism ignored that the Call Right was drafted to address a business issue, not an abstract legal question. The syllogism ignored the absence of any real-world effect on revenue in favor of focusing on recourse rates. It ignored the question of rate case risk and the real-world events that would have to take place before there was any effect on recourse rates. The syllogism was a contrived exercise designed to achieve a particular result.

b. The Rate Model Analysis

To provide the factual basis for the Opinion, Baker Botts had Boardwalk prepare the Rate Model Analysis. That analysis implemented Rosenwasser's syllogism and was designed to "get us where we need to go." JX 713 at 1. The exercise generated declines in hypothetical indicative rates of 11.68%, 12.12%, and 15.62% under circumstances where the rates that shippers actually paid had not changed at all and where recourse rates were unlikely to change for the foreseeable future.

The Rate Model Analysis departed from ratemaking principles. The Rate Model Analysis calculated a single, hypothetical, indicative rate for each of Boardwalk's three pipeline subsidiaries. *See* JX 1415 at 3. It then projected that the indicative rate would drop as a result of the removal of income tax allowance. *See id.* In other words, the Rate Model Analysis changed only the income tax allowance variable while holding all else constant. *See, e.g.*, JX 639 at 1; Wagner Tr. 258; Webb Tr. 938. That is single-issue ratemaking.

Through single-issue ratemaking, the Rate Model Analysis avoided any meaningful assessment of how, if at all, a change in the cost of service might impact any of the 167 recourse rates that Boardwalk had on file with FERC. Sullivan, the rate expert hired by Baker Botts, testified in his deposition that FERC would not focus on an indicative rate because it does not "mean anything." Sullivan Dep. 169. He confirmed that the Rate Model Analysis calculated a cost-of-service reduction, not a rate reduction. *Id.* at 118. He explained that deriving an indicative rate reduction by changing one cost-of-service variable was "kind of meaningless" because a rate change does not depend on one cost-of-service variable. *Id.* at 101. He observed that the Rate Model Analysis could not be used to calculate the change to Boardwalk's actual recourse rates. *Id.* at 150. At trial, the plaintiffs' rate expert testified persuasively on these same points. *See* Webb Tr. 913–14 (describing indicative rates as "meaningless" and "hypothetical").

Because the Rate Model Analysis employed a simple syllogism, it only contained a few pages of analysis. The calculations for the purported rate impact at Texas Gas took only five pages. Johnson Tr. 640, 652. By contrast, the rate models used in actual rate cases involve hundreds of pages of complex calculations to determine cost of service and, ultimately, recourse rates. *See* Webb Report ¶ 174; *see also* Johnson Tr. 653 (conceding that Gulf South's initial submission in a recent rate case spanned 3,844 pages). The Rate Model Analysis was much shorter because it skipped essential steps in the ratemaking process. *See, e.g.*, Johnson Tr. 651–52 (conceding that the Rate Model Analysis did not calculate discount adjustments); *id.* at 648–49 (conceding that FERC requires use of zone-based rate design where pipelines employ zones but the Rate Model Analysis failed to do so). At the same time, the Rate Model Analysis applied a de-functionalizing step that is not part of ratemaking process. Webb Tr. 967.

***66** The resulting simplified calculation was highly sensitive to assumptions about ADIT and ROE. The Rate Model Analysis thus confirms that Baker Botts could not opine on the effect of the March 15 FERC Actions on rates without knowing more about the regulations that FERC intended to adopt.

The Rate Model Analysis assumed that FERC would require amortization of ADIT using the Reverse South Georgia Method, which was one possibility. Virtually all of the pipelines (other than Boardwalk) publicly advocated for FERC to eliminate ADIT. Changing from the Reverse South Georgia Method to the elimination of ADIT would have eliminated Baker Botts' ability to claim a material adverse effect on indicative rates.

Subsidiary	Baker Botts Percentage Change	BB % Change with ADIT Adjustment
Texas Gas	12.12%	2.58%
Gulf South	11.68%	1.80%
Gulf Crossing	15.62%	-0.85%

Webb Report ¶ 128 fig. 6. The changes at Texas Gas and Gulf South become minimal, and Gulf Crossing's rates move in the opposite direction.

The Rate Model Analysis was also sensitive to assumptions about ROE. While Baker Botts was working on the Opinion, some industry participants thought that FERC might permit pipelines to calculate their cost-of-service requirements using higher ROEs to offset the effect of the lost income tax allowance. *See, e.g.*, JX 910 at 9 ("Guggenheim [Partners, LLC] thinks .... the change to the tax allowance might not be material, as the increased ROE could recover the cost lost by losing the tax allowance."). While he was acting as Baker Botts' rate expert, Sullivan gave testimony in which he advocated for increased ROEs. *See* Webb Report ¶¶ 132–33 (collecting Sullivan's advocacy); Sullivan Dep. 55 (conceding that he would have used a 13.5–14% ROE in a rate case).

Increasing the ROE in the Rate Model Analysis from 12% to 14% lowers the percentage change in rates by approximately five percent:

Subsidiary	Baker Botts Percentage Change	BB % Change with ROE Adjustment

Texas Gas	12.12%	7.14%
Gulf South	11.68%	6.91%
Gulf Crossing	15.62%	9.32%

See Webb Report ¶ 134 fig. 7. The changes at all three pipelines fall below the level that Baker Botts opined could give rise to a material adverse effect.

Changing both variables in the Rate Model Analysis—eliminating ADIT and increasing the permissible ROE—reverses the direction of the change in indicative rates.

Subsidiary	Baker Botts Percentage Change	BB % Change with Both ROE Correction and ADIT Adjustment
Texas Gas	12.12%	-3.33%
Gulf South	11.68%	-3.95%
Gulf Crossing	15.62%	-8.66%

See Webb Report ¶ 136 fig. 8. Instead of a projected decrease (which Baker Botts reports as a positive percentage), there is a projected increase (reflected as a negative percentage). That means that indicative rates would increase, resulting in a beneficial effect rather than an adverse effect. The plaintiffs concede that these outputs do not mean that Boardwalk's recourse rates were reasonably likely to rise. *See* Webb Tr. 959. What they demonstrate is that the Rate Model Analysis depended heavily on assumptions, including an answer on the treatment of ADIT that no one knew when Baker Botts rendered its Opinion.

The Rate Model Analysis could not provide an adequate factual basis for the Opinion. The Rate Model Analysis simply implemented Rosenwasser's syllogism, which ignored real world effects but allowed Baker Botts to reach the conclusion its client wanted.

3. Other Efforts To Reach The Desired Conclusion

***67** After making all of the foregoing efforts to create a structure that would permit the issuance of the Opinion, Baker Botts still had to stretch to render the Opinion. Those strained conclusions are signs of motivated reasoning.

Most notably, Baker Botts stretched on what constituted a material adverse effect. Richards Layton advised that "the better argument" was that a reduction in rates of 12–13%, in perpetuity, would suffice for a material adverse effect. [24] The Skadden attorneys believed that an 11% change was "likely insufficient" under Delaware law, although the duration of the change would be a pertinent consideration. *See* JX 772 at 1. In the Opinion, Baker Botts went further and took the position that a material adverse effect would result from "an estimated reduction *in excess of ten percent* in the maximum applicable rates that can be charged to the customers of each of the Subsidiaries on a long-term basis." JX 1522 at 3 (emphasis added); *see* Rosenwasser Tr. 96–98. Baker Botts had to dip below 12% because the Rate Model Analysis generated a decline of 11.68% in the hypothetical indicative rates that Texas Gas could charge. *See* JX 1522 at 3.

24 JX 975 at 1; JX 1507 at 1–2. At trial, Raju testified that Richards Layton thought the "better argument" was that "a 10 percent or greater adverse effect into perpetuity on the rates metric would constitute an MAE." Raju Tr. 800–01. The contemporaneous documents do not provide that additional color.

And Baker Botts stretched on other issues as well:

- Baker Botts was not sure what standard to use for "reasonably likely to have a material adverse effect." Rosenwasser decided to "call it more likely than not." JX 1807 at 12; *accord* Rosenwasser Tr. 98–99.

- Baker Botts viewed the reference to the Partnership's "status as an association not taxable as a corporation" as incorrect terminology. JX 939. Baker Botts decided to "tear off the band-aid and substitute 'entity' for 'association' in our statement of our opinion." *Id.* Thus, the real issue, as Baker Botts saw it, was the Partnership's status as an MLP. JX 733 at 1.

In substance, Baker Botts rewrote the Call Right so that it could render the Opinion. As written, the Call Right required an opinion that

> the Partnership's status as an association not taxable as a corporation and not otherwise subject to an entity-level tax for federal, state or local income tax purposes has or will reasonably likely in the future have a material adverse effect on the maximum applicable rate that can be charged to customers by subsidiaries of the Partnership that are regulated interstate natural gas pipelines.

PA § 15.1(b).

As rewritten by Baker Botts, the Call Right called for an opinion that

> a notice of a proposed regulation about whether a regulated interstate natural gas pipeline organized as an MLP can claim an income tax allowance in its cost of service ~~the Partnership's status as an association not taxable as a corporation and not otherwise subject to an entity-level tax for federal, state or local income tax purposes~~ has or ~~will reasonably likely~~ more likely than not in the future will have a ~~material~~ 10% or more adverse effect on the ~~maximum applicable~~ hypothetical indicative rates that can be charged to customers by subsidiaries of the Partnership that are regulated interstate natural gas pipelines if each subsidiary faces and loses a rate case in which FERC (i) removes only the income tax allowance from the pipeline's cost of service, (ii) requires amortization of ADIT using the Reverse South Georgia method, (iii) does not conduct the other steps in the ratemaking process, (iv) does not consider rate moratoria, the effects of competition, or other factors that FERC considers when determining rates, and (v) thereby violates the policy against single-issue ratemaking.

***68** Baker Botts chose to give the latter opinion. It could not have given the former opinion.

4. Knowingly Going Where Others Would Not Tread

In addition to counterfactual assumptions, in addition to Rosenwasser's syllogism, and in addition to stretching on a series of issues that amounted to rewriting the Call Right, at least two other dimensions of Baker Botts' conduct support a finding of bad faith. Baker Botts rendered a non-explained opinion on a complex issue of Delaware law that the two Delaware law firms who were consulted would not formally address. And Baker Botts did so in the face of fatal uncertainty that could have been mitigated simply by waiting.

Baker Botts is a sophisticated law firm, but it is not a Delaware law firm. Baker Botts is also a leader in transactions involving MLPs, but it is not in the habit of opining on complex issues of Delaware limited partnership law. Many sophisticated firms render closing opinions on routine issues of Delaware entity law, such as the due formation of an entity or the due authorization of a contract. Baker Botts generally rendered enforceability opinions under the Delaware Revised Uniform Limited Partnership Act, but the firm did not render opinions more broadly on other Delaware issues. *See* JX 878 at 4.

In this case, Baker Botts took on one of the most difficult issues under Delaware law: determining the existence of a material adverse effect. Neither of the Delaware firms in this case would render such an opinion. Skadden has a policy against rendering an opinion on whether an event constitutes a material adverse effect, and Grossman was not willing to give Baker Botts any work product that might be construed as expressing an opinion. *See* JX 771 at 1. Richards Layton gave oral advice about what was the "better argument" and was willing to memorialize its advice in an email, but it would not go further than that and would not let Baker Botts reference its views. *See* JX 975 at 1; *see* Raju Dep. 113–14.

Internally, Baker Botts appropriately questioned its ability to render this opinion under Delaware law. Initially, Baker

Botts sought to recast the matter as an issue of federal law. *See* JX 679 at 7. After accepting that it was a Delaware law question, Baker Botts looked to Skadden for help. *See* JX 770 at 1; JX 772. Skadden, however, only provided a summary of the main Delaware authorities and disclaimed any intent to analyze the Call Right. JX 900 at 2. That fell short of what Baker Botts wanted. *See* JX 913 at 1; *see also* JX 936 at 1. Facing a deadline from Loews, Rosenwasser turned to Richards Layton, but in an effort to obtain advice that would reassure his partners, Rosenwasser provided the Richards Layton attorneys with a misleading description of the factual record. *See* Part I.L, *supra.* Rosenwasser's query resulted in Richards Layton's oral advice that the firm would have a "hard time saying [a decline of 12% in perpetuity is] not material." JX 1007 at 2. Richards Layton later stated that subject to assumptions and carveouts, it would regard as the "better argument" the contention that a 12–13% change in rates in perpetuity was sufficiently material and adverse, but Richards Layton would not let Baker Botts reference its advice in the Opinion. JX 975 at 1; *see* Raju Dep. 113–14.

***69** Baker Botts nevertheless rendered a non-explained opinion to the effect that a 10% decline in indicative rates was reasonably likely to constitute a material adverse effect. Baker Botts, a non-Delaware firm that did not regularly render opinions on complex Delaware issues, did not explain how it reached that conclusion. It did not identify any indicators of materiality that would justify that threshold. It did not discuss and distinguish the well-known and (at that point) unbroken line of transactional cases which had failed to find a material adverse effects, such as *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14 (Del. Ch. 2001), *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027 (Del. Ch. Apr. 29, 2005), *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008), or *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2017 WL 2729860 (Del. Ch. June 26, 2017). Baker Botts acted as if it was rendering a third-party closing opinion on a routine issue, which it plainly was not. The fact that Baker Botts rendered a non-explained opinion on the existence of a material adverse effect itself suggests that Baker Botts was serving Loews' interests.

The timing of the Opinion points in the same direction. Given the non-final nature of the Revised Policy, the avalanche of comments that FERC received, the direct linkage between the Revised Policy and the ADIT NOI that Boardwalk itself identified, and the uncertainty regarding the treatment of ADIT, Baker Botts could not have believed in good faith that it could render the Opinion before FERC provided further guidance. There were too many known unknowns. And an opportunity for clarity on these unknowns was on the horizon: FERC was likely to provide more guidance at its meeting on July 19, 2018. Baker Botts needed to wait.

Naeve, the Skadden partner and former FERC Commissioner, candidly observed in real time that Baker Botts should have waited. He wrote to a colleague, "If I were Baker Botts I would prefer to wait until FERC acts on the comments." JX 1076 at 1. Among other things, Naeve noted that the Revised Policy was a "blunt instrument that ignore[d]" the fact that some MLPs (including Boardwalk) were "predominately owned by C-corps that pay federal income taxes." *Id.* Naeve described how "the 5 FERC Commissioners testified before a House Subcommittee and were grilled on this issue and others." *Id.* According to Naeve, "at least one Commissioner appeared to be having second thoughts about whether the Commission had fully considered industry input before acting." *Id.*

Yet Baker Botts pushed ahead. In doing so, Baker Botts gave Loews the ability to exercise the Call Right to maximum effect, during a fleeting period of maximum uncertainty before FERC provided additional information on its future decisions. Rather than exercising reasoned judgment, Baker Botts knowingly served Loews' interests.

5. The Human Dynamics

In the course of evaluating whether the Opinion was rendered in good faith, the court has taken account of the professional and personal incentives that Baker Botts faced. Throughout its work on the Opinion, Baker Botts approached the assignment with an advocate's mindset. "Lawyers by nature tend to be loyal to their clients. This is sort of baked into our professional rules." *Williams Cos.*, 159 A.3d at 280 (Strine, CJ., dissenting). Baker Botts strived to conclude that the General Partner could exercise the Call Right because that is what its client wanted.

Rosenwasser had an additional, personal incentive to push the limits. He drafted the Call Right, and he understandably wanted that provision to accomplish what his client thought it should do. [25] And Loews was a forceful client. Throughout the events giving rise to this litigation, Alpert demonstrated that he knew how to manipulate his outside counsel so that counsel would deliver the answers that he wanted to receive. Sometimes he did so subtly, as when he called for an immediate teleconference after receiving Wagner's email about the March 15 FERC Actions not being final. [26] Sometimes, he was less subtle, as when he "really beat on Skadden" until they "fell in line," but nevertheless decided to impose a consequence on Skadden by "look[ing] to other firms re potential litigation." JX 1136 at 1.

25 Loews and Baker Botts recognized that Rosenwasser's prior representation of Boardwalk in connection with its IPO and the drafting of the Partnership Agreement created a conflict of interest, and they called it out in Baker Botts' engagement letter. In an effort to neutralize it, they included the following statement: "We [Baker Botts] believe, and you have agreed, that the prior work by [Rosenwasser and other lawyers] while at Vinson & Elkins LLP for Boardwalk, is not substantially related to the Matter." JX 906 at 2.

That was not true. Under any reasonable understanding of the term, the two matters were "substantially related."

> Beyond switching sides in the same matter, the concept of substantial relationship applies to later developments out of the original matter. A matter is substantially related if it involves the work the lawyer performed for the former client. For example, a lawyer may not on behalf of a later client attack the validity of a document that the lawyer drafted if doing so would materially and adversely affect the former client.

Restatement, *supra*, § 132 cmt. d(ii); *see J.E. Rhoads & Sons, Inc. v. Wooters*, 1996 WL 41162, at *4 (Del. Ch. Jan. 26, 1996) (applying rule to disqualify a firm from litigating a case that involved an employment agreement that was part of a transaction that the firm helped negotiate and document).

This court expresses no view regarding Baker Botts' compliance with the ethical rules, both because in most circumstances any resulting conflict can be waived, and because any ethical issue did not affect the fairness of these proceedings. *Cf. In re Appeal of Infotechnology, Inc.*, 582 A.2d 215, 220 (Del. 1990) (holding that a trial court has no authority to rule on ethical issues involving Delaware lawyers, because that subject falls within the exclusive jurisdiction of the Delaware Supreme Court). The point is rather that the issue created by Rosenwasser's former representation was front and center for everyone. A related point is that the General Partner and Baker Botts attempted to deal with the issue by agreeing to something that was untrue.

26 *See* JX 616 at 1; *e.g.*, Rosenwasser Tr. 183–84 (testifying about obvious pressure from Alpert and Loews to give a "thumbs up"); JX 1225 (obtaining advice from Richards Layton to push back on Skadden without informing Richards Layton that Loews had already consulted the independent directors); JX 1262 at 1 (bringing in Davis Polk to address what Alpert described as "unusual language" in the Opinion).

***70** It is also contextually relevant that the Opinion was rendered for an interested transaction involving an MLP. In the MLP ecosystem, interested transactions abound and become routinized. Governance practices are frequently suboptimal, and the Delaware courts have had cause to question opinions rendered to facilitate transactions (albeit by financial advisors rather than lawyers). [27]

27 *See, e.g.*, *Gerber*, 67 A.3d at 422 (holding that plaintiffs stated a claim because a fairness opinion "did not fulfill its basic function"); *In re El Paso Pipeline P'rs, L.P. Deriv. Litig.*, 2015 WL 1815846, at *21–22 (Del. Ch. Apr. 20, 2015) ("[The financial advisor's] work product further undermined any possible confidence in the Committee.... [the financial advisor's] actions demonstrated that the firm sought to justify Parent's asking price and collect its fee."); *cf. Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 188 (Del. Ch. 2014) (denying a motion for summary judgment on an implied covenant of good faith and fair dealing claim where a fairness opinion did not take into account the possibility of excessive dilution), *aff'd*, 2015 WL 803053 (Del. Feb. 26, 2015) (TABLE).

The court recognizes that a parade of lawyers testified that they subjectively acted in good faith. Where, as here, witnesses testify about their intent, the trial judge must "make credibility determinations about [each] defendant's subjective beliefs by weighing witness testimony against objective facts." *Allen v. Encore Energy P'rs, L.P.*, 72 A.3d 93, 106 (Del. 2013). The credibility determination turns in part on "the demeanor of the witnesses whose states of mind are at issue." *Johnson v. Shapiro*, 2002 WL 31438477, at *4 (Del. Ch. Oct. 18, 2002). A finding that a witness' account is not credible does not mean that the witness lied. Human recall is not like playing a video tape. The act of remembering shapes recollection, as does the context in which the remembering takes place. A wide range of situational and subjective factors prime and shape first-hand accounts. When a witness' conduct is at issue, and as the witness strives to recall what happened in a setting where a particular set of recollections both supports the witness' self-image and generates a favorable outcome in the case, it is understandable that the witness could come to believe in a personally favorable account, while failing to recall or discounting contrary beliefs or disconfirming evidence.

A finding that a party did not act in good faith does not require a confession. It requires that the plaintiff prove by a preponderance of the evidence that the party in question knew it was not acting legitimately when it performed the actions in question. That finding can be made even if the human actors for that party convince themselves after the fact that they acted properly.

6. The Court's Finding

Based on the foregoing confluence of factors, and the more detailed recitation set forth in the Factual Background, the plaintiffs proved the Opinion did not reflect a good faith effort to discern the facts and apply professional judgment. The Opinion therefore failed to satisfy the Opinion Condition.

The analysis of the Opinion is necessarily holistic. Although this decision has discussed various aspects of the Opinion individually, it is the totality of the evidence that results in the finding that the Opinion did not reflect a good faith effort.

***71** If Baker Botts had only stretched once or twice, or made an isolated counterfactual assumption, then it would not be possible to reject the Opinion. Under those circumstances, the court might have disagreed with Baker Botts' assessments, but those disagreements would not have been sufficient to support a lack of good faith. But here, the record as a whole depicts a contrived effort to generate the client's desired result when the real-world facts would not support it. Baker Botts produced a simulacrum of an opinion, and that flawed imitation did not satisfy the Opinion Condition.

C. The Failure To Satisfy The Acceptability Condition

Before the General Partner could exercise the Call Right, the General Partner also had to satisfy the Acceptability Condition. PA §§ 1.1 at 24, 15.1(b)(ii). The Opinion Condition derives directly from Section 15.1. The definition of "Opinion of Counsel" adds the Acceptability Condition. If the Opinion was not acceptable, then the Acceptability Condition could not be met and the General Partner could not exercise the Call Right.

The General Partner purported to satisfy the Acceptability Condition by having Holdings determine in its capacity as Sole Member of the GPGP that the Opinion was acceptable. But the language of the operative agreements is ambiguous as to whether Holdings or the GPGP Board has the authority to make that determination. One reading of the relevant agreements would recognize Holdings as having that authority. That reading rests on textual hooks in the Partnership Agreement and the LLC Agreement, but it renders the Acceptability Condition surplusage. Another reading of the relevant agreements would recognize the GPGP Board as having the authority to make the acceptability determination. That reading has fewer textual supports but meshes better with the overall structure of the agreements. Both readings are reasonable.

As this decision has discussed, the doctrine of *contra proferentem* applies when a partnership agreement governing an MLP is ambiguous. That doctrine calls for the court to apply the reading that is more favorable to the limited partners. The reading that the GPGP Board had authority to make the acceptability determination is more favorable to the limited partners than a reading in which Holdings, an entity where all of the decision-makers were Loews insiders, had authority to make the acceptability determination in its own interests. Under the *contra proferentem* doctrine, the GPGP Board had the authority to make the acceptability determination. Because it did not, the Acceptability Condition was not satisfied.

1. The Contractual Language

The Acceptability Condition exists because the Call Right uses the defined term, "Opinion of Counsel." PA § 15.1(b). The Partnership Agreement defines "Opinion of Counsel" simply as "a written opinion of counsel ... acceptable to the General Partner." *Id.* § 1.1 at 24. The Partnership Agreement defines "General Partner" to mean "Boardwalk GP, LP ... except as the context otherwise requires." *Id.* § 1.1 at 18 (punctuation omitted).

The Partnership Agreement does not go further in defining who determines whether an Opinion of Counsel is acceptable. It does not discuss the internal governance structure of the General Partner or identify what organ within the

General Partner would make the acceptability determination. Traditionally, a general partner would be a natural person or an entity with a single governing body, such as a corporation with a board of directors. In that scenario, it would be clear who would make the determination. But Loews chose a more complicated structure. When Loews created Boardwalk, it structured the General Partner as another limited partnership, then installed the GPGP as its general partner. The GPGP is a limited liability company with *both* a board of directors (the GPGP Board) *and* a sole member (Holdings). The GPGP Board has general authority to act on behalf of the GPGP. The Sole Member has specific authority to make certain decisions on behalf of the GPGP.

***72** The Partnership Agreement did not attempt to allocate authority for the acceptability determination among the multiple entities and decision-makers that Loews created. The Partnership Agreement only spoke in terms of action by the General Partner. To the extent that the Partnership Agreement considered the internal structure of the General Partner, it contemplated that the General Partner would have a board of directors. *See, e.g.*, PA § 7.9(a). From a structural standpoint, the Partnership Agreement implied that the General Partner would make decisions through a board of directors.

Rather than assigning authority over different decisions to different actors, the Partnership Agreement distinguished between actions that the General Partner took in an individual capacity and actions that the General Partner took in an official capacity. The Partnership Agreement explains "[b]y way of illustration and not of limitation," that if a provision uses "the phrase 'at the option of the General Partner,' or some variation of that phrase," then that language "indicates that the General Partner is acting in its individual capacity." PA § 7.9(c). The Call Right contains that type of signaling language, so the decision whether to exercise the Call Right is a decision that the General Partner makes in its individual capacity. *See id.* § 15.1(b) (stating that General Partner has the "right ... exercisable at its option ... to purchase" all the outstanding limited partner interests so long as it satisfies the preconditions). The Opinion of Counsel definition does not have that signaling language. *See id.*§ 1.1 at 24.

Notably, whether the General Partner is acting in an individual capacity or an official capacity does not imply that a different decision-maker makes the decision. If the general partner was a natural person or an entity with a single governing body, such as a corporation with a board of directors, then the same decision-maker would make the decision regardless of whether the general partner was acting in an individual capacity or an official capacity. What would change is the contractual standard of review that would apply to the resulting decision. [28] For present purposes, the issue is *not* what standard of review to apply to the General Partner's decision to exercise the Call Right. The issue is whether the proper decision-maker made the decision.

28 *Compare* PA § 7.9(b) (providing the standard of review for a decision made by the General Partner "in its capacity as the general partner of the Partnership as opposed to in its individual capacity"), *with id.* § 7.9(c) (providing the standard of review for a decision made by the General Partner "in its individual capacity as opposed to in its capacity as the general partner of the Partnership"); *see also* JX 1201 at 48 ("Any exercise by our general partner of its call right is permitted to be made in our general partner's individual, rather than representative, capacity; meaning that under the terms of our partnership agreement our general partner is entitled to exercise such right free of any fiduciary duty or obligation to any limited partner and it is not required to act in good faith or pursuant to any other standard imposed by our partnership agreement.").

A limited partner thus could not readily determine from the Partnership Agreement who would make the acceptability determination on behalf of the General Partner. The Partnership Agreement is silent and ambiguous.

Lacking guidance, a limited partner might turn to other sources. A logical next step would be to look to the partnership agreement governing the internal affairs of the General Partner, but no one has suggested that any provision in that agreement would be pertinent.

***73** Still lacking guidance, a limited partner might search further. A sophisticated limited partner might realize that the General Partner was itself a limited partnership with the GPGP as its general partner. A diligent limited partner who pressed on might thus end up at a third agreement: the LLC Agreement governing the internal affairs of the GPGP.

The LLC Agreement also does not clearly address what decisionmaker would make the acceptability determination. The LLC Agreement provides generally that, "[e]xcept as otherwise specifically provided in this Agreement, the business and affairs of the Company shall be managed under the direction of the Board." LLCA § 5.2(a). Section 5.6 creates an exception that gives Holdings "exclusive authority over the business and affairs of the Company that do not relate to management and control of the [Partnership]." *Id.* § 5.6. The LLC Agreement adds that Holdings "shall have exclusive authority to cause the Company to exercise the rights of the Company and those of the MLP General Partner ... provided in ... Section 15.1." *Id.* § 5.6(xi) (the "Authority Provision").

The LLC Agreement thus divides the world of possible decisions into two categories. Unlike in the Partnership Agreement, those two categories do not depend on whether the General Partner is acting in an individual capacity or an official capacity. Rather, the categories in the LLC Agreement divide the world into decisions relating to "the business and affairs of the Company," where the GPGP Board has authority, and decisions "that do not relate to management and control of the [Partnership]," where Holdings has authority. The LLC Agreement then adds the Authority Provision to confirm that Holdings has authority over the rights provided in Section 15.1 of the Partnership Agreement. That addition suggests that without the Authority Provision it would be unclear whether the decision to exercise the Call Right fell within the purview of the GPGP Board or Holdings. The lack of clarity that would exist without the Authority Provision is also consistent with the fact that whether an action is done in the General Partner's "individual" or "official" capacity only dictates the applicable standard of review, not which decision-maker makes the decision.

The LLC Agreement also contains a definition of "Opinion of Counsel" that expressly refers to the Sole Member. Unlike the definition of "Opinion of Counsel" that appears in the Partnership Agreement, the definition in the LLC Agreement defines the term as "a written opinion of counsel (which may be regular counsel to the Company or the MLP or any of their respective Affiliates) acceptable to the Sole Member." LLCA § 1.1 at 7. But the LLC Agreement never uses the term "Opinion of Counsel" in any substantive provision. It is a stray definition.

As this discussion shows, none of the constitutive agreements gives a clear answer as to which entity makes the acceptability determination. Instead, the agreements divvy up decisions into categories, including (i) the difference between determining the acceptability of the Opinion and exercising the Call Right, (ii) the difference between action in an official capacity and action in an individual capacity, and (iii) the difference between decisions that relate to "the business and affairs of the Company" and those "that do not relate to management and control of the [Partnership]." When mixed and matched, the three pairs could generate eight combinatorial outcomes.

2. The Competing Arguments

***74** One reasonable reading of the provisions is that Holdings makes the acceptability determination. From a textual perspective, that reading treats the phrase "Opinion of Counsel" as the linguistic version of an equivalency formula, like "X = [the definitional text]." Under this reading, the definitional text is substituted algebraically wherever the "X" appears, such that the full language of the "Opinion of Counsel" definition would be substituted wherever the term "Opinion of Counsel" appears in the Partnership Agreement, including in the Call Right in Section 15.1. The Call Right thus would state that if the General Partner held "more than 50% of the total Limited Partner Interests of all classes then Outstanding" and had received "a written opinion of counsel ... acceptable to the General Partner" then the General Partner could exercise the Call Right, assuming the Opinion of Counsel satisfied the Opinion Condition. *See* PA §§ 1.1, 15.1(b). At that point, the argument goes, the Authority Provision in the LLC Agreement specifies that Holdings makes decisions regarding the General Partner's rights under Section 15.1, so Holdings has the authority to make the decision as the Sole Member. This reading has an added benefit of giving some purpose to the stray definition of "Opinion of Counsel" in the LLC Agreement. Although the definition is never used, it does refer to Holdings making the determination as Sole Member. [29]

29 Note that the argument in favor of Holdings making the acceptability determination is not advanced by equating (i) the Partnership Agreement's reference to the General Partner taking action in an official capacity with the LLC Agreement's reference to the GPGP Board having authority over decisions that relate to "the business and affairs of the Company," and (ii) the Partnership Agreement's reference to the General Partner taking action in an individual capacity with the LLC Agreement's reference to Holdings having authority over decisions "that do not relate to management and control of the [Partnership]." Aligning the categories in that way leads to the conclusion that Holdings exercises the Call Right, which is consistent with the Authority

> Provision. But that conclusion does not address whether the acceptability determination is part of the exercise of the Call Right.

The problem with this analysis is that Holdings always and inherently had the right to determine whether the Opinion is acceptable. Holdings possessed that authority as part of its ability to decide whether or not to exercise the Call Right. If Holdings did not think that the Opinion was acceptable, then Holdings could simply decide not to exercise. Because Holdings always had the ability to make a *de facto* acceptability determination, assigning the acceptability determination to Holdings renders the Acceptability Condition surplusage. Under standard principles of contract interpretation, a Delaware court generally eschews an interpretation that would result in surplusage. *See Sunline Com. Carriers, Inc. v. CITGO Petroleum Corp.*, 206 A.3d 836, 846 (Del. 2019).

When viewed as a whole, the language of the Partnership Agreement suggests that rather than serving as a redundant condition for the benefit of Holdings, the Acceptability Condition exists to protect the Partnership. Both the Opinion Condition and the Acceptability Condition ensure that the General Partner cannot exercise the Call Right arbitrarily without satisfying an up-front test. The Opinion Condition establishes the basic hurdle that the General Partner must clear, and the Acceptability Condition ensures that the General Partner cannot obtain a contrived opinion. The Acceptability Condition is thus not a protection for Holdings, which can always protect itself by deciding not to exercise the Call Right. It is instead a protection for the minority partners. In this regard, the Call Right at issue in this case contrasts with a second call right that the General Partner can exercise without satisfying either the Opinion Condition or the Acceptability Condition, as long as the General Partner owns 80% or more of the common units. *See* PA § 15.1(a). The difference between the two call rights indicates that the Opinion Condition and the Acceptability Condition were intended as meaningful limitations on the General Partner's ability to exercise the Call Right at the lower ownership level.

Viewed within this structure, the acceptability determination logically belongs to the GPGP Board. Only the GPGP Board has outside directors, and only the GPGP Board can inject a measure of independence into the determination of acceptability. The need for some measure of independence becomes critical for the Call Right, because otherwise the General Partner can exercise that right in its individual capacity, free of any duty or constraint whatsoever. The defendants' interpretation would make the General Partner the "judge in [its] own cause." *See Dr. Bonham's Case*, 8 Co. Rep. 107a, 114a, 118a, 77 Eng. Rep. 638, 646, 652 (C.P. 1610) ("[O]ne should not be judge in his own cause, indeed it is unjust for one to be a judge of his own matter; and one cannot be Judge and attorney for any of the parties ....").

***75** Against this backdrop, the textual arguments for treating the acceptability determination as a decision for Holdings to make as Sole Member are weaker than they initially seem. To reiterate, the distinction between the General Partner acting in an individual capacity as opposed to an official capacity does not shed light on who makes the acceptability determination. That distinction only determines the standard of review that applies to a decision made by the General Partner, not which entity within the General Partner makes the decision. *See* PA § 7.9(b), (c).

The distinction between the two definitions of "Opinion of Counsel," one in the Partnership Agreement and the other in the LLC Agreement, also appears in a different light. The fact that the LLC Agreement contains a reference to the Sole Member confirms the obvious: the drafters could have included a similar reference in the Partnership Agreement. The fact that they did not implies that the Partnership Agreement did not intend to confer the authority to make the acceptability determination on the Sole Member. *See Int'l Rail P'rs LLC v. Am. Rail P'rs, LLC*, 2020 WL 6882105, at *9 (Del. Ch. Nov. 24, 2020) (explaining that evidence of specific language in one agreement but not in a distinct yet related agreement "reflects that the drafters knew how to craft" and include the specific language at issue if they so desired).

Finally, the notion that the acceptability determination becomes part of the exercise of the Call Right also becomes suspect. The Call Right is structured as a conditional option. It first identifies conditions that the General Partner must meet, including receiving an Opinion of Counsel that both addresses the substantive issue identified in the Call Right and does so in an acceptable way. PA § 15.1(b)(ii). The second part of the Call Right provides that *if* the General Partner satisfies those conditions, "*then* the General Partner shall *then* have the right ... exercisable at its option within 90 days of receipt of such opinion to purchase all, but not less than all, of all Limited Partner Interests then Outstanding held by Persons other than the General Partner and its Affiliates." *Id.* (emphasis added). The conditions for exercise must be satisfied *before* the General Partner can determine whether to exercise it.

As noted previously, the reading that gives Holdings authority over the acceptability determination requires replacing "Opinion of Counsel" with the definitional language for that term. That move does not change the structure of the Call Right. It merely introduces the definitional language into the conditions that must be met before the General Partner can decide whether to exercise the Call Right. It does not change the fact that the condition must be met before the General Partner can act, and it does not address who has authority over evaluating the condition.

The term "Opinion of Counsel" was not drafted specifically for the Call Right. The Partnership Agreement uses it in many substantive provisions. *See, e.g.*, PA §§ 4.6(c), 4.8(b), 7.10(b), 11.1(b), 12.1(a), 12.2(iii), 13.1 (f), 13.3(d), 13.11, 14.3(d),(e). It requires consideration of context to determine who would make the resulting determination. For purposes of the Call Right, the Acceptability Condition remains part of the conditions that must be satisfied *before* the General Partner can exercise the Call Right. It is not part of the decision to exercise the Call Right. It follows that the General Partner's authority to exercise the Call Right in its individual capacity does not mean that it can determine acceptability in its individual capacity. For similar reasons, the Authority Provision does not clearly give the Sole Member the ability to make the acceptability determination as part of the "rights ... of the General Partner ... provided in ... Section 15.1." LLCA § 5.6(xi). The Acceptability Condition is not a right of the General Partner; it is a condition that must be satisfied before the General Partner can exercise its rights.

***76** Ultimately, the path to understand who makes the acceptability determination ends in the marshy distinction that the LLC Agreement makes between an issue that relates to the "business and affairs" of the Partnership, which is conferred to the GPGP Board, and an issue that does "not relate to [the] management and control of the [Partnership]," which is left to the Sole Member. LLCA § 5.6. At first blush, that distinction might seem to track the distinction in the Partnership Agreement between official capacity decisions and individual capacity decisions, but the language is different. To the extent the two concepts do align, there are no textual signals relating to the Acceptability Condition that would suggest that the General Partner makes the acceptability determination in an individual capacity, such that the decision would "not relate to [the] management and control of the [Partnership]."

Instead, the concepts of "business and affairs" and "management and control" hearken to Section 141(a) of the Delaware General Corporation Law, which establishes the capacious scope of authority possessed by a board of directors. *See* 8 *Del. C.* § 141(a). Landmark Delaware Supreme Court cases establish that decisions about whether a public entity's shares are acquired relate to the business and affairs of the enterprise; a purchase of shares is not exclusively an investor-level transaction between a buyer and seller that falls outside the board's purview.[30] Elsewhere in Section 5.6, the LLC Agreement expressly invokes corporate law principles by stating that "[e]xcept as otherwise specifically provided in this Agreement, the authority and functions of the Board, on the one hand, and the Officers, on the other hand, shall be identical to the authority and functions of the board of directors and officers, respectively, of a corporation organized under the General Corporation Law of the State of Delaware." LLCA § 5.6. Under corporate law principles, a decision that would affect the success of a take-private transaction would relate to the business and affairs of the corporation and fall within the authority of the board of directors. Even without the backdrop of Delaware corporate law, the exercise of the Call Right would "relate to" the management of the Partnership. If the Call Right cannot be exercised, then the General Partner will continue to manage the Partnership as an MLP with minority investors, making regular public filings with the SEC, complying with listing requirements, and experiencing all of the other costs and benefits of public status. If the Call Right is exercised, then the Partnership will no longer be an MLP, and the General Partner can manage the Partnership's affairs solely in the interest of Loews and without the accoutrements of public status. Making the acceptability determination therefore "relate[s] to [the] management and control of the [Partnership]."

30 *See, e.g.*, *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1353 (Del. 1985) ("[W]e note the inherent powers of the [b]oard conferred by 8 *Del. C.* § 141(a), concerning the management of the corporation's 'business and affairs' ... also provides the [b]oard additional authority upon which to enact the [r]ights [p]lan." (emphasis removed) (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 953 (Del. 1985))).

There is thus a reasonable reading of the pertinent agreements under which the GPGP Board has the authority to make the acceptability determination. Recognizing the potential merit in that argument, Loews initially intended to have the GPGP

Board make the acceptability determination. But the outside directors had a "hostile reaction," and they asked "shouldn't we have independent counsel[?]" JX 874 at 5; *see* Layne Dep. 160. The outside directors recognized the importance of the acceptability determination, and they did not want to be treated as a speedbump on Loews' path to the take-private. The outside directors' reaction shows why the Acceptability Condition exists, *viz.*, it could provide an external check. [31]

31 At trial, two defense witnesses disputed whether the outside directors had a "hostile" reaction. McMahon Tr. 535; Siegel Tr. 738. It is not clear why the witnesses quibbled over this point. They agreed that the outside directors were uncomfortable with the determination and did not want to be involved. McMahon Tr. 535; Siegel Tr. 738.

3. Counsel's Contemporaneous Recognitions Of Ambiguity

***77** Contrary to the defendants' assertions, all of the lawyers acknowledged the ambiguity that Loews created for the acceptability determination by establishing Boardwalk's complex entity structure. Within Skadden, Voss conducted the most thorough and detailed analysis. After reasoning through the various issues, she expressed the view that "the MLP Agreement likely requires that the [GPGP] Board make the determination to accept the Opinion of Counsel. Or, at a minimum, it is ambiguous." JX 747 at 1.

Skadden later prepared a memorandum for Alpert that framed the analysis more conservatively and with additional caveats and qualifications. The memorandum nevertheless made clear that there were ambiguities surrounding the acceptability determination. *See* JX 773 at 1, 3. And when advising Holdings about whether it could accept the Opinion, Skadden would say only that it was reasonable for Holdings to conclude that it had the authority to make the acceptability determination. *See* JX 1508 at 3. Even during his deposition, the farthest that Grossman would go in favor of the defendants' current view is that "the better reading" was for the GPGP Board to make the decision. Grossman Dep. 70–71.

Richards Layton also saw both sides of the interpretive coin. In contrast to Skadden's more detailed analysis, Richards Layton gave advice orally on a twenty-four hour turnaround, and without knowing that Loews had already received advice from Skadden and contacted the members of the GPGP Board about making the acceptability determination. In the initial call with Alpert, Richards Layton went beyond Grossman by an adverb, saying it was the "far better view" that Holdings could make the acceptability determination. Raju Tr. 808, 842. Only after receiving Richards Layton's oral advice did Alpert tell Richards Layton about Skadden's view. No one told Richards Layton about Loews' outreach to the GPGP Board until this litigation.

After receiving Richards Layton's oral advice, Alpert asked the firm to memorialize its advice in an email. JX 1225 at 1. The email backed away from the oral advice by removing the adverb, stating: "While there is some ambiguity and arguments can certainly be made to the contrary, we think that *the better view* is that the [acceptability determination] is within the sole authority of the Sole Member [Holdings] pursuant to Section 5.6 of the LLC Agreement." *Id.* at 2–3 (emphasis added). The email included the following caveat:

> [I]f the Board of Directors is approached and declines to determine that the Opinion of Counsel is acceptable and the Section 15.1(b) call right is exercised by the Sole Member anyway, *that would be a difficult fact to overcome in any future litigation* regarding the exercise of the Section 15.1(b) call right.

Id. at 3 (emphasis added). Richards Layton did not know that the GPGP Board had been approached already about making the decision. *See* Raju Tr. 843. At Alpert's request, Richards Layton later revised its email to restore the adverb, but it kept the caveats. *See* JX 1265 at 4.

Even Baker Botts never opined explicitly that the plain language of the Partnership Agreement and the LLC Agreement made clear that Holdings made the acceptability determination. In its initial advice to Alpert, Baker Botts wrote that "[i]t *seems* that determination of the acceptability of an opinion of counsel in the context of Section 15.1(b) should be made by the Sole Member as opposed to the board of directors of the General Partner." JX 686 at 4 (emphasis added). After obtaining advice from Skadden and Richards Layton, Baker Botts still only would go so far as to describe that as the "better view," while noting that "arguments can be made to the contrary." JX 1508 at 40.

***78** The lawyer who asserted most strongly that the Partnership Agreement gave the General Partner the authority to make the acceptability determination was Layne. He never prepared any written analysis, and he seems originally to have credited the argument that the GPGP Board would determine acceptability.[32] After the outside directors on the GPGP Board expressed their displeasure about being involved in the acceptability determination, Alpert tapped Layne to explain why they no longer had to address the issue. At that point, Layne seems to have lumped together the issue of the authority to exercise the Call Right with the issue of the authority to determine acceptability.[33] The vacillation in Layne's views is also consistent with the ambiguity inherent in the Acceptability Condition.

32 When reviewing a draft of a memorandum from Richards Layton which explained that Section 5.6 "specifies that the Sole Member has exclusive authority to cause GP LLC to exercise the rights of GP LLC," Layne commented, "but not to determine applicability." JX 1810 at 3. Next to another sentence that stated that Holdings decided whether the Opinion of Counsel was acceptable "pursuant to Section 5.6 of the LLC Agreement because the determination to accept the Opinion of Counsel is a part of Section 15.1 of the Partnership Agreement," Layne wrote "not exercise." *Id.*

33 *See* JX 1325; JX 1331 at 2; JX 1343; JX 1435 at 1, 3; JX 1812.

4. Ambiguity Means The GPGP Board Had To Make The Acceptability Determination.

Because the question of who could make the acceptability determination was ambiguous, well-settled interpretive principles require that the court construe the agreement in favor of the limited partners. *See Norton*, 67 A.3d at 360. Under the interpretation that favors the limited partners, the GPGP Board had the authority to make the acceptability determination. Because the GPGP Board did not make the acceptability determination, the General Partner breached the Partnership Agreement by exercising the Call Right.

D. Contractual Immunity To Damages

The defendants maintain that even if the General Partner breached the Partnership Agreement and otherwise would be responsible for damages, the plaintiffs cannot recover because the defendants immunized themselves contractually against any damages award. There are two relevant provisions in the Partnership Agreement. The first is a true exculpation provision. The second is a provision that establishes a conclusive presumption of good faith if the General Partner or another decision-maker relies on an advisor. The General Partner cannot rely on either of them to escape liability in this case.

1. The Exculpation Provision

Section 17-1101(f) of the Delaware Revised Uniform Limited Partnership Act authorizes a partnership agreement to eliminate "any and all liabilities for breach of contract and breach of duties (including fiduciary duties) of a partner or other person to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement," other than "any act or omission that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing." 6 *Del. C.* § 17-1101(f).

The Partnership Agreement takes full advantage of this statutory authority. Section 7.8(a) states:

> Notwithstanding anything to the contrary set forth in this Agreement, no Indemnitee shall be liable for monetary damages to the Partnership [or] the Limited Partners ... for losses sustained or liabilities incurred as a result of any act or omission of an Indemnitee unless there has been a final and non-appealable judgment entered by a court of competent jurisdiction determining that, in respect of the matter in question, the Indemnitee acted in bad faith or engaged in fraud, [or] willful misconduct ....

***79** PA § 7.8(a). The Partnership Agreement defines "Indemnitee" to include the "General Partner," "any Person who is or was an Affiliate of the General Partner," and "any Person who is or was a member, partner, director, officer, fiduciary or trustee of ... the General Partner or any Affiliate of ... the General Partner." *Id.* § 1.1 at 19.

Under this provision, to recover damages from the General Partner, the plaintiff must prove that the General Partner "acted in bad faith or engaged in fraud [or] willful misconduct." *Id.* § 7.8(a). The Partnership Agreement does not define these terms. Under Delaware law, however, all three require a showing of *scienter.*

The exception for willful misconduct best fits the facts of this case. That term requires a showing of "intentional wrongdoing, not mere negligence, gross negligence or recklessness." *Dieckman v. Regency GP LP*, 2021 WL 537325, at *31 (Del. Ch. Feb. 15, 2021) (quoting 12 *Del. C.* § 3301(g)), *aff'd per curiam*, No. 92, 2021, slip op. (Del. Nov. 3, 2021); *see Willful Misconduct*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Misconduct committed voluntarily and intentionally."). The concept of misconduct involves "unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust." *Misconduct*, BLACK'S LAW DICTIONARY (11th ed. 2019).

While serving as a member of this court, Chief Justice Strine described two situations that could support a finding of willful misconduct. *See Gotham P'rs, L.P. v. Hallwood Realty P'rs, L.P.*, 2000 WL 1476663 (Del. Ch. Sept. 27, 2000). A limited partner of an MLP asserted that the general partner "designed" a series of transactions "to entrench its owner [Hallwood Group Incorporated ("HGI")], by placing a large number of [partnership] units in HGI's hands at an unfairly low price." *Id.* at *3. The limited partner also asserted that the general partner "timed the [t]ransactions so as to enable HGI to grab up a control block at a depressed price." *Id.* Chief Justice Strine held on a motion for summary judgment that the plaintiffs could not prove a claim for fraud, but that the ruling did not eliminate the possibility that the plaintiffs could prove willful misconduct. Possible scenarios included if the general partner or its affiliates

> (i) purposely misled the [independent directors] about (a) the underlying value of the [p]artnership units or (b) the ability of the [p]artnership to get a higher price for the units than HGI was willing to pay, (ii) in order to induce the [independent directors] to approve a sale to HGI at an unfair price.

Id. at *14. Another possible scenario that would provide evidence of willful misconduct involved the general partner having "a secret plan to snatch up a large number of units that could entrench it at a bargain price before an expected up-turn in the market and did not disclose that plan to the [independent directors]." *Id.*

Striving to limit the conceptual space available for a finding of willful misconduct, the defendants argue that the court must (i) focus on the three individuals who comprised the Holdings board (Siegel, Keegan, and Wang), (ii) examine their individual states of mind when deciding to exercise the Call Right, and (iii) deny any recovery to the class unless all three acted with *scienter.* The defendants would have the court ignore all of the other actors in the drama and all of the events leading up to the decision to exercise the Call Right.

***80** If the court were deciding whether to hold Siegel, Keegan, or Wang personally liable for their decision to exercise the Call Right, such as under a tortious interference theory, then that mode of analysis might be warranted. But the plaintiffs are seeking to recover damages from the General Partner, not those three individuals.

"A basic tenet of corporate law, derived from principles of agency law, is that the knowledge and actions of the corporation's officers and directors, acting within the scope of their authority, are imputed to the corporation itself." *Stewart v. Wilm. Tr. SP Servs., Inc.*, 112 A.3d 271, 302–03 (Del. Ch. 2015), *aff'd*, 126 A.3d 1115 (Del. 2015); *see Teachers' Ret. Sys. of La. v. Aidinoff*, 900 A.2d 654, 671 n.23 (Del. Ch. 2006); Restatement (Third) of Agency § 5.03 Westlaw (Am. L. Inst. database updated Oct. 2021). That principle extends to alternative entities like the General Partner. *See CompoSecure, L.L.C. v. CardUX, LLC*, 206 A.3d 807, 823–24 (Del. 2018). "An entity ... can only make decisions or take actions through the individuals who govern or manage it." *Dieckman*, 2021 WL 537325, at *36 (quoting *Gerber v. EPE Hldgs., LLC*, 2013 WL 209658, at *13 (Del. Ch. Jan. 18, 2013) (omission in original)).

During the relevant period, numerous individuals acted on behalf of the General Partner in a manner sufficient to impute *scienter* to the General Partner. During the relevant period, Alpert, Siegel, McMahon and Johnson were management-level officers and agents of Loews, Holdings, the GPGP, the General Partner, and Boardwalk. Their actions and intent were imputed to the General Partner. Together, those individuals orchestrated the sham Opinion, supported the sham Opinion with the inadequate Rate Model Analysis, and diverted the acceptability determination for the sham Opinion from the GPGP Board to Holdings.

In addition, Baker Botts acted as counsel to the General Partner in rendering the Opinion. A lawyer acts as an agent for its client, and the lawyer's knowledge is imputed to the client for matters within the scope of the lawyer's agency. *Vance v. Irwin*, 619 A.2d 1163, 1165 (Del. 1993). Ordinarily, an issue would exist about whether to impute an attorney's knowledge to the client when the attorney did not act in good faith. Here, however, the General Partner wanted Baker Botts to render the Opinion and pushed for the outcome that Baker Botts reached. Under the circumstances, Baker Botts' *scienter* in issuing the Opinion can be attributed to the General Partner.

The General Partner engaged in "intentional wrongdoing ... designed to ... seek an unconscionable advantage." *Dieckman*, 2021 WL 537325, at *36 (quoting 12 *Del. C.* § 3301(g)). The General Partner and Baker Botts pasted together an Opinion intended to achieve the goal of enabling the General Partner to exercise the Call Right. That conduct is sufficient to render the exculpatory provision inapplicable. [34]

34 The parties have not addressed who has the burden to prove that the exculpatory provision applies. Authorities demonstrate persuasively that the General Partner should bear this burden. In the analogous context of corporate law exculpation, the director defendants must prove that they fall within the exculpatory provision's protections. *See* *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1223–24 (Del. 1999). For purposes of a breach of contract claim, the exculpatory provision operates as an exception to normal principles of contract liability. As a matter of hornbook law, "[a] party seeking to take advantage of an exception to a contract is charged with the burden of proving facts necessary to come within the exception." 29 Am. Jur. 2d Evidence § 173, Westlaw (database updated Aug. 2021). This decision has nevertheless analyzed the question of *scienter* as if the plaintiffs bore the burden of proof.

2. The Conclusive Presumption

***81** Section 17-407(c) of the Delaware Revised Uniform Limited Partnership Act states that a general partner

> shall be fully protected from liability to the limited partnership, its partners or other persons party to or otherwise bound by the partnership agreement in relying in good faith upon ... opinions, reports or statements presented ... by any ... person as to matters the general partner reasonably believes are within such ... person's professional or expert competence ....

6 *Del. C.* § 17-407(c).

The Partnership Agreement supercharges this statutory concept by providing as follows:

> The General Partner may consult with legal counsel ... and any act taken or omitted to be taken in reliance upon the advice or opinion (including an Opinion of Counsel) of such [counsel] ... shall be conclusively presumed to have been done or omitted in good faith and in accordance with such advice or opinion.

PA § 7.10(b) (the "Reliance Provision").

The General Partner cannot invoke the Reliance Provision when it knows that the opinion in question was contrived to generate a result. Under those circumstances, the General Partner is not relying on the contrived opinion. The opinion is window dressing to enable the General Partner to take action.

That reality prevents the General Partner from relying on the Opinion for purposes of the Reliance Provision. The General Partner not only knew the Opinion was contrived, but the General Partner's representatives participated actively in the manufacturing of the Opinion.

The General Partner also cannot rely on Skadden's advice about the acceptability of the Opinion. As a threshold matter, it is not clear that the Reliance Provision envisions opinions like Matryoshka dolls, in which counsel renders an opinion, then another counsel opines on the opinion, and so on, with the breadth of protection expanding at each level. If anything, the procuring of a second opinion can be a tell, implying inadequacies or taints in the original opinion. Boards often retain a second investment banker when they learn that their chosen banker has a conflict of interest that could render its advice suspect. At least in that setting, the second banker addresses the core issue. Here, Skadden refused as a matter of firm policy to opine on the core issue and instead provided an opinion about an opinion.

Regardless, the Reliance Provision only protects the General Partner when it actually relies on the underlying opinion, not when it manufactures the opinion and then gets another opinion to whitewash the first one. No matter what Skadden said about the Opinion, the General Partner knew how the Opinion came about, including that it addressed hypothetical maximum rates in a setting where the regulatory changes were not yet final and were unlikely to have any meaningful real-world effect. Under those circumstances, the General Partner cannot invoke the Reliance Provision.

Finally, the General Partner cannot invoke the Reliance Provision for purposes of the Acceptability Condition because the wrong decisionmaker considered the issue. The General Partner knew about the ambiguity surrounding the acceptability condition. The General Partner opted for the decisionmaker more favorable to its interests rather than the decisionmaker more favorable to the interests of the limited partners. With the wrong decisionmaker having acted, the General Partner cannot claim to have relied validly on Skadden's advice.

E. Damages

***82** Having found that the General Partner breached the Partnership Agreement, and having concluded that the General Partner can be held liable for damages, the next step is to determine whether the plaintiffs suffered damages, and if so, the amount of a damages award. The plaintiffs proved that by exercising the Call Right in breach of the Partnership Agreement, the General Partner inflicted damages on the class of $689,827,343.38. Plaintiffs are entitled to pre- and post-judgment interest on that amount. As the prevailing party, the plaintiffs are also entitled to an award of fees.

> [T]he standard remedy for breach of contract is based upon the reasonable expectation of the parties *ex ante.* This principle of expectation damages is measured by the amount of money that would put the promisee in the same position as if the promisor had performed the contract. Expectation damages thus require the breaching promisor to compensate the promisee for the promisee's reasonable expectation of the value of the breached contract, and, hence, what the promisee lost.

Duncan v. Theratx, Inc., 775 A.2d 1019, 1022 (Del. 2001).

An injured party "need not establish the amount of damages with precise certainty where the 'wrong has been proven and injury established.' " *Siga Techs., Inc. v. PharmAthene, Inc.*, 132 A.3d 1108, 1131 (Del. 2015) (quoting *Del. Express Shuttle, Inc. v. Older*, 2002 WL 31458243, at *15 (Del. Ch. Oct. 23, 2002)). "[D]oubts about the extent of damages are generally resolved against the breaching party." *Id.* at 1131. "Public policy has led Delaware courts to show a general willingness to make a wrongdoer 'bear the risk of uncertainty of a damages calculation where the calculation cannot be mathematically proven.' " *Beard Rsch., Inc. v. Kates*, 8 A.3d 573, 613 (Del. Ch. 2010) (quoting *Great Am. Opportunities, Inc. v. Cherrydale Fundraising, LLC*, 2010 WL 338219, at *23 (Del. Ch. Jan. 29, 2010) (collecting cases)). That said, expectation damages "should not act as a windfall." *Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146 (Del. 2009).

The plaintiffs proved that the General Partner breached the Partnership Agreement by exercising the Call Right without meeting the necessary conditions. By exercising the Call Right improperly, the General Partner deprived the plaintiffs of the stream of distributions that they otherwise would have received as unitholders. The appropriate measure of damages is therefore the difference between the present value of those future distributions and the transaction price. The transaction price is undisputed. The General Partner paid $12.06 per unit when it exercised the Call Right. Unsurprisingly, the parties dispute the present value of the future distributions, and they presented drastically different estimates to the court.

To make their respective cases, both sides presented damages experts. J.T. Atkins submitted a report and testified on behalf of the plaintiffs. Atkins has been involved in numerous M&A

financing and restructuring transactions in the energy and MLP sectors, and has acted as an expert witness in thirteen separate litigations involving energy companies or MLPs. Atkins Tr. 1018. R. Glenn Hubbard submitted a report and testified on behalf of the defendants. Hubbard is a professor at Columbia University's business school and has testified as an expert before this court on matters of valuation on numerous occasions. JX 1745 (Hubbard Report) ¶¶ 2, 5.

Atkins measured damages using a discounted distribution model (a "Distribution Model"). He calculated the fair value of the units to be $17.84 at the low end and $19.30 at the high end, resulting in a range of damages from $720 million to $901.6 million. JX 1761 (Atkins Rebuttal Report) ¶ 2(d).

***83** Hubbard also prepared a Distribution Model, but he discarded it in favor of a valuation based on the market price of Boardwalk's units. Using his market price metric, Hubbard opined that the fair value of the units was $10.74 per unit. Hubbard Report ¶ 9. Because that value was less than the Call Right exercise price, he concluded that the plaintiffs suffered no damages.

Hubbard's approach was not persuasive. This decision uses Atkins' model with one modification.

1. Hubbard's Approach

After considering several valuation indicators, Hubbard opined that the best evidence of the value of the units was their unaffected market price. In reaching this conclusion, Hubbard examined various jurisprudential indicators of market efficiency and concluded that when applied to Boardwalk's units, those indicators were "generally consistent with ... trading in an efficient market." Hubbard Report ¶ 71.

To derive a measure of damages based on the unaffected market price, Hubbard could not simply use the market price on the date of the Call Right, because the Potential Exercise Disclosures and the self-referential mechanic in the Purchase Price calculation drove the market price downward. To derive an unaffected market price, Hubbard started with the market price on the last trading day before the issuance of the Potential Exercise Disclosures, then used a regression analysis to bring the market price forward to the date on which Loews exercised the Call Right. *See id.* ¶ 89. Based on this analysis, Hubbard concluded that the unaffected market price of the units would have been lower than the Purchase Price. He therefore opined that the limited partners did not suffer any damages. *Id.* ¶ 9.

Hubbard's analysis is not persuasive because he failed to account for the General Partner's control over the Partnership and the resulting valuation overhang. A market for a company's shares "is more likely efficient, or semi-strong efficient, if it has ... no controlling stockholder."[35] Conversely, a market for a company's shares is less likely to be efficient if it has a controlling stockholder. The presence of a controlling stockholder matters because "participants will perceive the possibility that the controller will act in its own interests and discount the minority shares accordingly." *In re Appraisal of Regal Ent. Gp.*, 2021 WL 1916364, at *26 (Del. Ch. May 13, 2021) (emphasis removed) (declining to rely on unaffected trading price given the presence of a controlling stockholder); *accord Glob. GT v. Golden Telecom, Inc.*, 993 A.2d 497, 503, 508–09 (Del. Ch. 2010), *aff'd*, 11 A.3d 214 (Del. 2010). It is undisputed that Loews controlled the Partnership through the General Partner. Hubbard's starting point—the supposedly unaffected market price on the last trading date before the issuance of the Potential Exercise Disclosures—was thus not a reliable estimate of fair value.

35 *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1, 25 (Del. 2017); *In re Appraisal of Stillwater Mining Co.*, 2019 WL 3943851, at *51 n.22 (Del. Ch. Aug. 21, 2019) (collecting research supporting the reliability of unaffected trading price in absence of controlling stockholder), *aff'd sub nom. Brigade Leveraged Cap. Structures Fund Ltd. v. Stillwater Mining Co.*, 240 A.3d 3 (Del. 2020).

Hubbard's analysis also failed to account for the fact that the market did not possess material information about the level of distributions that Boardwalk could make in the future. "Under the semi-strong form of the efficient capital markets hypothesis, the unaffected market price is not assumed to factor in nonpublic information." *Verition P'rs Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128, 140 (Del. 2019). Consequently, it is inappropriate to rely on the unaffected trading price as a measure of value when there is "material, nonpublic information" which "could not have been baked into the public trading price." *Id.* at 139.

***84** In this case, Loews projected internally that the Partnership's distributions would quadruple in 2023. *See* JX 1529, "Side Model" tab. Because Loews controlled the Partnership, Loews had the ability to make that happen. The market was not aware of Loews' internal projections, and the unaffected trading price of the units could not and did not reflect this information. *See* Dell, 177 A.3d at 25–26 (explaining that "valuation gaps" can occur when "information fail[s] to flow freely or ... management purposefully temper[s] investors' expectations for the [c]ompany so that it [can] eventually take over the [c]ompany at a fire-sale price"). By relying on the unaffected trading price, Hubbard's approach failed to take into account this source of value.

Hubbard's analysis of the trading price does not provide a reliable damages estimate. This decision therefore declines to use it.

2. Atkins' Approach

Atkins provided a damages estimate using a Distribution Model. That methodology is a variant of a discounted cash flow analysis, but instead of discounting future cash flows at the entity level, the Distribution Model discounts the value of expected future distributions at the investor level. Because the Distribution Model only looks at returns to the equity, the discount rate is the company's cost of equity capital. Atkins Tr. 1022. As Hubbard acknowledged, a Distribution Model is a "customary" method for valuing units in an MLP.[36]

36 Hubbard Tr. 1194; *see* JX 397 at 15 (industry analyst white paper stating that "[t]he methodology we prefer [for valuing MLPs] is the distribution discount model"); JX 423 at 85 (industry analyst white paper stating that "[o]ur primary tool for valuing MLPs is a three-stage distribution (dividend) discount model"); JX 429 at 3 (analyst report valuing the Partnership using a Distribution Model); JX 431 at 10 (same); JX 523 at 4 (same); JX 1223 at 8 (same); *see also* JX 451 at 29 (analyst white paper using the same methodology but calling it a "Dividend Discount Model"). Hubbard prepared his own Distribution Model to "corroborat[e]" his damages estimate. Hubbard Report ¶¶ 150–51, 155, Ex. 32A.

The principal inputs to a Distribution Model are cash flow projections, the company's cost of equity capital, and a terminal growth rate. Atkins Tr. 1025–26. The defendants do not dispute Atkins' cost of equity capital or his terminal growth rate. In both cases, Atkins used more conservative figures than Hubbard used in his competing Distribution Model. *See* Hubbard Tr. 1195.

The defendants focused their attack on the cash flow projections that Atkins used. Thus, the central question is whether the cash flow projections were sufficiently reliable to use for valuation purposes.

"When evaluating the suitability of projections, Delaware cases express a strong preference for management projections prepared in the ordinary course of business and available as of the date of the [transaction]." *Regal Ent. Gp.*, 2021 WL 1916364, at *21 & n.17 (collecting cases). "[L]itigation-driven projections" are less likely to be reliable and therefore are disfavored. *Gray v. Cytokine Pharmasciences, Inc.*, 2002 WL 853549, at *8 (Del. Ch. Apr. 25, 2002). Relying on ex post, litigation-driven projections creates an "untenably high" risk of "hindsight bias and other cognitive distortions." *Agranoff v. Miller*, 791 A.2d 880, 891–92 (Del. Ch. 2000); *accord* *Owen v. Cannon*, 2015 WL 3819204, at *22 (Del. Ch. June 17, 2015) (finding that "the after-the-fact projections ... created for purposes of this litigation are tainted by hindsight bias and are not a reliable source to determine the fair value of [the] shares" (footnotes omitted)).

Both experts relied on a model that the Loews management team prepared (the "Loews Model"). The Loews Model started from a five-year plan that Boardwalk's management team created in the ordinary course of business. Siegel Dep. 115; *see* Siegel Tr. 754–55. The Loews management team then extended the five-year plan to the year 2029. In the course of assisting Loews senior executives in determining whether to exercise the Call Right, the Loews management team modified and refined their model many times. *See, e.g.*, JX 767; JX 881; JX 1485; JX 1529.

***85** Atkins used version ninety-one of the Loews Model. That version was the last one that the Loews management team prepared before the Loews board of directors met on June 29, 2018, and decided to cause the General Partner to exercise the Call Right. *See* JX 1529. Hubbard used version ninety of the Loews Model, which was the immediately preceding version. *See* JX 1485. The two versions are virtually identical, and both project the same amount of distributions. *Compare* JX 1485, "Side model" tab, Row 20, *with* JX 1529, "Side model" tab, Row 20.

Both experts agreed that the Loews Model was an appropriate starting point for a Distribution Model. The court concurs. The Loews Model started from a five-year plan prepared in the ordinary course of business, and the Loews management team refined it so it could be used in real time to make a $1.5

billion dollar investment. The projections were not created for litigation, nor is there any other reason to doubt their accuracy.

Both experts nonetheless made adjustments to the Loews Model. Hubbard made multiple modifications to the cash flow projections. Atkins kept the cash flow projections in the Loews Model, but he eliminated a reduction in EBITDA from the forecast. This decision declines to adopt any of the adjustments and uses the Loews Model in its original form.

a. Hubbard's Adjustments To The Loews Model

For purposes of his Distribution Model, Hubbard arbitrarily removed the projections for 2028 and 2029 from the Loews Model. *See* Hubbard Report Ex. 25. By doing so, Hubbard shortened the projection period and changed the cash flows for the terminal period. *See id.* Ex. 32A. Hubbard did not provide a persuasive explanation for this change. Hubbard was serving as a litigation expert, and he lacked prior experience with MLPs in general and Boardwalk's business in particular. There is no reason to believe that Hubbard had a better understanding of Boardwalk's prospects than the Loews management team.

Hubbard also eliminated the distributions in the out-years of the Loews Model. Hubbard claimed that he reduced the projections "so that the forecasts for the terminal period would reflect a more realistic and sustainable steady state." JX 1759 (Hubbard Rebuttal Report) ¶ 10. That explanation was conclusory and unpersuasive.

In addition, Hubbard progressively increased the projected capital expenditures for the years 2023–2027. *Compare* JX 1529, "Side model" tab, *with* Hubbard Report Ex. 25. Hubbard allocated all capital expenditures to maintenance capital, which reduced the projected distributions during those years. *See* Hubbard Report ¶ 114; Atkins Rebuttal Report ¶ 26. By the year 2027, Hubbard's approach resulted in more than double the expenditures of maintenance capital than the Loews management team had projected. *See* Atkins Rebuttal Report ¶ 26 tbl. 1. That was neither reasonable nor persuasive.

Hubbard's modifications to the Loews Model caused distributions to decline over time. Hubbard Report Ex. 32A. The high point for distributable cash flow in Hubbard's model was 2022, the last year before Hubbard's modifications kicked in. *See id.* After that, the value of the distributions declined steadily. Atkins explained persuasively that such a result was counterintuitive, both in terms of the underlying business and given Loews' decision to exercise the Call Right:

> [I]nstead of having the normal projections where you have a slow and steady growth in your distributions, [Hubbard's] assumptions ... push distributions downward. Why would Loews ... not just sell the business, get out of this business, if it really believed that [the] distributions would decline as opposed to go up over time?

***86** Atkins Tr. 1057.

Hubbard made these adjustments based on an interview with two Loews executives. Hubbard Report ¶ 106 n.161. Hubbard claimed that the executives told him that, "Loews focused mostly on the period 2018 through 2022 and [that] their assumptions for 2023 through 2029 were vetted less rigorously." Hubbard Report ¶ 106 n.161. The executives' account was self-serving, and the defendants could not produce any documents to support it. *See* JX 1752. The defendants also did not call either executive at trial to support Hubbard's assertion. Instead, they called Siegel, who knew next to nothing about the Loews Model. [37]

37 *See* Siegel Tr. 755 ("Q: By April 4th your team was up to Version 25 of the model; right? A: I don't know."); *id.* at 756–57 ("Q: By April 9th, your team had built a switch into the model; correct?" A: I don't know. Q: You could toggle the switch from base FERC impact to downside FERC impact or to off; correct? A: Don't know.... I never studied the actual model itself and how it was put together, so I can't comment. Q: If the switch was toggled to downside FERC impact, the model would show a hit to EBITDA from the refund to ADIT from the customers; correct? A: I don't know. Q: If the switch was off, the model would show no hit to EBITDA; correct? A: I don't know. Q: On April 9th, your team was at Version 39 of the Loews' [sic] model; correct? A: Don't know."); *id.* at 758 ("Q: By that point, the model was up to Version 43; correct? A: Again, I don't know."); *id.* at 761–62

> (“Q: Barclays gave input to Ms. Wang about the model; correct? A: I don't know.”); *id.* at 763 (“Q: First of all, [the Loews Model] initially went out ten years; correct? A: I don't know.... Q: Version 43 of the model goes out 12 years; isn't that right? A: I have no recollection of seeing that model or many of the models you've referred to.”); *id.* at 764 (Q: “Isn't it true that the incentive distribution rights kick in in years 11 and 12 of the Loews’ [sic] model? A. I don't know. I'm not sure I've seen the model. Q. That's why the model goes out 12 years; right, Mr. Siegel? A. I don't know.”); *id.* at 765 (“Q: Isn't it true that there are 91 versions of this model, Mr. Siegel? A. I have no idea.”); *id.* at 766 (“Q: Isn't it true that Version 91 of the model was used to prepare the June 29th Loews’ [sic] board deck? A. I don't know. Q. Isn't it true that the inputs or the pages of the Loews’ [sic] June 29th board deck come directly from Version 91 of the model? A. I don't know. I'm not sure I've seen Version 91 of the model. Q. Isn't it true that your expert in this case uses Version 90 of the model? A: Again, I don't know.”).

This court has rejected expert opinions when the experts downsized management projections for purposes of litigation. While serving as a member of this court, Chief Justice Strine rejected an expert's opinion that was based “on a substantial negative revision of ... projections that he came up with after discussions with [the company's] managers after the valuation date.” *Agranoff*, 791 A.2d at 891. A party seeking to vary from reliable projections must “proffer legitimate reasons to vary from the projections.” *Prescott Gp. Small Cap, L.P. v. Coleman Co., Inc.*, 2004 WL 2059515, at *21 (Del. Ch. Sept. 8, 2004) (internal quotation marks omitted). To proffer legitimate reasons, a party must offer more than just “reliance on management's off-the-record denigrations of its own projections.” *Id.* “Any other result would condone allowing a company's management or board of directors to disavow their own data in order to justify a lower valuation....” *Gray*, 2002 WL 853549, at *8. The same reasoning supports rejecting Hubbard's modifications to the Loews Model.

***87** This court likewise has rejected a valuation opinion when the expert increased capital expenditures without good reason, thereby reducing cash flows. *See In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *15 (Del. Ch. May 3, 2004). Hubbard did the same thing. As Atkins explained, Hubbard's changes were inconsistent with “Boardwalk's actual operational history.” Atkins Rebuttal Report ¶ 27. Maintenance capital expenditures for pipelines are “normally significantly less than depreciation,” and Boardwalk's “maintenance capital expenditures were on average 39.3% of depreciation expense.” Atkins Rebuttal Report ¶¶ 28–29 (quoting Credit Suisse, *CS MLP Primer – Part Deux* 14 (Nov. 23, 2011)). Hubbard projected that maintenance capital expenditures would increase to 61.7% of depreciation by the terminal year of his Distribution Model. Atkins Rebuttal Report ¶ 29; *see id.* Ex. B. at 46. That percentage exceeded Boardwalk's historical levels and the levels at eleven of twelve comparable MLPs. *Id.* ¶ 29 tbl. 2.

b. Atkins’ Adjustment To The Loews Model

Atkins made one modification to the Loews Model. The Loews management team included a “switch” in the Loews Model labeled “FERC Impact,” which enabled a user to toggle between three possible scenarios: “Base FERC Impact,” “Downside FERC Impact,” and “Off,” meaning no FERC impact (the “FERC Switch”) The first two options—Base FERC Impact and Downside FERC Impact—reflected Loews management's assessment of the potential implications of the March 15 FERC Actions. Johnson Tr. 636. The model built on FERC's proposed Form 501(g), which instructed MLPs to submit cost-of-service information using an indicative ROE of 10.55%. Because FERC had singled out that figure, the Loews management team was concerned that FERC could use it as a trigger for pursuing a rate case.

Even using these assumptions, Gulf South and Gulf Crossing did not face any risk of a rate case. Texas Gas faced some risk. The Loews management team projected that if Texas Gas filed its Form 501(g) and presented its cost-of-service calculations using the indicative ROE, no income tax allowance, and ADIT amortized using the Reverse South Georgia method, then Texas Gas would show an ROE of 24.3%, which was within the range of ROEs that historically had triggered rate cases. *See* JX 1071 at 1, 3; *accord* Wagner Tr. 247. If FERC initiated a rate case and mandated an adjustment in the rates that Texas Gas could charge based on an ROE of 10.55%, then the Loews Model calculated that Texas Gas would face a revenue reduction of $73.9 million per year. *See* Johnson Tr. 636. The “Base FERC Impact” scenario therefore deducted $73.9 million from Boardwalk's EBITDA for every year of the discrete projection period, beginning in 2019. *See* JX 1485, “Side Model” tab, Row 11. Turning the FERC Switch to “Off” removed the negative impact.

Projecting a rate case for Texas Gas based on these assumptions reflected the conservativism that went into the Loews Model. Wagner, the internal FERC expert on the Baker Botts team, believed that there was "a low probability that Texas Gas would face a section 5 case in the next 1–2 years." JX 1071 at 1. Although an ROE of 24.3% was "the type of return that has caused FERC to initiate a section 5 case" in the past, Wagner believed that FERC's existing workload, in addition to the influx of Form 501-G filings, made it likely that FERC would "probably be somewhat swamped and not able to begin those investigations." Wagner Tr. 245; *see* JX 1071 at 1. Beyond two years, there were "too many variables to make a prediction with any confidence." JX 1071 at 1. Sullivan, the outside rate expert that Baker Botts hired, thought that it would require an ROE of 20–30% to trigger a rate case for the foreseeable future. *See* JX 1807 at 6; Sullivan Dep. 168. The plaintiffs' rate expert also believed that there was a "low risk of a rate case for Texas Gas." Webb Tr. 1008.

***88** Based on Webb's opinion, Atkins set the FERC Switch to the "Off" position. That was reasonable, and it finds support in the broader record. But it results in an alteration to the Loews Model. The Loews Model adopted a conservative approach on the assumption that the Base FERC Impact scenario would occur. This decision therefore uses the Base FERC Impact scenario.

By using the Base FERC Impact scenario, this decision also adopts a conservative measure of damages compared to the more than $900 million that the court could have awarded under the wrongdoer rule. That rule provides that when the "defendant's wrongful act" causes uncertainty in estimating damages, "justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931). The wrongdoer rule is a "corollary to [the] presumption" that "doubts about the extent of damages are generally resolved against the breaching party." *PharmAthene*, 132 A.3d at 1131. Under the wrongdoer rule, the court "take[s] into account the willfulness of the breach in deciding whether to require a lesser degree of certainty" about the extent of damages. [38]

38 *See* Restatement (Second) of Contracts § 352 cmt. a, Westlaw (Am. L. Inst. database updated Oct. 2021) ("A party who has, by his breach, forced the injured party to seek compensation in damages should not be allowed to profit from his breach where it is established that a significant loss has occurred. A court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty, giving greater discretion to the trier of facts."); *see also Agilent Techs., Inc. v. Kirkland*, 2010 WL 610725, at *27 (Del. Ch. Feb. 18, 2010) ("[I]n cases where a specific injury to the plaintiff cannot be established, the defendant's actual gain may be considered.").

In this case, the General Partner breached the Partnership Agreement by exercising the Call Right without first meeting the necessary conditions. The General Partner's breach was willful. The uncertainty about the FERC Impact switch only existed because of the timing of the willful breach, which resulted in the take-private transaction being completed just before FERC published its final rule. The publication of the final rule "mitigate[d]" the supposed "adverse effect" of the March 15 FERC Actions that formed the basis for the Opinion. JX 1569. The uncertainty embodied in the Base FERC Impact scenario would not have existed but for the opportunistic timing of the exercise of the Call Right. Under the wrongdoer rule, that uncertainty should be resolved against the defendants, meaning the proper measure of damages should use the Loews Model with the FERC Switch in the "Off" position.

This decision nonetheless declines to apply the wrongdoer rule. Because Atkins' model with the FERC Switch in the Base FERC Impact position results in a persuasive and reliable measure of damages, the court adopts it.

3. The Finding Regarding Damages

With the FERC Switch set for the Base FERC Impact Scenario, Atkins' Distribution Model results in a valuation of $17.60 per unit. The transaction price was $12.06 per unit. The plaintiffs are entitled to damages of $5.54 per unit.

When the General Partner exercised the Call Right, there were 124,467,395 units outstanding that were not beneficially owned by Loews or its affiliates. [39] Multiplying 124,467,395 by $5.54 yields total damages of $689,827,343.38.

39 *See* JX 1514 at 3 (June 29, 2018, Schedule 13D filing showing "250,296,782 Common Units Outstanding as of March 31, 2018," of which "124,710,649 Common Units that may be deemed to be beneficially owned by [Loews] based on the right of the General Partner to acquire voting

and investment power over such Common Units on July 18, 2018 as a result of the Transaction"); PTO ¶ 388 ("[T]hrough the exercise of the Call Right, Loews ... acquired all 124,710,469 of the outstanding common units"). Directors and officers of the Partnership disposed of 243,254 units in the Call-Right Exercise. JX 1561 at 1 (Hyland and Hyland's spouse disposed of 29,307 units); JX 1562 at 1 (Rebell, Rebell's spouse, and an affiliated LLC disposed of 60,583 units); JX 1563 at 1 (Shapiro disposed of 33,907 units); JX 1564 at 1 (Tisch disposed of 81,050 units); JX 1565 at 1 (Cordes disposed of 23,407 units); JX 1566 at 1 (Horton's spouse disposed of 15,000 units). Subtracting 243,254 from 124,710,649 yields 124,467,395, the total number of shares held by the class. *See* Atkins Report Ex. C at 7.

***89** The resulting damages figure is conservative compared to the more than $900 million that the court could have awarded if it had adopted Atkins' opinion in full. It is also conservative relative to Loews' contemporaneous estimate of the $1.557 billion in "Value Creation" that Loews expected to enjoy from exercising the Call Right. JX 1505 at 10.

The plaintiffs are entitled to pre- and post-judgment interest on the damages award from July 18, 2018, until the date of payment. When neither party submits evidence showing the appropriate rate of interest, "the court looks to the legal rate of interest." *Taylor v. Am. Specialty Retailing Gp., Inc.*, 2003 WL 21753752, at *12 (Del. Ch. July 25, 2003). "The legal rate of interest, as defined by 6 *Del. C.* § 2301, is 5% over the Federal Reserve discount rate." *Doft & Co. v. Travelocity.com Inc.*, 2004 WL 1152338, at *12 (Del. Ch. May 20, 2004). When the court "award[s] the legal rate of interest, the appropriate compounding rate is quarterly." *Id.*; *accord Taylor*, 2003 WL 21753752, at *13. The plaintiffs therefore are entitled to pre- and post-judgment interest at the legal rate, compounded quarterly, from July 18, 2018, until the date of payment, with the legal rate fluctuating with changes in the underlying reference rate. The plaintiffs are additionally entitled to an award of fees as the prevailing party.

F. The Implied Covenant Of Good Faith And Fair Dealing

As an alternative theory of breach, the plaintiffs contend that the General Partner breached the implied covenant of good faith and fair dealing that inheres in every contract governed by Delaware law. Because the court has held that the General Partner breached the express terms of the Partnership Agreement, there is no need to reach the implied covenant.

The plaintiffs have articulated non-duplicative implied covenant theories about the effect of the Potential Exercise Disclosures and the operation of the Purchase Price formula, but a judgment in the plaintiffs' favor on those questions would result in a lower damages award than the claim for breach of the Call Right. The plaintiffs are only entitled to one recovery. This decision therefore does not wade into the additional implied covenant issues.

G. The Claims Against The Defendants Other Than The General Partner

The plaintiffs have asserted theories that would enable them to recover from the GPGP, Holdings, and Loews. Those affiliates of the General Partner directed its actions and caused it to exercise the Call Right, but the affiliates are not parties to the Partnership Agreement and hence are not liable in contract. The plaintiffs maintain that the GPGP, Holdings, and Loews are liable to the class on a claim for tortious interference with contract and under the doctrine of unjust enrichment.

Determining whether the General Partner's affiliates should be liable for tortious interference will require a complex balancing of different factors. *See, e.g.*, *NAMA Hldgs., LLC v. Related WMC LLC*, 2014 WL 6436647, at *25–36 (Del. Ch. Nov. 17, 2014). This decision has covered much ground, and it would extend its length significantly to take on the tortious interference claim at this time. Furthermore, as a practical matter, it should be unnecessary to determine whether the General Partner's affiliates tortiously interfered with the Partnership Agreement. As noted, the plaintiffs are only entitled to a single recovery, and if the General Partner pays the damages award, then the class will have no basis to pursue the other defendants.

***90** The facts of this case make it unlikely that pursuing the other defendants will be necessary to ensure the plaintiffs recover their damages. The General Partner acquired 49% of the limited partner interest by exercising the Call Right. It already possessed a 2% general partner interest and all of Boardwalk's incentive distribution rights. The General Partner thus has access to substantial cash flows.

The same is true for the plaintiffs' claim for unjust enrichment, although that claim is comparatively easier to analyze. The General Partner remains the principal wrongdoer. It should satisfy the claim.

Given these dynamics, the court will not adjudicate the claims for tortious interference or unjust enrichment at this time. Those claims are severed and stayed. If the General Partner satisfies the judgment, then those claims will be moot. If the General Partner fails to satisfy the judgment, then the claims can be revived.

III. CONCLUSION

The General Partner is liable to the plaintiff class for damages in the amount of $689,827,343.38, plus pre- and post-judgment interest on that amount through the date of payment. The plaintiffs are also entitled to an award of costs as the prevailing party.

The parties will incorporate the court's rulings into a partial final judgment that has been agreed as to form. The partial final judgment will not extinguish the separate claims for breach of the implied covenant of good faith and fair dealing against the General Partner or for tortious interference and unjust enrichment against the General Partner's affiliates.

If there are other issues that the court needs to address before such an order can be entered, then the parties will prepare a joint letter that identifies the issues and proposes a procedure for resolving them.

All Citations

Not Reported in Atl. Rptr., 2021 WL 5267734

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE BAXTER INTERNATIONAL INC.	)))	C.A. No. 11609-CB

STIPULATION AND [PROPOSED] ORDER REGARDING PAYMENT OF SPECIAL COUNSEL'S FEES AND EXPENSES

WHEREAS, on October 14, 2015, Baxter International Inc. ("Baxter") filed its Verified Application Pursuant to 8 *Del. C.* § 205 (the "Application"). (Trans. ID 58014003.)

WHEREAS, on October 28, 2015, the Court appointed Gregory P. Williams of Richards, Layton & Finger, P.A. ("Special Counsel") to file a brief in opposition to the Application in the event that no stockholder intervened before December 3, 2015. (Trans. ID 58078399.)

WHEREAS, no Baxter stockholder intervened in the matter before December 3 and Special Counsel filed its opposition to the Application on December 16, 2015. (Trans. ID 58309890.)

WHEREAS, at oral argument regarding the Application on January 15, 2016, the Court noted that it was open to considering an application for fees by Special Counsel, should Special Counsel choose to submit such application.

WHEREAS, Special Counsel has incurred $83,488 in fees and expenses in this matter and has unilaterally reduced its requested award of fees to $65,000 (see Exhibit A hereto).

WHEREAS, Baxter has agreed to pay Special Counsel the sum of $65,000 as remuneration for fees and expenses incurred in acting as Special Counsel in the above-captioned action.

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED, subject to the approval of the Court:

1. Baxter shall pay Special Counsel the sum of $65,000 within thirty (30) days of the Court's entry of this order as full compensation for its fees and expenses incurred in this matter.

Dated: March 1, 2016

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Special Counsel

IT IS SO ORDERED this _____ day of __________, 2016.

____
Chancellor

Court:	DE Court of Chancery Civil Action
Judge:	Andre G Bouchard
File & Serve Transaction ID:	58649760
Current Date:	Mar 01, 2016
Case Number:	11609-CB
Case Name:	In re Baxter International Inc.
Court Authorizer:	Bouchard, Andre G

/s/ Judge Bouchard, Andre G

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE VBR AGENCY, LLC) C.A. No. 2022-0328-JTL

OPINION

Date Submitted: April 13, 2022
Date Decided: April 20, 2022

Eric D. Schwartz, Thomas W. Briggs, Jr., Joseph C. Barsalona II, Sabrina M. Hendershot, MORRIS NICHOLS ARSHT & TUNNEL LLP, Wilmington, Delaware; Nader A. Amer, CARLTON FIELDS, P.A., Miami, Florida; *Attorneys for Petitioner*.

LASTER, V.C

VBR Agency, LLC, is a defunct Delaware entity (the "Defunct Company"). Petitioner Clement Dwyer, Jr., alleges that he is a former manager and director of VBR Holdings LLC, which is also a defunct Delaware entity (the "Defunct Manager"). Dwyer alleges that the Defunct Manager was a member and the sole manager of the Defunct Company. Dwyer asks the court to appoint him as the receiver for the Defunct Company for the purpose of addressing claims that the Insurance Commissioner of the Commonwealth of Pennsylvania (the "Pennsylvania Commissioner") has asserted against the Defunct Company, as well as any related proceedings that may arise. *See* Dkt. 1 (the "Petition").

Dwyer's submissions provide the court with virtually no information about him, other than his status as a former manager and director of the Defunct Manager. He is not a regular practitioner in the Court of Chancery. He is evidently not a Delawarean, as he states in a short affidavit that he resides in New Hampshire. The Petition provides no reason to doubt Dwyer's bona fides. The problem is not negative information, but rather the absence of information.

In recent years, the members of the court have been forced to address actions taken by custodians or receivers who obtained appointments on similarly scant records. In some of those situations, the custodian or receiver has taken action that caused the court to question whether the appointment should have been made, or the court has learned information which might have caused the court to decline to make the appointment in the first instance.

One way to address these problems is to obtain additional information up front. Dwyer has retained estimable counsel, who are well positioned to help the court. In this decision, the court identifies information that Dwyer must provide before the court can give meaningful consideration to the Petition. Counsel can assist the court by identifying other information that is material to the Petition. Given the status of the Defunct Company, it seems likely that the Petition will be considered ex parte, and in that setting, the court is even more reliant on counsel's assistance.

Dwyer has leave to supplement the record with the additional information that this decision requests and with any other material that counsel believes should be brought to the court's attention. Once that process is complete, counsel shall request a conference so that the court can consider next steps.

I. FACTUAL BACKGROUND

The facts are drawn from submissions in the case.

A. The Defunct Company

The Defunct Company traces its origins to the incorporation of its corporate predecessor, Sharebridge Private Equity Consolidated, Inc., on July 6, 2005. Effective December 30, 2013, the Defunct Company converted to a limited liability company and changed its name to Vanbridge LLC. The Petition alleges that the Defunct Company acted as an insurance and reinsurance broker and advisor. It provides no other information about the Defunct Company's business or activities.

The Petition does not provide any meaningful information about the Defunct Manager. All the Petition discloses is that the Defunct Manager was formerly known as

Vanbridge Holdings LLC and that it served as a member and the sole manager of the Defunct Company.

The Petition states that at all relevant times, Dwyer served as a member of the board of managers of the Defunct Manager. The Petition says nothing else about Dwyer or his relationship to the Defunct Manager or the Defunct Company.

The Petition provides no other information about the internal governance of the Defunct Manager or the Defunct Company. One can infer that the Defunct Manager's board of managers had other members in addition to Dwyer. One can infer that the Defunct Company had other members besides the Defunct Manager. It is not possible to glean more than that.

The Petition alleges that on August 24, 2018, the Defunct Manager and the Defunct Company sold all of their assets to EPIC Holdings, Inc., an affiliate of Edgewood Partners Insurance Center, Inc. The Petition does not provide any information about the transaction.

The Petition alleges that after the sale, the Defunct Manager and the Defunct Company changed their names to their current appellations and dissolved. The Petition does not provide any information about the dissolution.

The Petition attaches the certificates that canceled the certificates of formation for the Defunct Manager and the Defunct Company. It shows that their existence as jural entities ceased on December 29, 2020.

B. The SHIP Litigation

On January 28, 2022, the Pennsylvania Commissioner filed a lawsuit in the Commonwealth Court of Pennsylvania against the Defunct Company (the "SHIP

Litigation”). The Pennsylvania Commissioner filed the SHIP Litigation in her capacity as the statutory rehabilitator of Senior Health Insurance Company of Pennsylvania (“SHIP”), an insolvent Pennsylvania insurer.

The Pennsylvania complaint alleges that the Defunct Company structured a transaction for SHIP with Roebling Re Ltd., a newly formed entity (the “New Reinsurer”). At the Defunct Company’s urging, SHIP (1) ceded 49% of most of its policy liabilities for long-term care insurance to the New Reinsurer and (2) paid the New Reinsurer a reinsurance premium substantially equal to the value placed on the ceded liabilities on SHIP’s financial statements. The Pennsylvania Commissioner asserts that the book value of the ceded liabilities was excessive, causing the premium payment to be excessive. The Pennsylvania Commissioner also asserts that although the New Reinsurer appeared to accept financial responsibility for the liabilities, it had no assets to satisfy the liabilities other than what it received from SHIP. The transaction therefore did not involve a meaningful transfer of risk. The Pennsylvania Commissioner alleges that in addition, the New Reinsurer was permitted to withdraw $100 million from the ceded premium and exchange the cash for unrated securities of dubious value.

Just over a year later, the New Reinsurer was no longer able to meet its reserve obligations, and some of the substituted securities were valueless. Within fifteen months, nearly all of the New Reinsurer’s assets were exhausted. SHIP was left holding the bag.

For brokering the transaction, the Defunct Company received a fee of $3 million. The Pennsylvania complaint alleges that by structuring and recommending these transactions, the Defunct Company breached its contractual obligations and its fiduciary duties, conspired with other defendants, and failed to act with appropriate care.

Dwyer contends that the Pennsylvania Commissioner never properly served the complaint on the Defunct Company. He asserts that other former members of the Defunct Company learned of the complaint from a fellow defendant. That statement is the only reference in the Petition to the Defunct Company having other members.

C. The Filing Of This Litigation

Dwyer commenced this action by filing his Petition on April 13, 2022. He simultaneously filed a motion for expedited treatment. Dkt. 2. He also simultaneously filed a motion for appointment of receiver with a proposed form of order. Dkt. 3 (the "Motion").

Dwyer argues that because the Defunct Company was dissolved and its certificate of formation canceled, no person or entity has the power to respond to the complaint in the SHIP Litigation. Dwyer seeks to be appointed as the receiver for the Defunct Company for the limited purpose of addressing the SHIP Litigation and any other ancillary or supplemental proceedings or litigation arising therefrom on the Defunct Company's behalf. The Petition does not specify whether Dwyer believes he would have the authority to pursue offensive litigation or whether he intends to do so.

II. LEGAL ANALYSIS

The Delaware Limited Liability Company Act empowers the court to appoint a receiver to take all actions necessary to settle the unfinished business of a limited liability company. Section 18-805 states:

> When the certificate of formation of any limited liability company formed under this chapter shall be canceled by the filing of a certificate of cancellation pursuant to § 18-203 of this title, the Court of Chancery, on application of any creditor, member or manager of the limited liability company, or any other person who shows good cause therefor, at any time, may either appoint 1 or more of the managers of the limited liability company to be trustees, or appoint 1 or more persons to be receivers, of and for the limited liability company, to take charge of the limited liability company's property, and to collect the debts and property due and belonging to the limited liability company, with the power to prosecute and defend, in the name of the limited liability company, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by the limited liability company, if in being, that may be necessary for the final settlement of the unfinished business of the limited liability company. The powers of the trustees or receivers may be continued as long as the Court of Chancery shall think necessary for the purposes aforesaid.

6 *Del. C.* § 18-805.

Dwyer asserts that good cause exists to appoint a receiver for the Defunct Company so that the Defunct Company can address "through formal or informal means" the SHIP Litigation and any ancillary or supplemental proceedings or litigation. Petition ¶ 15. As noted, the Petition does not elaborate on what ancillary or supplemental proceedings might be involved. The Petition does not elaborate on what informal means Dwyer might envision using. The Motion does not shed light on these issues either.

Dwyer's proposed receivership does not plainly fall within the statutory authority

> to take charge of the limited liability company's property, and to collect the debts and property due and belonging to the limited liability company, with the power to prosecute and defend, in the name of the limited liability company, or otherwise, all such suits as may be necessary or proper for the purposes aforesaid.

6 *Del. C.* § 18-805. One might, however, view the receivership as falling within the statutory authority "to do all other acts which might be done by the limited liability

company, if in being, that may be necessary for the final settlement of the unfinished business of the limited liability company." *Id.* There are authorities that appear pertinent to that issue, but Dwyer's submissions do not cite them.

The more significant problem is that the court has virtually no basis to evaluate whether to appoint *Dwyer* as the receiver for the Defunct Company. The fact that Dwyer previously had roles with the Defunct Manager is one factor in his favor. So is the fact that Dwyer has hired reputable counsel to seek his appointment. Other than that, the court has no information on which to make a decision.

Delaware has a significant interest in ensuring that questionable individuals do not use judicial proceedings to gain control over Delaware entities. Delaware likewise has an interest in ensuring that its entities are not used as vehicles for improper schemes. In light of these interests, a party wishing to revive a defunct Delaware entity should submit information sufficient to establish that the application is bona fide.

A. Information About Dwyer And His Affiliates And Associates

To ensure that the court has a sufficient informational base on which to rule, Dwyer must provide an affidavit that describes his background and attaches a current curriculum vitae. In addition, the affidavit will contain three categories of information.

The first category of issues relates to any interactions between Dwyer or his current and former affiliates and associates (each, a "Covered Person") and any regulatory agency or authority, including but not limited to any insurance regulator, any other state regulatory agency, any federal regulatory agency, any foreign financial regulatory authority, or any self-regulatory organization or commodities exchange (generally, a "Regulator"). Dwyer's affidavit will identify and explain any instance in which a Regulator

(a) Found that a Covered Person made a false statement or omission.

(b) Found that a Covered Person was involved in a violation of its regulations or statutes.

(c) Found that a Covered Person had its authorization to do business denied, suspended, revoked, or restricted.

(d) Entered an order sanctioning the Covered Person.

(e) Imposed a civil money penalty on the Covered Person or ordered the Covered Person to cease and desist from any activity.

(f) Named the Covered Person as a subject of an investigation or proceeding.

The second category of issues relates to any interactions that a Covered Person has had with the criminal and civil justice systems. Dwyer's affidavit will disclose and explain any instance in which any Covered Person has been

(a) Charged with, convicted of, or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to any felony.

(b) Charged with, convicted of, or pled guilty or nolo contendere in a domestic, foreign, or military court to a misdemeanor involving fraud or dishonesty.

(c) Sanctioned by any domestic or foreign court.

The third category of issues relates to any conflicts of interest that a Covered Person may have pertaining to the proposed receivership. Dwyer will identify any member of the Defunct Company and any other stakeholder in the Defunct Company that is likely to be affected by the receivership. Dwyer will disclose (i) whether any Covered Person has received or will receive any payments for reviving the Defunct Company, and if so, the amount of such payments and (ii) whether any Covered Person will receive any compensation for acting as receiver for or directing the Defunct Company's actions in connection with the SHIP Litigation. Dwyer also will explain how the Defunct Company anticipates paying for counsel in the SHIP Litigation.

The court is not asking for this information because it suspects that Dwyer or any other Covered Person is a fraudster or would use the Defunct Company for a fraudulent purpose. The disclosures represent an important prophylactic step to protect the integrity of Delaware's role as a chartering jurisdiction.

These questions are not intended to be exclusive. Counsel may identify other topics to address. The court welcomes counsel's assistance.

B. Information About Dwyer And His Plans For The Defunct Company

To ensure that the court has a sufficient informational base on which to rule, Dwyer also must provide information in an affidavit about his plans for the receivership. Dwyer has stated generally that he intends to represent the Defunct Company in the SHIP Litigation. He seems to plan to contend that the complaint was not validly served and is "baseless," but he also refers to addressing the complaint "formally or informally" and to the possibility of "other ancillary or supplemental proceedings or litigation." Petition ¶¶ 10, 12.

Dwyer will explain what he is talking about and what he has in mind. It is not immediately clear why Dwyer would want to revive the Defunct Company for purposes of the SHIP Litigation. A defunct entity cannot be sued. Before the Pennsylvania Commissioner could proceed against the Defunct Company, the Pennsylvania Commissioner (or some other interested party) would have to petition this court to revive it. Dwyer appears to be helping the Pennsylvania Commissioner advance the litigation, which seems counterintuitive.

Counsel is in the best position to help the court understand how the Petition fits into the larger picture. The court welcomes the explanation.

C. Ongoing Reporting

Dwyer asks to be empowered as a representative of the court, acting under the court's imprimatur, with authority to address the proceedings taking place in Pennsylvania and to take any other action on behalf of the Defunct Company "associated therewith." Dwyer requests a receivership under which he would have no obligation to report to the court about what he is doing. His proposed form of order exempts his receivership from the coverage of Court of Chancery Rules 149 through 168. He has not offered to provide the court with any form of periodic reporting on his activities. He merely proposes that either "prior to the Termination Date or within thirty (30) days thereafter," he will "file with this Court a report advising the Court of the Termination Date and describing the actions taken by the Receiver pursuant to this Order." That is insufficient.

A receiver or custodian must provide periodic reports on a schedule that enables the court to oversee the appointment. Counsel will propose a schedule. Pending further guidance from counsel, it would seem appropriate for the court to receive a report on a quarterly basis. If any material events take place that warrant a more timely report, the court would expect an interim submission.

The reports must provide sufficient detail so that the court can understand what its appointed representative is doing. At a minimum, the receiver must describe the activities that he has undertaken and the status of his efforts. Because the reports are likely to constitute ex parte submissions, counsel will need to provide guidance to ensure that the court receives all material information.

D. An Agent For Service Of Process

The Petition includes a barebones affidavit in which Dwyer "consent[ed] to the personal jurisdiction of the courts of Delaware over any claims arising out of [his] service as a receiver for [the Defunct Company]." Dkt. 1, Affidavit ¶ 6. Dwyer did not appoint an agent for service of process or provide any contact information where he might be found. He identified himself as a resident of New Hampshire, but provided no other information.

Any order appointing a receiver must identify an agent in the State of Delaware for the service of process. Alternatively, the receiver must agree to a straightforward method for service and provide the necessary contact information.

E. The Request For Relief From Rule 150

Court of Chancery Rule 150 provides that "[n]o person shall be appointed sole receiver who does not at the time of appointment reside in the State of Delaware." Ct. Ch. R. 150. As a resident of New Hampshire, Dwyer cannot satisfy that requirement.

The Petition did not mention Rule 150, and the Motion did not cite it. The only reference to Rule 150 in Dwyer's papers appears in his proposed form of order, which provides that "Rules 149 through 168 shall not be applicable to this proceeding."

Court of Chancery Rule 148 authorizes the court to "relieve the receiver[] . . . from complying with all or any of the duties and proceedings set forth in Rules 149 through 168." *Id.* R. 148. It is thus possible to obtain relief from Rule 150. But the Petition or the

Motion—and ideally both—should identify the baseline rule and request relief. This court has previously directed a petitioner who failed to identify Rule 150 in his petition to amend the petition and address the rule. *Tratado de Libre Commercio, LLC v. Splitcast Tech., LLC*, 2019 WL 1057976, at *3 (Del. Ch. Mar. 6, 2019).

Both the Petition and the Motion should have identified Rule 150 specifically and explained why an exemption was warranted. Before being appointed as a receiver, Dwyer must address this issue.

F. Service Of Process

This court has held that a party cannot serve a canceled entity through its registered agent; rather, service must be effected through publication. *Id.* at *1. The court has held that an application under Section 18-805 "may not be considered by the Court until service has been perfected upon the dissolved entity." *Id.* at *3 (citing *Mathias v. Angola Neck Park Prop. Owners Ass'n, Inc.*, 2014 WL 6478844, at *1–2 (Del. Ch. Nov. 20, 2014), *report adopted by* 2014 WL 6847893 (Del. Ch. Dec. 4, 2014)).

Dwyer sought expedited treatment, and he filed the Motion in which he sought appointment as a receiver, but he did not file a motion seeking an order providing for service by publication, nor did his papers flag the issue. It would have been all too easy for the court to take up the application without considering the idiosyncrasies of achieving service of process on a defunct entity.

As a predicate to further consideration of his application, Dwyer shall file a motion addressing service of process.

G. Identifying Adverse Authority And Providing Information To The Court

A lawyer has an obligation "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." Del. Lawyers' R. Prof'l Conduct 3.3(a)(2). When a lawyer makes an ex parte application, a lawyer has an obligation to "inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." *Id.* R. 3.3(d).

Common law adjudication is a cooperative exercise between counsel and the court. Failing to bring relevant authority to the court's attention risks generating rulings that diverge or even conflict with the main body of the law. Future cases may cite the divergent ruling, without engaging in the archeological digging necessary to determine what the court issuing the prior ruling did or did not consider.

The court understands that busy counsel are not perfect. No one is. It is therefore understandable that from time to time, counsel may overlook pertinent authority or fail to flag an important issue. With each passing year, the legal industry generates more and more authorities, making counsel's task of finding the pertinent authorities all the more challenging. And counsel operates in an environment in which the goal is to obtain a result for a client, which may make counsel hesitant to identify adverse authority or, if the client is cost-conscious, reluctant to expend the time necessary to vet an issue fully.

Notwithstanding these real-world considerations, lawyers must make a diligent effort to identify and present the authorities that the court needs to render a just and correct decision. "A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. . . . The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case." Del. Lawyers' R. Prof'l Conduct 3.3 cmt. 4. As the Delaware Supreme Court has explained, a lawyer's "responsibility to the Court takes precedence over the interests of the client" because as officers of the court, lawyers must represent their clients "*within* the bounds of both the positive law and the rules of ethics." *In re Abbott*, 925 A.2d 482, 487–88 (Del. 2007) (cleaned up).

Chancellor McCormick recently identified a problem of this sort in *In re Jeremy Paradise Dynasty Trust*, 2022 WL 840074 (Del. Ch. Mar. 22, 2022). The parties disputed whether the petitioner had standing to object to third-party discovery requests. The parties did not cite Rule 26(c), which addressed the issue. Chancellor McCormick reasoned through the rulings that the parties submitted and reached an outcome consistent with Rule 26(c). She subsequently issued a supplemental letter decision noting that the parties had not called Rule 26(c) to her attention and that, as a result, her decision "failed to address controlling authority directly on point but consistent with the ruling." *In re Jeremy Paradise Dynasty Trust*, C.A. No. 2021-0354-KSJM, at 1 (Del. Ch. Mar. 31, 2022). She asked counsel to "take greater care in the future to find and address controlling authorities when presenting your arguments." *Id.* at 2.

Echoing the Chancellor's statements, counsel are asked to take greater care to find and address controlling authorities. Counsel are also requested to give careful consideration when making an application that is likely to be considered ex parte to the information that the court should have when rendering its decision.

III. CONCLUSION

The Petition seeks an order appointing Dwyer as a receiver for the Defunct Company. Dwyer did not provide sufficient information on which the court could rule. Counsel may supplement the record to address the issues identified in this decision and any other matters that they believe should be brought to the court's attention. Once this has occurred, counsel shall seek a conference with the court to discuss next steps.

EFiled: Mar 31 2022 04:53PM EDT
Transaction ID 67444405
Case No. 2021-0354-KSJM

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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March 31, 2022

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Re: *In the Matter of The Jeremy Paradise Dynasty Trust and The Andrew Paradise Dynasty Trust*, C.A. No. 2021-0354-KSJM

Dear Counsel:

I write to supplement my March 22, 2022 letter decision on the Fiduciaries' motion for issuance of a commission for documents and testimony directed to Vigomar Realty LLC (the "Letter Decision").[1] In that decision, I rejected the Fiduciaries' argument that Petitioner lacked standing to object to third-party discovery. The Fiduciaries based this argument on a 2005 decision of this court, *Cede & Co. v. Joulé Inc.*, 2005 WL 736689, at *1 (Del. Ch. Feb. 7, 2005), and two later decisions that followed *Cede*.[2]

The Letter Decision failed to address controlling authority directly on point but consistent with the ruling. Court of Chancery Rule 26(c) was amended in 2019 to provide

[1] *See In the Matter of The Jeremy Paradise Dynasty Tr.*, 2022 WL 840074, at *1 (Del. Ch. Mar. 22, 2022). Capitalized terms not defined herein shall have the meaning ascribed to them in the Letter Decision.

[2] *See* C.A. No. 2021-0354-KSJM, Docket 127, Reply in Supp. of Mot. for Commission Duces Tecem & Ad Testificandum Directed to Vigomar Realty LLC ¶¶ 9–10 & n.7.

that "[a] party has standing to move for a protective order with respect to discovery directed at a non-party on the basis of annoyance, embarrassment, oppression, or undue burden or expense that the moving party will bear."[3] This language of Rule 26(c) presents an independent reason for rejecting the Fiduciaries standing argument based on *Cede*.

The Letter Decision did not address this language of Rule 26(c) because the Fiduciaries did not cite to it. Luckily for all involved, on this point, my reading of the decisional authority cited by the parties was consistent with Rule 26(c) as amended. So, the Letter Decision need not be revised; hence this supplement.

You are all excellent attorneys who have earned the esteem of this court. I do ask that you take greater care in the future to find and address controlling authorities when presenting your arguments. It is not only a part of your ethical obligations but also helpful to this busy court.

Sincerely,

/s/ Kathaleen St. Jude McCormick

Kathaleen St. Jude McCormick
Chancellor

cc: All counsel of record (by *File & ServeXpress*)

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[3] Ct. Ch. R. 26(c).

257 A.3d 1022 (Table)
Unpublished Disposition
This unpublished disposition is
referenced in the Atlantic Reporter.
Supreme Court of Delaware.

Frederick WILLIAMS, Plaintiff Below, Appellant,
v.
TOLL BROTHERS BUILDERS, Hockessin Chase LP, Michael Brown, and Timothy J. Hoban, Defendants Below, Appellees.

No. 371, 2020
|
Submitted: June 4, 2021
|
Decided: July 28, 2021

Court Below—Superior Court of the State of Delaware C.A. No. N20C-06-198.

Before VALIHURA, VAUGHN, and TRAYNOR, Justices.

ORDER

James T. Vaughn, Jr., Justice

***1** After consideration of the briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Frederick Williams, challenges a decision of the Superior Court that dismissed his claims against Hockessin Chase, LP and others for damages arising out of home-construction defects. For the reasons discussed below, we affirm the Superior Court's judgment.

(2) Williams purchased a house from Hockessin Chase in 2011. In December 2017, Williams filed a complaint in the Court of Common Pleas against Toll Brothers Builders and Michael Brown, alleging that the builder had poorly constructed, and then poorly repaired, the driveway. [1] On May 11, 2018, the Court of Common Pleas dismissed the action, without prejudice, for failure to name and serve the appropriate defendants. [2] Specifically, the appellees' counsel informed Williams that Toll Brothers Builders was not a legal entity and that Hockessin Chase, LP would be the appropriate defendant; the court also provided Williams with information regarding how to serve an entity defendant.

1 *See* Appendix to Answering Brief, at B-63.

2 *Id.* at B-42-43. In a later action, the appellees took the position that the Court of Common Pleas also dismissed that first action "for, in part, failure to have jurisdiction over Plaintiff's alleged claims in light of the arbitration clauses within the governing documents." *Williams v. Hockessin Chase, LP*, C.A. No. CPU4-19-002007, Motion to Dismiss filed Oct. 11, 2019, ¶ 8 (Del. Ct. Com. Pl.). In our view, the record, including the Court of Common Pleas order dated May 11, 2018 (Appendix to Answering Brief, at B-65) and the transcript of the May 11, 2018 hearing (Appendix to Answering Brief, at B-27-45), does not support the appellees' assertion that the Court of Common Pleas dismissed the first action based on the arbitration provision.

(3) In 2019, Williams filed a second lawsuit in the Court of Common Pleas, naming Hockessin Chase, among others, as defendants. [3] The complaint sought damages for construction defects of the driveway, stucco, roof, and other areas of the home. The defendants moved to dismiss, arguing that the Court of Common Pleas was not the proper venue, and lacked jurisdiction, because the matter was subject to arbitration under arbitration clauses in the sales agreement and home warranty contract. On November 1, 2019, the Court of Common Pleas dismissed Williams's complaint, holding that "[p]ursuant to both Section 11 of the purchase agreement for the sale of the home and Article VII of the warranty agreement, the parties have agreed to resolve any and all claims arising out of the home or home warranty through binding arbitration." [4] Williams did not appeal, but he filed a motion that the Court of Common Pleas treated as a motion for reargument and denied. [5]

3 Appendix to Answering Brief, at B-71-73.

4 *Id.* at B-90-91 (citations omitted).

5 *Id.* at 92-101.

(4) In June 2020, Williams initiated a new suit in Superior Court, again seeking damages for construction defects of the driveway, stucco, roof, and other areas of the home. The defendants moved to dismiss, arguing that the complaint was

barred by *res judicata* and because the dispute was subject to arbitration.[6] The Superior Court granted the motion to dismiss, holding that the Superior Court claims were barred by the doctrine of claim preclusion because they arose out of the same operative facts as the complaint that the Court of Common Pleas had previously dismissed. Williams has appealed to this Court.

6 *Id.* at B-57-58.

***2** (5) The Superior Court correctly determined that Williams's claims were precluded by the judgment in the second Court of Common Pleas case. The doctrine of claim preclusion, or *res judicata*, forecloses a party from bringing a second suit based on the same cause of action after a court has entered judgment in a prior suit involving the same parties.[7] The Court of Common Pleas dismissed Williams's claims against Hockessin Chase and the other defendants on the grounds that Williams was required to submit the dispute to binding arbitration, and Williams neither appealed that decision nor participated in arbitration. The Superior Court did not err by dismissing Williams's Superior Court complaint on that basis.

7 *Betts v. Townsends, Inc.*, 765 A.2d 531, 534 (Del. 2000). *See also Dover Hist. Soc'y, Inc. v. City of Dover Planning Comm'n*, 902 A.2d 1084, 1092 (Del. 2006) ("*Res judicata* operates to bar a claim where the following five-part test is satisfied: (1) the original court had jurisdiction over the subject matter and the parties; (2) the parties to the original action were the same as those parties, or in privity, in the case at bar; (3) the original cause of action or the issues decided was the same as the case at bar; (4) the issues in the prior action must have been decided adversely to the appellants in the case at bar; and (5) the decree in the prior action was a final decree.").

(6) Williams asserts that binding arbitration was not his only available remedy, pointing to the decision in *Wang v. Hockessin Chase L.P.*[8] In *Wang*, homeowners asserted similar construction-defect claims against Hockessin Chase as the claims that Williams has asserted against Hockessin Chase. The *Wang* defendants sought dismissal of the homeowners' claims, as they did of Williams's claims, on the grounds that the sales contract and warranty required the homeowners to submit the dispute to binding arbitration. The contract and warranty at issue in *Wang* appear to include very similar language regarding arbitration as the Williams contract and warranty. On November 9, 2018, approximately one year before the Court of Common Pleas determined that Williams was required to submit the dispute to binding arbitration, the Superior Court in *Wang* denied the defendants' motion to dismiss. The court held that it was "unable to interpret the [sales contract and warranty] to mean that any action under the Warranty must be resolved by binding arbitration or that, if another remedy is pursued, the buyer forfeits their rights under the Warranty"[9] and that "other remedies are a plausible means of dispute resolution."[10]

8 2018 WL 6046620 (Del. Super. Ct. Nov. 9, 2018).

9 *Id.* at *6.

10 *Id.* at *5. *See also Hockessin Chase, L.P. v. Wang*, C.A. No. 2017-0719-TMR, order at 3-4 (Del. Ch. Mar. 4, 2019) (Appendix to Appellees' Supplemental Brief, at B-200-05) (dismissing Hockessin Chase's action to confirm an arbitral award, and "agree[ing] with the Superior Court's reasoning and conclusion" that binding arbitration was not the only remedy available to the Wangs under the contract and warranty).

(7) Unfortunately, Williams does not appear to have cited *Wang* while his case was pending in the Court of Common Pleas in 2019. And in response to our request for supplemental briefing concerning *Wang*—including our specific request to address whether the appellees or their counsel brought *Wang* to the attention of the Court of Common Pleas—the appellees have not indicated that they did so. We therefore cannot determine from the record before us whether the Court of Common Pleas was aware of the *Wang* decision or whether the court's consideration of *Wang* would have changed its decision in Williams's case. Nevertheless, we conclude that the judgment in the Court of Common Pleas precluded Williams's later action in the Superior Court. If Williams believed that the Court of Common Pleas overlooked *Wang*, he should have cited it or pursued reargument or an appeal on that basis. Indeed, even now, he might possibly seek relief from the Court of Common Pleas under that court's Civil Rule 60(b), but we express no opinion on whether relief would be warranted in the circumstances of this case.[11]

11 *Cf. Gibson v. Car Zone*, 2011 WL 5354270, at *2 (Del. Nov. 8, 2011) (affirming denial of motion under Rule 60(b) where appellant failed to show

> that opposing counsel had violated Rule 3.3(a)(2) of the Delaware Lawyers' Rules of Professional Conduct).

***3** (8) Although we affirm the Superior Court's judgment, we are troubled by the appellees' counsel's failure to bring *Wang* to the attention of the Court of Common Pleas in the 2019 case, and we take this opportunity to remind the bar of counsel's obligation to cite adverse authority. Rule 3.3(a)(2) of the Delaware Lawyers' Rules of Professional Conduct provides that a lawyer shall not knowingly "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." Comment 4 to that rule states:

> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party.

Under Rule 3.3, "an attorney should not ignore potentially dispositive authorities"; rather, counsel must "cite adverse cases which are ostensibly controlling and then may argue their merits or inapplicability." [12]

12 *Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989).

(9) In the supplemental briefing, the appellees contend that they and their counsel were not required to cite *Wang* when seeking dismissal of Williams's 2019 Court of Common Pleas complaint because the Wang litigation had not concluded and could have been overturned on appeal. They cite no authority for the proposition that counsel has no obligation to cite an adverse decision because it might be reversed or overturned in the future. This Court has not had occasion to address that issue; because of our determination that counsel's failure to cite *Wang* does not warrant reversal here, we decline to resolve this issue in the procedural posture of this case. But we note that courts in other jurisdictions have opined that a lawyer's obligation to cite "adverse authority" extends to authorities from the controlling jurisdiction that are "directly adverse to any proposition of law on which the lawyer expressly relies" and that "would reasonably be considered important by the judge sitting on the case." [13] Thus, "a court decision can be 'directly adverse' to a lawyer's position even though the lawyer reasonably believes that the decision is factually distinguishable from the current case or the lawyer reasonably believes that, for some other reason, the court will ultimately conclude that the decision does not control the current case." [14] In short, counsel "have an affirmative obligation to advise the court of adverse authorities, though they are free to urge their reconsideration." [15]

13 *Tyler v. State*, 47 P.3d 1095, 1104 (Alaska 2001) (quoting Formal Opinion No. 280 of the American Bar Association's Committee on Professional Ethics and Grievances); *In re Greenberg*, 104 A.2d 46, 48 (N.J. 1954). *See also In re Bowen*, 2015 WL 5717439, at *5 (Bankr. E.D. Va. Sept. 29, 2015) ("Under Model Rule 3.3, counsel has a duty not only to cite adverse authority but also must bring to the attention of the deciding court another court's ruling against the lawyer's client on the same issue."); *Cicio v. City of New York*, 98 A.D.2d 38, 40 (N.Y. App. Div. 1983) (stating that city's counsel's failure to cite multiple adverse authorities was "most disturbing and clearly inexcusable" as to two of the adverse cases in which the city was also a party).

14 *Tyler*, 47 P.3d at 1105-06.

15 *Cicio*, 98 A.D.2d at 40.

***4** NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

All Citations

257 A.3d 1022 (Table), 2021 WL 3200825

THE DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT

Forms

Index follows Rules.

Preamble: A lawyer's responsibilities.

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer

should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCOPE

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties

flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating

conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each rule is authoritative.

Rule 1.0. Terminology.

(a) “Belief” or “believes” denotes that the person involved actually supposed the fact in question to be true. A person’s belief may be inferred from circumstances.

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of “informed consent.” If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) “Fraud” or “fraudulent” denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) “Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and electronic communications. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] *Confirmed in Writing.* — If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act in

reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

[2] *Firm.* — Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

[5] *Fraud.* — When used in these Rules, the terms “fraud” or “fraudulent” refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant

information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

[6] *Informed Consent.* — Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has

reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and(b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

[8] *Screened.* — This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Cross references. — As to the Statement of Principles of Lawyer Conduct, see Supreme Court Rule 71(b)(ii).

NOTES TO DECISIONS

Knowingly.

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).

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT

[1] *Legal knowledge and skill.* — In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited

to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

[5] *Thoroughness and preparation.* — Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

[6] *Retaining or contracting with other lawyers.* — Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule

1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

[8] *Maintaining competence.* — To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

NOTES TO DECISIONS

Analysis

Client relations.

— Conflicts of interest.

Attorney failed to provide competent representation where the attorney failed to check files to determine if a conflict of interest existed as a result of the attorney's representation of the client's ex-spouse against the client in a former proceeding involving the same issues. In re Mekler, 689 A.2d 1171 (Del. 1996).

Attorney was suspended from the practice of law for 3 months, followed by a 1-year period of probation, for violating Law. R. Prof. Conduct 1.1, 1.4(b), 1.7, and 1.16(a) (Interpretative Guideline Re: Residential real estate transactions); the attorney failed to obtain the clients' consent to a conflict of interest that arose when the attorney represented both the borrower and the lender in a loan transaction, and failed to inform the clients of their 3-day right to rescind. In re Katz, 981 A.2d 1133 (Del. 2009).

Where an attorney committed violations of Law. R. Prof. Conduct 1.1, 1.4(b), and 1.16 during the course of 10 closings for a private money lender, a public reprimand was deemed the appropriate sanction; the attorney had ethical duties to disclose to the borrowers a conflict of interest and the fact that the loan documents were inadequate, even though the attorney did not represent them, as they had no attorneys. In re Goldstein, 990 A.2d 404 (Del. 2010).

— Effective representation.

Failure to promptly comply with court rules, even after notification from the court, is a violation of this Rule. In re Tos, 576 A.2d 607 (Del. 1990).

Failure to file an opening brief on behalf of a client, resulting in the dismissal of the client's appeal, was a violation of this rule. In re Sullivan, 727 A.2d 832 (Del. 1999).

Attorney violated this rule by failing to provide competent representation to client where attorney had the requisite legal knowledge and skills but did not exercise the thoroughness and preparation reasonably necessary to properly represent client in bankruptcy action. In re Benge, 754 A.2d 871 (Del. 2000).

Lawyer who violated numerous professional duties in real estate practice, and caused over $ 500,000 in damages to clients, was disbarred. In re Spiller, 788 A.2d 114 (Del. 2001).

Finding that attorney violated Law. R. Prof. Conduct 1.1 was warranted where the attorney failed to probate the estate in a timely manner. In re Wilson, 900 A.2d 102 (Del. 2006).

Attorney violated Law. R. Prof. Conduct 1.1 by: (1) failing to conduct an adequate investigation; and (2) failing to prepare and file a motion for reduction of sentence upon which a Superior Court might have relied to reduce the client's sentence. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Attorney whose multiple federal actions for assorted clients were dismissed due to failure to respond to dismissal or summary judgment motions violated Law. R. Prof. Conduct 1.1, 1.3, 1.4, 1.5, and 8.4, warranting a 2-year suspension from the practice of law, with conditions where: (1) the attorney had an unblemished record; (2) the attorney had undergone 2 eye surgeries; (3) the attorney had suffered the loss of a half-sibling; but (4) the conduct was deemed "knowing" and evidenced engagement in a pattern of misconduct. In re Feuerhake, 998 A.2d 850 (Del. 2010).

Where an attorney engaged in lateness or failure to appear at scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and wasted judicial resources in 3 Delaware Courts, in addition to violating the duty of candor to the Supreme Court of Delaware, the attorney violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Attorney did not violate Law. Prof. Conduct R. 1.1 by failing to take time to explain various forms of joint ownership available and their legal implications or by failing to attend a settlement. In re Sisk, 54 A.3d 257 (Del. 2012).

Lawyer violated Law. Prof. Conduct R. 1.1 because the lawyer did not file a complaint or secure a tolling agreement to preserve the statute of limitations. In re Wilks, 99 A.3d 228 (Del. 2014).

Professional conduct.

— Candor toward the tribunal.

Attorney's misrepresentation to a Family Court that a client was not in arrears with regard to alimony and had paid the debt in full was determined to have been an act of dishonesty, fraud, deceit, or misrepresentation in violation of Law. Prof. Conduct R. 8.4(c) and (d), a failure to provide competent representation to the client, in violation of Law. Prof. Conduct R. 1.1, and a failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions, in violation of Law. Prof. Conduct R. 1.4(b); the misrepresentation was found to have been knowingly made, but the recommended suspension of 2 years was reduced to 6 months, because mitigating circumstances were found in the nature of the attorney providing the Family Court with correspondence, which would have permitted the Family Court and the adverse party an opportunity to verify the debt. In re Chasanov, 869 A.2d 327 (Del. 2005).

Sanctions.

— Reprimand.

Because an attorney neglected client's matters, failed to promptly disburse client funds, and failed to cooperate with disciplinary authorities, the attorney violated Law. R. Prof. Conduct 1.1, 1.3, 1.4(a)(3), (4), 1.15(d), and 8.1(b); accordingly, the attorney was publicly reprimanded and placed on probation for 18 months with the imposition of certain conditions. In re Member of the Bar of the Supreme Court of Del., 999 A.2d 853 (Del. 2010).

Attorney was publicly reprimanded and placed on conditional probation for violating Law. Prof. Conduct R. 1.1, 1.3, 1.4(a)(3), (4), 1.15(b), and 8.1(b) where the attorney: (1) failed to timely distribute settlement funds; (2) failed to communicate with a personal injury client; and (3) failed to keep the Office of Disciplinary Counsel informed of changes. In re Siegel, 47 A.3d 523 (Del. 2012).

— Suspension.

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in Certificates of Compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Suspension for 6 months and 1 day was warranted where an attorney: (1) violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4; (2) had a record of 2 prior private admonitions; (3) engaged in a pattern of misconduct consisting of multiple offenses; (4) suffered from personal or emotional problems; (5) cooperated with the Office of Disciplinary Counsel in connection with the hearing; (6) was generally of good character, as evidenced by willingness to represent those who might not otherwise have had representation; and (7) exhibited remorse. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Attorney who committed numerous ethical violations, including neglecting multiple client matters, making misrepresentations to the court and failing to properly safeguard clients' funds, was suspended for 18 months, based on a determination that the mitigating factors significantly outweighed the aggravating factors. In re Carucci, 132 A.3d 1161 (Del. 2016).

Rule 1.2. Scope of representation.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

COMMENT

Allocation of authority between client and lawyer. — [1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

[5] *Independence from client's views or activities.* — Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

[6] *Agreements limiting scope of representation.* — The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made

available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

[9] *Criminal, fraudulent and prohibited transactions.* — Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

NOTES TO DECISIONS

Analysis

Client relations.

— Effective representation.

Evidence held sufficient to establish a violation of subsection (d) of this Rule where attorney prepared and filed certain deeds on behalf of a client in derogation of a final judgment concerning that client. In re Shearin, 721 A.2d 157 (Del. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1776, 143 L. Ed. 2d 805 (1999).

Attorney's failure to file an underinsured motorist claim on behalf of the client was in violation of this rule. In re Becker, 788 A.2d 527 (Del. 2001).

Defendant's motion for postconviction relief pursuant to Super. Ct. Crim. R. 61 was denied where defendant: (1) failed to show that trial counsel was ineffective for failing to request an accomplice level of liability jury instruction pursuant to 11 Del. C. § 274; (2) failed to rebut the presumption that not requesting an accomplice level of liability instruction was reasonable, professional trial conduct; (3) failed to adduce a reasonable probability that, but for the lack of jury instruction, the trial results would have been different; and (4) personally rejected a plea offering the same lesser included offenses that a level of liability instruction would have provided. State v. Dickinson, 2012 Del. Super. LEXIS 380 (Del. Super. Ct. Aug. 17, 2012).

Delay of 18 days in extending a settlement offer did not satisfy Law. Prof. Conduct R. 1.2. In re Sisk, 54 A.3d 257 (Del. 2012).

— Perjury.

Defense counsel's refusal to cooperate with defendant's planned perjury (as was required by Law. Prof. Conduct R. 1.2) did not deprive defendant of right to counsel or the right to testify truthfully and did not give rise to a disqualifying conflict of interest. Riley v. State, 867 A.2d 902 (Del. 2004).

— Scope.

—— Authority.

In a matter before the Industrial Accident Board, attorney's agreeing to employer's petition to terminate total disability benefits without his client's consent violated subsection (a). In re Maguire, 725 A.2d 417 (Del. 1999).

Defendant's counsel had no authority to agree to giving of jury charge, in defendant's absence, where there was no showing that defendant expressly waived his right to be present; defendant's right to be present was personal and could not be waived by counsel. Bradshaw v. State, 806 A.2d 131 (Del. 2002).

Nothing in the constitution prevented defendant from choosing to have his fate tried before a judge without a jury even though, in deciding what was best for himself, defendant followed the guidance of his own wisdom and rejected the advice of his attorney; professional rule required defendant's attorney to abide by his client's decision to waive trial by jury. Davis v. State, 809 A.2d 565 (Del. 2002).

Attorney violated Law. R. Prof. Conduct 1.2(a) by failing to consult with a divorce client about the contents of a petitioner's answer to respondent's counterclaim, signing the client's name on the document, and filing it with the Family Court without the client's approval. In re Pankowski, 947 A.2d 1122 (Del. 2007).

—— Objectives of representation.

A defendant's wish to forego further appeals and accept the death penalty, like other decisions relating to the objectives of litigation, is essentially that of the client, whose decision the attorney must respect. Red Dog v. State, 625 A.2d 245 (Del. 1993).

Counsel representing a shareholder class in a derivative suit was not subject to being disqualified for advocating the adoption of a settlement proposal to which some members of the class objected, and there was no violation of Del. Law. R. Prof. Conduct 1.2(a). In re M&F Worldwide Corp. S'holders Litig., 799 A.2d 1164 (Del. Ch. 2002).

Employment contracts.

Discharge of legal counsel and vice president who was employed as a licensed professional and who claimed that the action for which she was discharged was required by her employment contract, but prohibited by her obligation under the Delaware Rules of Professional Conduct, stated a claim for breach of at-will employment contract. Shearin v. E.F. Hutton Group, Inc., 652 A.2d 578 (Del. Ch. 1994).

Sanctions.

— Reprimand.

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a) and (d), Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

— Suspension.

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in Certificates of

Compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the

relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

NOTES TO DECISIONS

Analysis

— Reprimand.

— Suspension.

Client relations.

— Diligence.

Failure to promptly comply with requests of the Court, such as to prepay costs, is a violation of this Rule. In re Tos, 576 A.2d 607 (Del. 1990).

Failure either to file several dues collection cases, or keep client informed of his progress in relation to these cases, violated this Rule and Prof. Cond. Rule 1.4(a). In re McCann, 669 A.2d 49 (Del. 1995).

Failure to file an opening brief on behalf of a client, resulting in the dismissal of the client's appeal, was a violation of this rule. In re Sullivan, 727 A.2d 832 (Del. 1999).

Attorney violated this rule by failing to respond promptly to client's requests for information and by failing to promptly and properly determine the status of client's bankruptcy petition so that the client was subjected to sanctions. In re Benge, 754 A.2d 871 (Del. 2000).

Attorney violated Law. R. Prof. Conduct 1.3 by: (1) failing to conduct an adequate investigation; and (2) failing to prepare and file a motion for reduction of sentence upon which a Superior Court might have relied to reduce the client's sentence. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Because an attorney neglected client's matters, failed to promptly disburse client funds, and failed to cooperate with disciplinary authorities, the attorney violated Law. R. Prof. Conduct 1.1, 1.3, 1.4(a)(3), (4), 1.15(d), and 8.1(b); accordingly, the attorney was publicly reprimanded and placed on probation for 18 months with the imposition of certain conditions. In re Member of the Bar of the Supreme Court of Del., 999 A.2d 853 (Del. 2010).

Attorney whose multiple federal actions for assorted clients were dismissed due to failure to respond to dismissal or summary judgment motions violated Law. R. Prof. Conduct 1.1, 1.3, 1.4, 1.5, and 8.4, warranting a 2-year suspension from the practice of law, with conditions where: (1) the attorney had an unblemished record; (2) the attorney had undergone 2 eye surgeries; (3) the attorney had suffered the loss of a half-sibling; but (4) the conduct was deemed "knowing" and evidenced engagement in a pattern of misconduct. In re Feuerhake, 998 A.2d 850 (Del. 2010).

Attorney failed to act with reasonable diligence in violation of Law. Prof. Conduct R. 1.3, where the attorney admitted conducting a real estate settlement while under the influence of alcohol. In re Davis, 43 A.3d 856 (Del. 2012).

Where an attorney engaged in lateness or failure to appear at scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and wasted judicial resources in 3 Delaware Courts, in addition to violating the duty of candor to the Supreme Court of Delaware, the attorney violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Attorney did not violate Law. Prof. Conduct R. 1.3, with respect to the delay in recording a deed, where the attorney was faced with the choice of preparing the deed in compliance with condominium council requirements or not settling on the purchase at all; the attorney acted in what was thought to be the best interests of the client. In re Sisk, 54 A.3d 257 (Del. 2012).

Lawyer violated Law. Prof. Conduct R. 1.3 because the lawyer did not diligently pursue a client's claims or timely file a complaint. In re Wilks, 99 A.3d 228 (Del. 2014).

Sanctions.

— Disbarment.

Lawyer who violated numerous professional duties in real estate practice, and caused over $500,000 in damages to clients, was disbarred. In re Spiller, 788 A.2d 114 (Del. 2001).

— Reprimand.

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a) and (d), Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

When an attorney handling 2 estates failed to act with reasonable diligence and promptness in probating the estates, the attorney violated Law. R. Prof. Conduct 1.3; attorney was publicly reprimanded, prevented from representing a personal representative or serving as 1, and required to cooperate and pay costs. In re Wilson, 886 A.2d 1279 (Del. 2005).

Attorney was publicly reprimanded and placed on conditional probation for violating Law. Prof. Conduct R. 1.1, 1.3, 1.4(a)(3), (4), 1.15(b), and 8.1(b) where the attorney: (1) failed to timely distribute settlement funds; (2) failed to communicate with a personal injury client; and (3) failed to keep the Office of Disciplinary Counsel informed of changes. In re Siegel, 47 A.3d 523 (Del. 2012).

— Suspension.

Suspension for 6 months and 1 day was warranted where an attorney: (1) violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4; (2) had a record of 2 prior private admonitions; (3) engaged in a pattern of misconduct consisting of multiple offenses; (4) suffered from personal or emotional problems; (5) cooperated with the Office of Disciplinary Counsel in connection with the hearing; (6) was generally of good character, as evidenced by willingness to represent those who might not otherwise have had representation; and (7) exhibited remorse. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Attorney who committed numerous ethical violations, including neglecting multiple client matters, making misrepresentations to the court and failing to properly safeguard clients' funds, was suspended for 18 months, based on a determination that the mitigating factors significantly outweighed the aggravating factors. In re Carucci, 132 A.3d 1161 (Del. 2016).

Rule 1.4. Communication.

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

[2] *Communicating with client.* — If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In

some situations—depending on both the importance of the action under consideration and the feasibility of consulting with the client—this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

[5] *Explaining matters.* — The client should have sufficient information to participate intelligently indecisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

[7] *Withholding information.* — In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

NOTES TO DECISIONS

Analysis

Client relations.

— Communication.

Lawyer's duty to communicate under subsection (b) runs only to a client and presupposes, for the duty to arise, the existence of a lawyer-client relationship. In re Berl, 540 A.2d 410 (Del. 1988); In re Berl, 560 A.2d 1009 (Del. 1989).

Subsection (b) violation could not be sustained without more particularized findings by the Board on Professional Responsibility establishing that attorney, at a particular time, came under a lawyer-client relationship from which a duty arose to inform plaintiff of the application and relevance of 18 Del. C. § 6865, notwithstanding plaintiff's relationship with his attorney of record. In re Berl, 540 A.2d 410 (Del. 1988); In re Berl, 560 A.2d 1009 (Del. 1989).

Failure either to file several dues collection cases, or keep client informed of his progress in relation to these cases, violated Prof. Cond. Rule 1.3 and subsection (a) of this Rule. In re McCann, 669 A.2d 49 (Del. 1995).

Attorney's failing to consult with client prior to agreeing to dismiss a discrimination complaint violated subsection (b). In re Maguire, 725 A.2d 417 (Del. 1999).

Attorney's failure to keep a client informed about the status of her case and to explain certain matters violated this rule. In re Sullivan, 727 A.2d 832 (Del. 1999).

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a) and (d), Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

Attorney's failure over a period of six years to communicate with client, and failure to notify the client of the dismissal of the no-fault lawsuit were in violation subsection (a) of this rule. In re Becker, 788 A.2d 527 (Del. 2001).

Attorney's misrepresentation to a Family Court that a client was not in arrears with regard to alimony and had paid the debt in full was determined to have been an act of dishonesty, fraud, deceit, or misrepresentation in violation of Law. Prof. Conduct R. 8.4(c) and (d), a failure to provide competent representation to the client, in violation of Law. Prof. Conduct R. 1.1, and a failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions, in violation of Law. Prof. Conduct R. 1.4(b); the misrepresentation was found to have been knowingly made, but the recommended suspension of 2 years was reduced to 6 months, because mitigating circumstances were found in the nature of the attorney providing the Family Court with correspondence, which would have permitted the Family Court and the adverse party an opportunity to verify the debt. In re Chasanov, 869 A.2d 327 (Del. 2005).

Attorney's acceptance of a retainer of $250 from a client through a prepaid legal plan, while never contacting the client and refusing to refund the retainer until after the first disciplinary hearing, was held to have violated Law. Prof. Conduct R. 1.3, with regard to acting with reasonable diligence and promptness, Law. Prof. Conduct R. 1.4(a) and (b), with regard to failing to keep the client reasonably informed to the extent reasonably necessary to permit the client to make informed decisions, and, Law. Prof. Conduct R. 1.15(b) and (d), with regard to failing to safeguard the client's funds and deliver them upon request; the prepaid legal firm had refused to refund the retainer and, in fact, showed no record of the amount, which had been paid directly to the attorney. In re Chasanov, 869 A.2d 327 (Del. 2005).

Attorney violated Law. R. Prof. Conduct 1.4(a) by: (1) failing to consult with a divorce about the contents of the petitioner's answer to the respondent's counterclaim; (2) failing to respond to the client's attempts to inquire as to status of a Family Court case over a period of 2 weeks; and (3) failing promptly to inform the client that a final divorce decree and other orders had been entered by the Family Court. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Defendant's motion for postconviction relief was denied because defendant did not explain how counsel's attempt to reduce defendant's confusion over the term "evidentiary hearing" was objectively unreasonable or prejudicial to the case; where the attorney attempted to clarify that what defendant called an "evidentiary hearing" was, in fact, referred to as a motion to suppress, the failure of the attorney's attempt to clear up defendant's understanding of motions to suppress was not evidence that counsel's actions were objectively unreasonable. State v. Addison, 2007 Del. Super. LEXIS 441 (Del. Super. Ct. June 15, 2007).

Attorney was suspended from the practice of law for 3 months, followed by a 1-year period of probation, for violating Law. R. Prof. Conduct 1.1, 1.4(b), 1.7, and 1.16(a) (Interpretative Guideline Re: Residential real estate transactions); the attorney failed to obtain the clients' consent to a conflict of interest that arose when the attorney represented both the borrower and the lender in a loan transaction, and failed to inform the clients of their 3-day right to rescind. In re Katz, 981 A.2d 1133 (Del. 2009).

Counsel for a disabled person was presumed to have had lawful authority to settle a personal injury action, where (1) the disabled person's guardian, did not successfully rebut that presumption by claiming the guardian either agreed to the settlement under duress or failed to agree to it at all; (2) counsel's notes and letters supported the finding of a settlement agreement; (3) counsel properly informed the guardian about the agreement pursuant to obligations under Law. R. Prof. Conduct 1.4(a)(1); and (4) the fact that the agreement was oral did not render it unenforceable under the statute of frauds, 6 Del. C. § 2714(a). Williams v. Chancellor Care Ctr., 2009 Del. Super. LEXIS 166 (Del. Super. Ct. Apr. 22, 2009).

Where an attorney committed violations of Law. R. Prof. Conduct 1.1, 1.4(b), and 1.16 during the course of 10 closings for a private money lender, a public reprimand was deemed the appropriate sanction; the attorney had ethical duties to disclose to the borrowers a conflict of interest and the fact that the loan documents were inadequate, even though the attorney did not represent them, as they had no attorneys. In re Goldstein, 990 A.2d 404 (Del. 2010).

Attorney whose multiple federal actions for assorted clients were dismissed due to failure to respond to dismissal or summary judgment motions violated Law. R. Prof. Conduct 1.1, 1.3, 1.4, 1.5, and 8.4, warranting a 2-year suspension from the practice of law, with conditions where: (1) the attorney had an unblemished record; (2) the attorney had undergone 2 eye surgeries; (3) the attorney had suffered the loss of a half-sibling; but (4) the conduct was deemed "knowing" and evidenced engagement in a pattern of misconduct. In re Feuerhake, 998 A.2d 850 (Del. 2010).

Attorney did not violate Law. Prof. Conduct R. 1.4(a)(4) for failing to explain to a client the various forms of joint ownership available and their legal implications; the attorney was not retained to do any more than take the matter to closing, which required compliance with condominium council titling requirements. In re Sisk, 54 A.3d 257 (Del. 2012).

Lawyer violated Law. Prof. Conduct R. 1.4(a)(3) and (4) by failing to provide information, including negotiations status and a client's file, despite client's multiple requests. In re Wilks, 99 A.3d 228 (Del. 2014).

Sanctions.

— Reprimand.

For the violation of both subdivision (b) of this Rule and Rule 1.5(e)(1), the appropriate sanction to be imposed is a public reprimand. In re Berl, 560 A.2d 1009 (Del. 1989).

Because an attorney neglected client's matters, failed to promptly disburse client funds, and failed to cooperate with disciplinary authorities, the attorney violated Law. R. Prof. Conduct 1.1, 1.3, 1.4(a)(3), (4), 1.15(d), and 8.1(b); accordingly, the attorney was publicly reprimanded and placed on probation for 18 months with the imposition of certain conditions. In re Member of the Bar of the Supreme Court of Del., 999 A.2d 853 (Del. 2010).

Attorney was publicly reprimanded and placed on conditional probation for violating Law. Prof. Conduct R. 1.1, 1.3, 1.4(a)(3), (4), 1.15(b), and 8.1(b) where the attorney: (1) failed to timely distribute settlement funds; (2) failed to communicate with a personal injury client; and (3) failed to keep the Office of Disciplinary Counsel informed of changes. In re Siegel, 47 A.3d 523 (Del. 2012).

— Suspension.

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in certificates of compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Rule 1.5. Fees.

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the client is advised in writing of and does not object to the participation of all the lawyers involved; and

(2) the total fee is reasonable.

(f) A lawyer may require the client to pay some or all of the fee in advance of the lawyer undertaking the representation, provided that:

(1) The lawyer shall provide the client with a written statement that the fee is refundable if it is not earned,

(2) The written statement shall state the basis under which the fees shall be considered to have been earned, whether in whole or in part, and

(3) All unearned fees shall be retained in the lawyer's trust account, with statement of the fees earned provided to the client at the time such funds are withdrawn from the trust account.

COMMENT

[1] *Reasonableness of fee and expenses.* — Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor

be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

[2] *Basis or rate of fee.* — When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. Applicable law also may apply to situations other than a contingent fee, for example, government regulations regarding fees in certain tax matters.

[4] *Terms of payment.* — A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money

maybe subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

[6] *Prohibited contingent fees.* — Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

[7] *Division of fee.* — A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee without regard to whether the division is in proportion to the services each lawyer renders or whether each lawyer assumes responsibility for the representation as a whole, so long as the client is advised in writing and does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.

[9] *Advance fees.* — A lawyer may require that a client pay a fee in advance of completing the work for the representation. All fees paid in advance are refundable until earned. Until such time as that fee is earned, that fee must be held in the attorney's trust account. An attorney who accepts an advance fee must provide the client with a written statement that the fee is refundable if not earned and how the fee will be considered earned. When the fee is earned and the money is withdrawn from the attorney's trust account, the client must be notified and a statement provided.

[10] 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 or the attorney's appearance on the record. However, a fee considered to be "earned upon commencement of the attorney's work on the matter" is not the same as a fee "earned upon receipt." The former requires that the attorney actually begin work whereas the latter is dependent only upon payment by the client. In a criminal defense matter, for example, a smaller fee—such as a fee under $2500.00—may be considered earned upon entry of the attorney's appearance on the record or at the initial consultation at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. a co-defendant). 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.

[11] As a general rule, larger advance fees—such as those over $2500.00—will not be considered earned upon one specific event. Therefore, the attorney must identify the manner in which the fee will be considered earned and make the appropriate disclosures to the client at the outset of the representation. The written statement must include a reasonable method of determining fees earned at a given time in the representation. One method might be calculation of fees based upon an agreed upon hourly rate. If an hourly rate is not utilized, the attorney is required to identify certain events which will trigger earned fees. For

example, in a criminal defense matter, an attorney might identify events such as entry of appearance, arraignment, certain motions, case review, and trial as the events which might trigger certain specified earned fees and deduction of those fees from the attorney trust account. Likewise, in a domestic matter, an attorney might identify such events as entry of appearance, drafting petition, attendance at mediation conference, commissioner's hearing, pre-trial conference, and judge's hearing as triggering events for purposes of earning fees. It might be reasonable for an attorney to provide that a certain percentage of this fee will be considered earned on a monthly basis, for any work performed in that month, or upon the completion of an identified portion of the work. Nevertheless, all fees must be reasonable such that even a fee considered earned in full per the written statement provided to the client might be refundable, in whole or in part, if it is not reasonable under the circumstances.

[12] In contrast to the general rule, a larger advance fee may, under certain circumstances, be earned upon one specific event. For example, this fee or a large portion thereof could become earned upon an attorney's initial consultation with a client in a bankruptcy matter at which substantive, confidential information has been communicated which would preclude the attorney from representation of another potential client (e.g. the client's creditors). In this context, the attorney must provide a clear written statement that the fee, or a portion thereof, is earned at time of consultation as compensation for this lost opportunity. Likewise, a criminal defense attorney might outline in the written agreement that the entire fee becomes earned upon conclusion of the matter—in the case of negotiation and acceptance of a plea agreement prior to trial. Both of these examples are tempered, however, by the reasonableness requirement set forth above.

[13] It is not acceptable for an attorney to hold earned fees in the attorney trust account. See Rule 1.15(a). This is commingling. Once fees are earned, those fees must be withdrawn from the attorney trust account. Typically, it is acceptable to draw down earned fees from an attorney trust account on a monthly or some other reasonable periodic basis. Similarly, monthly/periodic statements are considered an acceptable method of notifying one's clients that earned fees have been withdrawn from a trust

account. For those attorneys earning fees on a percentage basis, wherein the fee would be considered earned upon the completion of an identified portion of the work, a statement to that effect upon completion of that work would satisfy this requirement.

[14] *Disputes over fees.* — If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

NOTES TO DECISIONS

Analysis

— Suspension.

Arbitration.

— Fees.

Arbitrator's award of fees to law firm that represented the clients in an underlying complex and physically dangerous lawsuit was not manifestly violative of the terms of the arbitration agreement or Delaware law; although the court did not review the individual factual findings, it did find substantial evidence supporting the approach taken by the arbitrator in reviewing the reasonableness of various groups of charges according to rules of Delaware case law and ethical rules. Blank Rome, L.L.P. v. Vendel, 2003 Del. Ch. LEXIS 84 (Del. Ch. Aug. 5, 2003).

Attorneys' fees.

— Allocation in Family Court.

Husband's motion for counsel fees under 13 Del. C. § 1515 and Fam. Ct. Civ. R. 11 was granted in part in a wife's action, seeking specific performance under the parties' separation agreement, because the wife had changed her position with respect to selection of an appraiser; while the fees were reasonable under Fam. Ct. Civ. R. 88 and Law. Prof. Conduct R. 1.5(a), since it was unclear whether counsel made a reaonable inquiry, sanctions were not imposed directly against counsel. C.L.G. v. J.F.W., 2002 Del. Fam. Ct. LEXIS 111 (Del. Fam. Ct. June 3, 2002).

Based on consideration of 13 Del. C. § 1515, Fam. Ct. Civ. R. 88 and Law Prof. Conduct R. 1.5(a), it was not deemed appropriate to award counsel fees to either party in post-divorce ancillary proceedings; while the court must provide reasons for any award of fees, it need not justify a denial of counsel fees. N.M.B. v. C.R.B., 2002 Del. Fam. Ct. LEXIS 155 (Del. Fam. Ct. June 26, 2002).

Based on the financial circumstances, each party was to pay their own attorney's fees. R.A.C. v. V.M.E., 2002 Del. Fam. Ct. LEXIS 153 (Del. Fam. Ct. Mar. 7, 2002).

Mother was awarded counsel fees under 13 Del. C. § 1515 where the parties substantially agreed on visitation, making a court appearance unnecessary had the father informed the mother that he did not intend to pursue primary residential custody; although the mother's counsel fees of $1,462 were reasonable under Fam. Ct. Civ. R. 88 and Law. Prof. Conduct R. 1.5(a), given the parties' finances, it was improper to order the father to pay the mother's fees in full. E.K. v. C.K., 2002 Del. Fam. Ct. LEXIS 163 (Del. Fam. Ct. Dec. 16, 2002).

Because both parties were difficult and contributed to unnecessary and excessive litigation, each party was to bear his or her own attorney's fees and costs pursuant to 13 Del. C. § 1515, Fam. Ct. Civ. R. 88, and Del. Law. Prof. Conduct R. 1.5. T.M. v. M.M., 2002 Del. Fam. Ct. LEXIS 250 (Del. Fam. Ct. Mar. 12, 2002); D. L. M. v. A. L. M., 2005 Del. Fam. Ct. LEXIS 35 (Del. Fam. Ct. June 6, 2005).

Trial court evaluated relevant evidence and 13 Del. C. § 1515 Del. Fam. Ct. Civ. R. 88, and Del. Law. R. Prof. Conduct 1.5 to conclude that each party was to pay their own attorneys' fees. R.D.L. v. C.M.U., 2003 Del. Fam. Ct. LEXIS 56 (Del. Fam. Ct. Apr. 30, 2003); S.W. v. S.W., 2003 Del. Fam. Ct. LEXIS 62 (Del. Fam. Ct. June 24, 2003); J. P. v. S. P., 2004 Del. Fam. Ct. LEXIS 189 (Del. Fam. Ct. Nov. 8, 2004); J.H. v. L.H., 2006 Del. Fam. Ct. LEXIS 267 (Del. Fam. Ct. Nov. 13, 2006); D.E. v. S.M.E., 2007 Del. Fam. Ct. LEXIS 38 (Del. Fam. Ct. Mar. 29, 2007).

Trial court entered orders, under 13 Del. C. § 1513, awarding 65 percent of marital assets and 35 percent of liabilities to the wife, under 13 Del. C. § 1512, and after making allowance for her mother's living with her, awarding the wife $ 241 monthly alimony for 8.5 years, 50 percent of their 17-year marriage; under 13 Del. C. § 1515, Del. Fam. Ct. Civ. R. 88, and Del. Law. R. Prof. Conduct 1.5, the court awarded no attorneys' fees. J.S. v. K.S., 2003 Del. Fam. Ct. LEXIS 54 (Del. Fam. Ct. May 12, 2003); K.D.R. v. C.P.R., 2003 Del. Fam. Ct. LEXIS 58 (Del. Fam. Ct. May 12, 2003).

The purpose of 13 Del. C. § 1515 is to equalize the parties' positions by providing a financially disadvantaged party with the financial means to prosecute or defend a divorce action; the court must provide reasons for any award of fees, and is also guided by Del. Fam. Ct. Civ. R. 88 and Del. Law. R. Prof. Conduct 1.5. S. S. v. C. S., 2003 Del. Fam. Ct. LEXIS 213 (Del. Fam. Ct. Aug. 22, 2003); M. B. v. P. B., 2005 Del. Fam. Ct. LEXIS 63 (Del. Fam. Ct. Apr. 21, 2005); D.B. v. N.D.B., 2006 Del. Fam. Ct. LEXIS

218 (Del. Fam. Ct. Jan. 31, 2006); N.P. v. S.B., 2007 Del. Fam. Ct. LEXIS 194 (Del. Fam. Ct. Oct. 24, 2007).

Del. Fam. Ct. Civ. R. 88 requires the Family Court of Delaware, in determining the reasonableness of litigation costs incurred by the parties, to consider: (1) the time and expense expended; (2) an itemization of services rendered; (3) relevant hourly rates; (4) an itemization of disbursements claimed; (5) any sums received or that will be received with respect to legal services and/or disbursements; and (6) any information that will enable the court to properly weigh the relevant factors set forth in this rule. L. E. B. v. J. J. B., 2004 Del. Fam. Ct. LEXIS 17 (Del. Fam. Ct. Mar. 25, 2004).

Family court awarded a mother attorney fees and costs because, in light of the factors enumerated in 13 Del. C. § 731 and Law. Prof. Conduct R. 1.5, the fees she incurred were reasonable, with the exception of charging the father with the travel time of the mother's counsel to and from the courthouse; the father was responsible for the remainder of the mother's fees, notwithstanding the disparity in the parties' incomes, because it was his refusal to exercise the visitation awarded him and to comply with his responsibilities as the joint custodian of the parties' sons that caused the mother to incur the fees that she did. M. D. H. v. G. S. H., 2004 Del. Fam. Ct. LEXIS 62 (Del. Fam. Ct. June 29, 2004); M.B.M. v. C.M., 2006 Del. Fam. Ct. LEXIS 10 (Del. Fam. Ct. Jan. 27, 2006); S.F.C. v. D.F.C., 2007 Del. Fam. Ct. LEXIS 164 (Del. Fam. Ct. Nov. 27, 2007); M.B. v. E.B., 28 A.3d 495 (Del. Fam. Ct. 2011).

Under the 13 Del. C. § 1515 factors (especially the financial conditions of both parties), Fam. Ct. Civ. R. 88 and Law. Prof. Conduct R. 1.5, it was appropriate for the husband and the wife to be responsible for their own attorneys' fees and costs; this was despite the fact that the husband refused to consider an offer to settle alimony until the day before the trial, leading to an eventual award of alimony at trial. K. A. D. v. F. W. D., 2005 Del. Fam. Ct. LEXIS 28 (Del. Fam. Ct. May 24, 2005); A.C.M.-W. v. S.W., 2009 Del. Fam. Ct. LEXIS 58 (Del. Fam. Ct. Feb. 2, 2009); In re C.M., 2011 Del. Fam. Ct. LEXIS 54 (Del. Fam. Ct. Aug. 22, 2011).

Wife's recalcitrant behavior regarding a sale of the marital home was excessively litigious behavior that increased litigation costs and warranted an attorney's fee award to husband; in finding that the requested fees were reasonable, the court considered the factors listed under Fam. Ct. Civ. R. 88, which incorporated consideration of any factors that would be relevant under Law. R. Prof. Conduct 1.5(a) to determine whether an attorney met the ethical duty to charge reasonable fees. D.L.D. v. N.M.D., 2005 Del. Fam. Ct. LEXIS 143 (Del. Fam. Ct. Nov. 7, 2005); D. E. v. S. M. E., 2003 Del. Fam. Ct. LEXIS 211 (Del. Fam. Ct. Dec. 19, 2003).

Taking into account Fam. Ct. Civ. R. 88 and Law. R. Prof. Conduct 1.5, the court denied mother's request for attorney's fees and costs in a custody modification action under 13 Del. C. § 731; the mother did not prevail in her requests for sole legal custody of her minor daughter, for permission to relocate with the child to Utah or a neighboring state, or for restrictions on the location of the father's visits with the child, and she and the child's father were in comparable financial positions. K.J.G. v. J.M., 2005 Del. Fam. Ct. LEXIS 164 (Del. Fam. Ct. Nov. 1, 2005).

Family Court declined to award attorneys' fees to either a wife or husband in an ancillary order following the dissolution of their 35-year marriage; both parties worked and had sufficient income or assets to pay their own legal fee obligations. S.C. v. D.C., 2006 Del. Fam. Ct. LEXIS 232 (Del. Fam. Ct. Nov. 20, 2006).

Parties' requests for attorneys' fees were denied as an interim agreement did not prohibit a husband from making a claim against the increased equity in the wife's home, even though the trial court ruled that the parties could keep the appreciation in their respective properties, and neither party took an overly litigious position. K. C. S. v. S. H. S., 2006 Del. Fam. Ct. LEXIS 160 (Del. Fam. Ct. Sept. 7, 2006).

As a wife in a divorce proceeding was extremely litigious, took unreasonable positions and incurred a significant amount of attorneys' fees as a result, and was relentless with numerous filings that proved baseless and bordered on harassment, the wife's request under 13 Del. C. § 1515 for attorneys' fees, as well as based on considerations of Fam. Ct. Civ. R. 88 and Law R. Prof. Conduct was 1.5, was not deemed meritorious. C.G.B. v. P.C.B., 2006 Del. Fam. Ct. LEXIS 255 (Del. Fam. Ct. Dec. 4, 2006).

Because the wife received a substantial portion of the marital estate, the wife was required to pay her own attorneys' fees pursuant to 13 Del. C. § 1515, Fam. Ct. Civ. R. 88 and Law. R. Prof. Conduct 1.5. S.C.B. v. L.A.S., 2007 Del. Fam. Ct. LEXIS 138 (Del. Fam. Ct. June 7, 2007).

Because a wife was to receive a large portion of the marital estate, it would not have been appropriate to award attorneys' fees, under 13 Del. C. § 1515, Fam. Ct. Civ. R. 88, and Law R. Prof. Conduct 1.5. E.F.F. v. A.J.O., 2007 Del. Fam. Ct. LEXIS 165 (Del. Fam. Ct. Nov. 15, 2007); C.F.M. v. S.R.M., 2007 Del. Fam. Ct. LEXIS 250 (Del. Fam. Ct. Oct. 31, 2007); E.F.F. v. A.J.C., 2008 Del. Fam. Ct. LEXIS 17 (Del. Fam. Ct. Jan. 29, 2008).

Because a husband's request for a continuance resulted not from an intentional attempt to cause delay but rather the unforeseen unavailability of witnesses and the husband's position regarding the wife's alleged cohabitation was not frivolous, it would be inequitable to order attorneys' fees merely because the wife prevailed. M.D. v. C.D., 2007 Del. Fam. Ct. LEXIS 11 (Del. Fam. Ct. Mar. 15, 2007).

Pursuant to 13 Del. C. § 1515, Fam. Ct. Civ. R. 88, and Law. R. Prof. Conduct 1.5, a wife was entitled to an award of reasonable attorneys' fees from the husband in the parties' divorce action, as the wife did not have sufficient income or ability to pay her own fees. W.J.F. v. K.F., 2008 Del. Fam. Ct. LEXIS 88 (Del. Fam. Ct. Jan. 15, 2008).

As parties in a divorce proceeding were not overly litigious and did not take unreasonable positions, neither party was entitled to an award of attorneys' fees from the other pursuant to 13 Del. C. § 1515; the court considered the financial circumstances of the parties in denying the fee awards, as well as Fam. Ct. Civ. R. 88 and Law. R. Prof. Conduct 1.5. K.T. v. Y.T., 2008 Del. Fam. Ct. LEXIS 39 (Del. Fam. Ct. Feb. 8, 2008).

Since both the husband and wife had some income even though they were in dire financial straits, the trial court decided not to award attorneys' fees and costs to either party following the end of their 16-year marriage; pursuant to 13 Del. C. § 1515, and considering reasonable fee award factors set forth in Fam. Ct. Civ. R. 88 and Law. R. Prof. Conduct 1.5, the trial court directed each party to pay his or her own fees and costs, as the husband had limited income because the husband was disabled and only receiving weekly workers' compensation payments, while the wife although working had been bearing the brunt of paying the bills and rearing the parties' 2 children even before the husband left the marital residence. K.F. v. L.F., 2008 Del. Fam. Ct. LEXIS 10 (Del. Fam. Ct. Mar. 10, 2008).

Upon evaluation by a court of each party's assets, debts, and financial circumstances in their divorce and ancillary relief proceeding, each party was responsible for their own attorneys' fees pursuant to Fam. Ct. Civ. R. 88 and Law. R. Prof. Conduct 1.5. N.P. v. J.L.P., 2008 Del. Fam. Ct. LEXIS 20 (Del. Fam. Ct. Mar. 11, 2008).

Husband was not entitled to counsel fees under 13 Del. C. § 1515, Fam. Ct. Civ. R. 88 or Law. R. Prof. Conduct 1.5, given the de minimis size of the marital estate ($645 equity in a car), the 25-year length of the marriage and the substantial difference in income and earning capacity of the parties; the husband took unreasonable positions, leading to excessive litigation. N.J.H. v. J.H.H., 2008 Del. Fam. Ct. LEXIS 128 (Del. Fam. Ct. Nov. 26, 2008).

Wife was not awarded attorney fees and costs under 13 Del. C. § 1515, Fam. Ct. Civ. R. 88, and Law. R. Prof. Conduct 1.5, even though the wife was disabled and the husband was in good health, as the parties had been essentially placed in equal financial positions through the payment of alimony and the disposition of the marital home. A.S. v. R.S., 2010 Del. Fam. Ct. LEXIS 39 (Del. Fam. Ct. May 12, 2010).

Based on the counsel fees incurred by the husband in successfully defending the wife's appeal on the issue of the validity of the parties' divorce, and upon consideration of Fam. Ct. Civ. R. 88 and Law Prof. Conduct R. 1.5, there was no basis to support an award of fees. M.R. v. B.R., 2012 Del. Fam. Ct. LEXIS 51 (Del. Fam. Ct. May 23, 2012).

Although a decision on attorney's fees was deferred, the court was inclined to require that each party be responsible for payment of their respective counsel fees and costs because, although the wife was the economically weaker party, she was receiving 60% of the marital estate and 50% of tax-deferred assets, in addition to alimony and child support. E.K. v. M.K., 2013 Del. Fam. Ct. LEXIS 55 (Del. Fam. Ct. Mar. 28, 2013).

Wife was awarded attorneys' fees in a divorce action based upon the husband's unreasonable conduct of dissipation, but not based upon her economic state (due to the substantial award of marital property and alimony to her). In re J-M-R, 2013 Del. Fam. Ct. LEXIS 50 (Del. Fam. Ct. July 29, 2013).

Award of attorneys' fees in the wife's favor was appropriate because the Family Court on several occasions acknowledged the husband's delay in litigation and the wife's need to continually resort to motions to compel discovery for litigation. Weiner v. Weiner, — A.3d —, 2015 Del. Fam. Ct. LEXIS 34 (Del. Fam. Ct. July 13, 2015).

Family Court limited the award of fees to the mother only to the narrow issue covered under the rule to show cause (RTSC) because: (1) the testimony regarding the father's use and/or possession of alcohol in the home was easily divisible from the rest of the testimony; and (2) the time spent at trial limited to the RTSC did not exceed 3%, resulting in the father paying $1,005 in fees and costs. K.W. v. S.W., — A.3d —, 2019 Del. Fam. Ct. LEXIS 35 (Del. Fam. Ct. July 16, 2019).

— Contingency fees.

Attorney's failing to put a contingency fee arrangement in writing violated subsection (c). In re Maguire, 725 A.2d 417 (Del. 1999).

Attorney was entitled to quantum meruit fees up to a 1/3 contingency fee from former clients because: (1) the attorney was not fired for cause; (2) the issues were not complex; (3) the clients pressed the attorney to settle quickly; (4) nothing showed the attorney was precluded from other employment; (5) the fee was contingent and based on 1/3 of the recovery; and (6) the clients' subsequent attorney could pay the fee based on a charging lien on recovered fees. Murrey v. Shank, 2011 Del. Super. LEXIS 431 (Del. Super. Ct. Aug. 30, 2011).

— Fee agreements.

Attorney was suspended for 3 months, followed by 18 months of conditional probation, for having violated Law Prof. Conduct R. 1.5(f), 1.7(a), 1.15(a), 1.16(d) by: (1) having a conflict of interest with 2 clients; (2) having a personal interest in a loan transaction; (3) failing to safeguard client funds; and (4) failing to provide a new client with a fee agreement. In re O'Brien, 26 A.3d 203 (Del. 2011).

The Delaware Supreme Court accepted the Board on Professional Responsibility's findings and recommendation for discipline, publicly reprimanding and placing the attorney on a 2-year period of probation with the imposition of specific conditions, because the attorney failed to provide the client with a fee agreement and/or statement of earned fees withdrawn from the trust account, to identify and safeguard client fund, to maintain financial books and records or to supervise nonlawyer assistants; the attorney had engaged in conduct involving misrepresentation, prejudicial to the administration of justice. In re Malik, 167 A.3d 1189 (Del. 2017).

— Fee splitting.

Finding of attorney's violation of subdivision (e)(1) was supported by substantial evidence. In re Berl, 540 A.2d 410 (Del. 1988); In re Berl, 560 A.2d 1009 (Del. 1989).

Fee division agreement between a law firm and its former associate was valid and enforceable and did not violate the disciplinary rules; it is not common for a law firm and a departing attorney to divide the fees resulting from contingent fee cases which the attorney has been handling and will continue to handle after he leaves. Tomar, Seliger, Simonoff, Adourian & O'Brien v. Snyder, 601 A.2d 1056 (Del. Super. Ct. 1990).

A Delaware lawyer may not assert non-compliance with Rule 1.5(e) as a defense to an oral agreement with an out-of-state lawyer who is not charged with compliance with that rule or a similar rule of another jurisdiction. Potter v. Peirce, 688 A.2d 894 (Del. 1997).

Attorney's failing to obtain a written agreement with the client regarding joint representation with another lawyer and his attempting to divide a prospective fee violated subsection (e). In re Maguire, 725 A.2d 417 (Del. 1999).

Assuming that there was a contract by which a law firm engaged a representative plaintiff to perform legal work in class action litigation, any purported contract would have been void and unenforceable as it was unethical and in violation of the principles governing representative actions in Delaware; in particular, the agreement would have violated Law. R. Prof. Conduct 1.5(e) as the representative plaintiff did not advise the class, either in writing or orally, of the alleged fee-sharing agreement. Fuqua Indus. S'holder Litig. v. Abrams (In re Fuqua Indus.), 2006 Del. Ch. LEXIS 167 (Del. Ch. Sept. 7, 2006).

— Prevailing party.

Pursuant to Law. Prof. Conduct R. 1.5(a)(4), an award for fees, costs, and expenses incurred in the Chancery Court was not warranted to an investment company, because it was not the prevailing party there; rather, the company's claims in that Court were dismissed. Shore Invs., Inc. v. Bhole, Inc., 2012 Del. Super. LEXIS 621 (Del. Super. Ct. Apr. 9, 2012).

— Reasonableness.

Although the fees incurred by a mother in an expedited custody proceeding were reasonable in light of the factors enumerated in Law. Prof. Conduct R. 1.5, pursuant to 13 Del. C. § 731, the father was not responsible for fees that the mother would have incurred regardless of his obstreperous conduct. M.D.H. v. G.S.H., 2003 Del. Fam. Ct. LEXIS 6 (Del. Fam. Ct. Feb. 28, 2003).

Court granted the father's motion for attorney fees because the mother violated the court's order granting the father joint legal custody of and visitation with the parties' children in several respects; in setting the fees, the court considered the factors enumerated in Del. Law. R. Prof. Conduct 1.5. D.M.E. v. M.B.S.E., 2003 Del. Fam. Ct. LEXIS 119 (Del. Fam. Ct. Sept. 11, 2003).

Although the insured was entitled to an attorney fee award as the prevailing party against the insurer, its fee request was excessive and had to be reduced to a reasonable amount. Nassau Gallery, Inc. v. Nationwide Mut. Fire Ins. Co., 2003 Del. Super. LEXIS 401 (Del. Super. Ct. Nov. 18, 2003).

Exercising its broad 13 Del. C. § 731 discretion and considering Del. Fam. Ct. Civ. R. 88, Del. Law. R. Prof. Conduct 1.5, and related factors to determine a reasonable fee, the court allowed the mother's $412 and father's $275 attorney fee requests and ordered the father to pay $100 of the mother's fee; the court specifically mentioned it took into account the father's intransigent position violating Del. Fam. Ct. Civ. R. 16(b) policy that contemplated the parties' participation in mediation to mediate to settle unresolved issues, the positions taken by the parties, the discrepancy in counsel's experience, and the parties' incomes. N. J. G. v. J. J. G., 2004 Del. Fam. Ct. LEXIS 18 (Del. Fam. Ct. Mar. 2, 2004); L D M v. R L, 2006 Del. Fam. Ct. LEXIS 131 (Del. Fam. Ct. June 1, 2006); D.G.C. v. R.C., 2006 Del. Fam. Ct. LEXIS 260 (Del. Fam. Ct. Aug. 30, 2006); R.U. v. R.L.U., 2008 Del. Fam. Ct. LEXIS 26 (Del. Fam. Ct. Jan. 22, 2008).

After plaintiffs voluntarily dismissed their action against defendants for the interpretation of a partnership agreement, defendants were entitled to reasonable attorney fees for answering the complaint and responding to the motion to dismiss; however, the court declined to award fees for the preparation of defendants' counterclaims since these were voluntary in nature and were not necessarily incurred in defense of the action. Richmont Capital Ptnrs. I, L.P. v. J. R. Invs. Corp., 2004 Del. Ch. LEXIS 73 (Del. Ch. May 20, 2004).

Taking into account the Law. Prof. Conduct R. 1.5(a) factors, the trial court approved the reasonableness of the attorney fees the Special Master recommended in the Special Master's Final Report, as the coproate officer was due the advancement of funds (as provided for in the corporation's bylaws) in an investigation for possible accounting irregularities; however, the trial court had to modify the corporate officer's pre-judgment interest request because the corporate officer was only entitled to interest from the time the officer produced specific advancement expenses to the corporation. Tafeen v. Homestore, Inc., 2005 Del. Ch. LEXIS 41 (Del. Ch. Mar. 29, 2005).

Delaware Industrial Accident Board, in awarding minimal attorney's fee to the employee's counsel under 19 Del. C. § 2320, abused its discretion in failing to demonstrate that it had considered the requisite Cox factors, based on Law. R. Prof. Conduct 1.5(a), in making its award; the Board merely stated that it awarded a minimal fee due to the employee's counsel's failure to cooperate with the employer's counsel by refusing to send photographs of the employee's disfigurement. Green v. ConAgra Poultry Co., 2005 Del. Super. LEXIS 321 (Del. Super. Ct. Sept. 8, 2005).

Wife's counsel's motion for attorneys' fees and costs in the parties' post-divorce proceedings was granted based upon consideration of the relevant factors under Fam. Ct. Civ. R. 88, as well as the reasonableness of the fee under Law. R. Prof. Conduct 1.5; the award was within the family court's authority under 13 Del. C. § 1515, and included consideration of the former husband's financial situation, his retention of a new attorney for a longer time than the wife, the extensiveness of the parties' litigation, and the necessity of the wife's retention of counsel to obtain a final resolution of pending matters. L. F. v. L. M. H., 2005 Del. Fam. Ct. LEXIS 73 (Del. Fam. Ct. June 3, 2005).

Because a mortgage agreement established a ceiling of 5 percent of the judgment amount which ultimately would be entered after trial and the lender could not recover attorneys' fees outside of the foreclosure, the requested attorneys' fees were unreasonable. Beneficial Delaware, Inc. v. Waples, 2006 Del. Super. LEXIS 274 (Del. Super. Ct. July 3, 2006).

When the court had held that a workers' compensation claimant was an employee and not an independent contractor, the claimant's attorney was awarded a fee of $29,053.19, representing $300 multiplied by 96 hours plus costs of $253.19, as the time expended and the hourly rate were reasonable given the nature of the case, counsel's experience, and community custom, and the employers had not supplied any evidence of their claimed inability to pay the fee; a 1/3 multiplier, however, was not justified, because if the issue was complex at all, it was factually, not legally, complex. Falconi v. Coombs & Coombs, Inc., 2006 Del. Super. LEXIS 471 (Del. Super. Ct. Nov. 21, 2006).

The employee was entitled to attorney's fees under 19 Del. C. § 2350(f) where: (1) the employee's total disability case presented relatively difficult questions on appeal; (2) the attorney's hourly rate was reasonable; (3) the attorney was successful on appeal; (4) pursuant to Law. Prof. Conduct R. 1.5, the employer was able to pay; and (5) the Industrial Accident Board's award was the only source of attorneys' fees. Smith v. Del. State Hous. Auth., 2006 Del. Super. LEXIS 624 (Del. Super. Ct. Feb. 14, 2006).

When an employer was partially successful in a suit against an employee for the employee's violation of a noncompetition agreement, an award to the employer of attorneys' fees exceeding the amount of damages awarded was not excessive under Law. R. Prof. Conduct 1.5 because the employee was responsible for delays resulting in increased fees, as: (1) the employee's motion for a continuance required counsel to prepare for trial twice; and (2) the employee could have minimized litigation costs but instead drew out the case by requiring the employer to prove every key issue of fact. EDIX Media Group v. Mahani, 2007 Del. Ch. LEXIS 17 (Del. Ch. Jan. 25, 2007), aff'd, 935 A.2d 242 (Del. 2007); Mahani v. EDIX Media Group, Inc., 935 A.2d 242 (Del. 2007); Weichert Co. v. Young, 2008 Del. Ch. LEXIS 51 (Del. Ch. May 1, 2008).

Attorney violated Law. R. Prof. Conduct 1.5(a) by charging a fee of $1,500 for the minimal legal services performed in connection with a motion for reduction of sentence. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Attorneys' total fees of $144,866.70 were reasonable as the case required a tenacious and highly-skilled lawyer with extensive understanding of employment law and, as a solo practitioner, the attorney's ability to take on other cases was severely limited by the obligations in the case; the amount involved and the amount recovered by the client, $252,416 on wrongful termination and bad faith claims, were both substantial. Bunting v. Citizens Fin. Group, 2007 Del. Super. LEXIS 205 (Del. Super. Ct. June 29, 2007).

The attorneys' request for the maximum fee allowed by law was unsupported because: (1) motion practice was a normal part of litigation; (2) movant attorneys offered no reason why their motions were so complex as to justify an attorneys' fee award of 33%; and (3) the fact that the county vigorously opposed the motion was irrelevant. Korn v. New Castle County, 2007 Del. Ch. LEXIS 139 (Del. Ch. Oct. 3, 2007).

Although an attorney fee award in a workers' compensation case could be based on nonmonetary benefits, the Industrial Accident Board had nothing before it other than the employee's monetary award from which to calculate the attorney fee award; however, applying Del. Law. R. Prof. Conduct 1.5, regarding reasonable attorney fees, and the General Motors Corporation v. Cox, 304 A.2d 55, 57 (Del. 1973) factors that included the amount involved and the results obtained, there existed no basis for overturning the Board's attorney fee award. Pugh v. Wal-Mart Stores, Inc., 945 A.2d 588 (Del. 2008).

Reimbursement of defense fees and costs pursuant to an indemnification provision in a stock purchase agreement of a manufacturing entity by the former manufacturer was warranted where the fees were reasonable based on consideration of the reasonableness factors under Law. R. Prof. Conduct 1.5(a)(1) and (4); such fees included work done prior to the time when the underlying environmental litigation was commenced, as there were subpoenas and information requests that served as the basis for the lawsuit against the new manufacturing entity and others. Rexnord Indus., LLC v. RHI Holdings, Inc., 2009 Del. Super. LEXIS 47 (Del. Super. Ct. Feb. 13, 2009).

Attorney fees and expert witness fees incurred by former executives in their action against a corporation, seeking payment of certain options that they were allegedly promised, were ordered to be paid by the corporation where the executives were awarded judgment after trial and the sums sought were, for the most part, reasonable, not duplicative, and not excessive under Law. R. Prof. Conduct 1.5(a); the executives were also entitled to fees for the prosecution of their action seeking payment of fees. Lillis v. AT&T Corp., 2009 Del. Ch. LEXIS 34 (Del. Ch. Feb. 25, 2009).

Treatment center that failed to comply with subpoenas duces tecum for substance and alcohol abuse records of an indigent parent involved in a child dependency case, and which was ultimately found in contempt for its misconduct, was ordered to pay the parent's attorney that attorney's reasonable attorneys' fees under Fam. Ct. Civ. R. 88; such attorneys' fees, based on what the attorney would have earned if the attorney was working for a private client, were reasonable in the circumstances pursuant to Law. R. Prof. Conduct 1.5. A.B. v. Thresholds, Inc., 982 A.2d 295 (Del. Fam. Ct. 2009).

Plaintiffs' request for $83,980 in attorneys' fees was reduced by 30 percent where: (1) the disputed fees pertained directly to plaintiffs' efforts to gain possession of and ability to inspect a defendant's computer which that defendant had already modified, losing or disposing of, the hard drive; (2) the time spent by the most junior and senior attorneys was disallowed; (3) it was reasonable under Law. R. Prof. Conduct 1.5(a) to allow a weighted average rate of approximately $340 per hour for the other 2 attorneys who spent almost 240 hours on the claimed work, given their level of experience; and (4) much of the requested relief was denied; and (5) the award was directed to the prejudice caused by the spoliation. Beard Research, Inc v. Kates, 2009 Del. Ch. LEXIS 170 (Del. Ch. Oct. 1, 2009).

Condominium code and declaration authorized attorneys' fees to a prevailing party, such that a condominium council that was awarded partial summary judgment in its debt action against condominium owners was awarded its reasonable fees; the fees were reasonable under Law. R. Prof. Conduct 1.5(a), based on the amount charged, the hours worked, the owners' willingness to pursue litigation, and their ability to pay. Dixon v. Council of the Cliff House Condo., 2009 Del. C.P. LEXIS 71 (Del. Dec. 8, 2009).

Although the first party's attorneys' fees were reasonable under the factors set forth in Law. Prof. Conduct R. 1.5(a), the first party's expenses related to photocopying, transcripts, travel, and computer research were not to be included because: (1) the terms "costs" and "expenses" had different meanings; and (2) the parties' asset purchase agreement only provided for payment of costs, pursuant to Ch. Ct. R. 54. Ivize of Milwaukee v. Compex Litig. Support, 2009 Del. Ch. LEXIS 251 (Del. Ch. June 24, 2009).

Attorneys' fees based on Law. R. Prof. Conduct 1.5(a) were reduced partially where the amount of time spent by partners in 1 law firm was deemed an artificial inflation of a company's requested fees; the company was awarded fees based on another company's breach of a noncompetition provision in the parties' asset purchase agreement. Concord Steel, Inc. v. Wilmington Steel Processing Co., 2010 Del. Ch. LEXIS 18 (Del. Ch. Feb. 5, 2010).

Because the plaintiffs' fees were reasonable as to the amount involved, and because the time expended was justifiable based on the amount of money involved, the number of the defendants, and the vigor with which the arbitration was contested, the plaintiffs were entitled to their attorneys' fees and costs under Law. R. Prof. Conduct 1.5(a). Global Link Logistics, Inc. v. Olympus Growth Fund III, L.P., 2010 Del. Ch. LEXIS 30 (Del. Ch. Feb. 24, 2010).

With the exception of certain expenses that fell outside the fee award, a corporation's attorneys' fees were reasonable as to the number of attorneys involved and the related dollar amounts; therefore, pursuant to Law. R. Prof. Conduct 1.5(a) and Ch. Ct. R. 88, a shareholder was obligated to pay the corporation's expenses incurred by the shareholder's contempt. Aveta Inc. v. Bengoa, 2010 Del. Ch. LEXIS 175 (Del. Ch. Aug. 13, 2010).

Former officer of a corporation reasonably requested $292,019.91 for fees and expenses incurred in connection with the officer's defense of claims asserted against the officer by the corporation's parent in an underlying action; the record in the underlying action strongly suggested that the parent adopted a litigation strategy designed to overwhelm the officer by forcing the officer to incur significant expenses defending a wide-ranging, unfocused action. Danenberg v. Fitracks, Inc., 58 A.3d 991 (Del. Ch. 2012).

Attorneys' fees and costs of $3,267,355 requested were reasonable and were awarded to a fund under a contractual fee-shifting provision because: (1) the attorneys' fee component was calculated using the rates the fund's counsel customarily charged the fund, which were their standard hourly rates discounted by 10%; (2) the lawyers who staffed the matter were able and experienced practitioners and charged what were readily recognizable as reasonable rates for complex commercial litigation; (3) that the opponents' attorneys charged lower rates did not render the fund's counsel's rates unreasonable in light of the fund's counsel's prominence, the qualifications of its practitioners and the legal market in which the firm provided services; and (4) that the opponents' attorneys incurred fewer hours working on the case did not undercut the reasonableness of the fund's request. ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC, 50 A.3d 434 (Del. Ch. 2012).

Trial court properly awarded a minority stockholder's attorney a fee of $304 million (15% of a $2.031 billion judgment) in a derivative suit since Law Prof. Conduct R. 1.5(c) contemplated fees that were based on a percentage; the trial court properly made a reasonableness determination based on the Sugarland Indus. v. Thomas, 420 A.2d 142 (Del. 1980) factors. Ams. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

The extraordinary benefit that was achieved by plaintiff minority shareholder in a derivative suit merited a very substantial award of $304 million in attorneys' fees where: (1) plaintiff's attorneys pursued the case on a contingent fee basis, invested a significant number of hours, incurred more than $1 million in expenses, attorneys reviewed approximately 282,046 pages in document production and traveled outside the United States to take multiple depositions; (2) plaintiffs indisputably prosecuted the action through trial and secured an immense economic benefit; (3) plaintiff had to deal with very complex financial and valuation issues, while being up against major league, first-rate legal talent; (4) with prejudgment interest, the benefit achieved through the litigation amounted to more than $2 billion; and (5) postjudgment interest accrued at more than $212,000 per day. Ams. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

Award of $304 million in attorneys' fees in a derivative suit was properly based upon the total damage award, which included prejudgment interest; the Court of Chancery's decision to include prejudgment interest in its determination of the benefit achieved was not arbitrary or capricious, but rather was the product of a logical and deductive reasoning process which took into account the slow pace of litigation and any part plaintiffs might have played in that pace. Ams. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

Award of $304 million in attorneys' fees in a derivative suit, based upon a calculation of 15% of a $2.031 billion judgment, was proper due to the complexity of the case and valuable benefits conferred; the fact that plaintiff's counsel spent 8,597 hours on this case, meaning that the award would represent a per hour payment of approximately $35,000 an hour, was irrelevant because the benefit achieved by the litigation was the common yardstick by which a plaintiff's counsel should be compensated in a successful derivative action. Ams. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

Pursuant to Law. Prof. Conduct R. 1.5, an award for fees, costs and expenses incurred in a breach of lease claim was reasonable and appropriate where an investment company prevailed on that claim; the court allocated the percentage to be awarded for each item, because other claims had also been pursued. Shore Invs., Inc. v. Bhole, Inc., 2012 Del. Super. LEXIS 621 (Del. Super. Ct. Apr. 9, 2012).

Wife's request for attorneys' fees was granted only in part because many of the entries by her attorney did not relate to the husband's dissipation of marital assets, which was the basis of the award; the amount awarded was deemed reasonable. J- M- R- v. K- J. R-, 2013 Del. Fam. Ct. LEXIS 48 (Del. Fam. Ct. Sept. 23, 2013).

In awarding fees and costs under the bad faith exception to the American Rule, an indication that the amount of the fee request was reasonable was that at the time the fees and expenses were incurred, plaintiffs had no guarantee of obtaining a fee-shifting award; further, the court determined that most prelitigation expenses were reasonable, considering that plaintiffs acted reasonably by seeking to resolve the matter before filing suit Staffieri v. Black, 2013 Del. Ch. LEXIS 322 (Del. Ch. Aug. 8, 2013).

While the attorney fee award was greater than the amount recovered for the breach of contract, the award was supported because: (1) the guarantor made many claims which were costly to defend against; (2) the lender hired a legal team and expert advisors necessary to tackle the numerous, difficult issues; (3) the fees charges were reasonable and less than those expended by the guarantor; and (4) the professionals chosen were well-qualified. Edgewater Growth Capital Partners L.P. v. H.I.G. Capital, Inc., 2013 Del. Ch. LEXIS 104 (Del. Ch. Apr. 18, 2013).

Defendant's attorneys' fees of $287,339 were reasonable because: (1) the litigation lasted over 3 years; (2) plaintiff repeatedly engaged in bad faith litigation tactic; (3) defense counsel's hourly rates were consistent with the rates generally charged in Delaware; and (4) the number of hours devoted to the litigation was not excessive, redundant, duplicative or otherwise unnecessary. Preferred Invs., Inc. v. T&H Bail Bonds, — A.3d —, 2014 Del. Ch. LEXIS 43 (Del. Ch. Mar. 25, 2014).

Shifting attorneys' fees under the bad faith exception to the American Rule and awarding reasonable fees to an estate for defending against a challenger's exceptions to the final accounting was appropriate because: (1) the challenger lacked standing to prosecute exceptions; (2) the litigation was vexatious and frivolous; and (3) the attorney's fees requested were reasonable and involved a modest hourly rate of $225 for over 20 hours in preparing for the exceptions. In re Estate of Branson, — A.3d —, 2014 Del. Ch. LEXIS 57 (Del. Ch. Apr. 22, 2014).

In this contract action, defendant was entitled to an award of $700,000 for attorneys' fees, costs and expenses because defendant predominated in the litigation regarding the breach of contract issuea; the time and labor required in this suit were significant because the ownership and control of defendant was at stake. AFH Holding & Advisory, LLC v. Emmaus Life Scis., Inc., — A.3d —, 2014 Del. Super. LEXIS 228 (Del. Super. Ct. Apr. 16, 2014).

Although plaintiff requested $374,128 in attorneys' fees and costs for misuse of computer system information, the award was reduced to $200,000 because: (1) the amount sought was unreasonable and disproportionate to the $87,016.25 awarded to plaintiff as nominal and unjust enrichment damages; and (2) not all of the time and labor expended by plaintiff's counsel on the computer misuse claim was necessary. Wayman Fire Prot., Inc. v. Premium Fire & Sec., LLC, — A.3d —, 2014 Del. Ch. LEXIS 108 (Del. Ch. June 27, 2014).

Plaintiff was entitled to an award of reasonable attorneys' fees of $33,440 for defendant's refusal to comply with a discovery request because: (1) plaintiff's time entries sufficiently advised the court as to the task being completed; (2) plaintiff's explanations as to the nature of any disputed work were credible; (3) defendant was not paying for purely clerical tasks; and (4) defendant was not paying for redundant/unnecessary tasks or excessive time. Mine Safety Appliances Co. v. AIU Ins. Co., — A.3d —, 2014 Del. Super. LEXIS 475 (Del. Super. Ct. Sept. 19, 2014).

While the amount of time law firms devoted to the representation of the trustees of a trust was reasonable, given that the beneficiaries vigorously contested numerous aspects of the action, and the amounts charged by the trustees' attorneys generally were reasonable, the court capped the reimbursable billing rates for one law firm when the court determined that the maximum rate for reasonable attorneys' fees was lower than that firm charged. In re Hawk Mt. Trust, — A.3d —, 2015 Del. Ch. LEXIS 236 (Del. Ch. Sept. 8, 2015).

Upon granting a mortgagee's foreclosure and breach of contract claims pursuant to a judgment on the pleadings, the court determined the reasonable amount of attorneys' fees to award, based upon consideration of the professional conduct factors, including the billing statements that detailed the hours worked, the nature of the representation and the amount of the judgment. CRELK Enters. v. Meris Props., — A.3d —, 2016 Del. Super. LEXIS 180 (Del. Super. Ct. Apr. 21, 2016).

Nursing home's attorney was entitled to an award of fees and costs pursuant to the admission agreement because: (1) the attorney practiced law for more than 40 years, including the representation of nursing homes for about 20 years; (2) the attorney's discounted hourly rate of $270 was below those fees customarily charged by attorneys with similar experience; and (3) the attorney obtained a favorable result for the home. 810 South Broom St. Operations, LLC v. Daniel, — A.3d —, 2016 Del. Super. LEXIS 332 (Del. Super. Ct. July 15, 2016).

Trial court did not abuse its discretion in awarding attorneys' fees and costs in the amount of $10,296 to a nursing home because: (1) there was a contractual basis for shifting attorneys' fees; (2) the parties engaged in an unsuccessful mediation; (3) the nursing home was required to engage in motion practice; and (4) there was a 1-day trial. Miller v. Onix Silverside, LLC, — A.3d —, 2016 Del. Super. LEXIS 434 (Del. Super. Ct. Aug. 26, 2016).

Although a commercial landlord sought $42,412 in attorneys' fees, the landlord was awarded $20,132 in fees because 32.5 hours billed for post-trial memoranda was unreasonable; the landlord was not permitted to bill for another trial that had to be held at a later date when 2 of the landlord's witnesses were unavailable for the original trial. J.M.L. Inc. v. Shoppes of Mount Pleasant, LLC, — A.3d —, 2016 Del. Super. LEXIS 519 (Del. Super. Ct. Oct. 14, 2016).

Trial court did not abuse its discretion by awarding attorneys' fees to a maintenance company in its action against a property owner, arising from the property owner's alleged failure to pay annual assessment; the amount awarded was reasonable. Saunders-Gomez v. Rutledge Maint. Corp., — A.3d —, 2017 Del. Super. LEXIS 164 (Del. Super. Ct. Apr. 3, 2017).

Defendant's motion for attorneys' fees was granted, in part, because: (1) tasks performed by defendant's attorneys were made necessary by counsel having had no part in negotiating the asset purchasing agreement; and (2) defendant's attorneys were required to research and understand a complex corporate transaction with little to no prior familiarity with what occurred. The Boeing Co. v. Spirit Aerosystems, Inc., — A.3d —, 2017 Del. Super. LEXIS 630 (Del. Super. Ct. Dec. 5, 2017).

In an action for breach of a commercial lease, the landlord's attorneys' fees were reasonable because counsel: (1) could not work on other matters while working on the instant litigation; (2) gave the landlord a discounted fee rate due to their continued business; (3) assigned different matters to associates and paralegals at a lower billable rate; and (4) never raised its rates throughout the 3-year litigation. Bridev One, LLC v. Regency Ctrs., L.P., — A.3d —, 2017 Del. Super. LEXIS 729 (Del. Super. Ct. Dec. 1, 2017).

When a partnership official sought advancement of fees and costs, where the partnership objected that the official's counsel's fees exceeded rates charged by other law firms, the official was not entitled to summary judgment; a discrepancy between rates the official's counsel charged and rates other firms charged raised a fact question on the reasonableness of the firm's fees. Weil v. Vereit Operating P'ship, L.P., — A.3d —, 2018 Del. Ch. LEXIS 48 (Del. Ch. Feb. 13, 2018).

In light of the absence of any novel or complex issues on appeal from a decision of the Delaware Industrial Accident Board, a request for attorneys' fees was excessive (failing to justify a contingency multiplier). McCabe v. Bayside Roofing, Inc., — A.3d —, 2018 Del. Super. LEXIS 76 (Del. Super. Ct. Feb. 13, 2018).

Plaintiff's counsel's fees of $41,110 were reasonable, even though plaintiff's counsel spent 11 more hours working on the case than defendant's counsel, because: (1) plaintiff's counsel had to review and respond to defendant's affirmative defenses; (2) plaintiff showed that the services its attorneys rendered were thought prudent and appropriate at the time, in the good faith professional judgment of counsel; and (3) plaintiff's counsel successfully secured a $1,000,000 award and charged less than 5% of that sum to do so. Bellmoff v. Integra Servs. Techs., — A.3d —, 2018 Del. Super. LEXIS 273 (Del. Super. Ct. June 22, 2018).

In response to competing motions for attorney fees and costs, the court held that shifting fees was inequitable and unwarranted in favor of any party because no bad faith existed; under Law Prof. Conduct R. 1.5(a), plaintiffs were entitled to fees and costs in the amount of $681,835 in light of the fees expended by them and the amount recovered. Brace Indus. Contr. v. Peterson Enters., — A.3d —, 2018 Del. Ch. LEXIS 567 (Del. Ch. Dec. 12, 2018).

— Retainer.

Attorney's acceptance of a $1,000.00 retainer, without providing the client with a written explanation of fees, was in violation of subsection (f) of this rule. In re Becker, 788 A.2d 527 (Del. 2001).

Attorney violated Law. R. Prof. Conduct 1.5(f) by: (1) failing to provide a client with a written statement that a $1,500 advance fee was refundable (if not earned) and stating the basis under which the fees would be considered to have been earned, whether in whole or in part; and (2) by failing to deposit, account for and retain the $1,500 in a client trust account as fees were earned. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Attorney did not violate Law. Prof. Conduct R. 1.5 where a retainer was deposited originally into a trust account and not into an operating account; because no fees were claimed to have been earned at the time the retainer was deposited, a written statement of the fees earned was not required. In re Sisk, 54 A.3d 257 (Del. 2012).

Attorney violated various disciplinary rules because the results of an audit showed the attorney's failure to adequately maintain books and records, to safeguard client funds or to indicate in the retainer that unearned fees were refundable. In re A Member of the Bar of the Supreme Court of Delaware: Fred Bar, 99 A.3d 639 (Del. 2013).

Sanctions.

— Reprimand.

For the violation of both Rule 1.4(b) and subdivision (e)(1) of this Rule, the appropriate sanction to be imposed is a public reprimand. In re Berl, 560 A.2d 1009 (Del. 1989).

When respondent violated Law. Prof. Conduct R. 1.5(f), 1.15(a) and (d), 8.4(c) and (d) by failing to properly maintain law firm's books and records for 3 consecutive years, filing inaccurate certificates of compliance for 3 consecutive years, and failing to give flat fee clients proper notice that the fee was refundable if not earned, a public reprimand with a 2-year period of probation was appropriate; this was true, even considering the mitigating factors, given a lawyer's obligation to maintain orderly books and records. In re Castro, 160 A.3d 1134 (Del. 2017).

— Suspension.

Where a lawyer engaged in a pattern of knowing misconduct over a period of several years by commingling client funds, failing to maintain the lawyer's law practice accounts, failing to pay taxes, falsely representing on certificates of compliance that the lawyer complied with the record-keeping requirements and paid taxes, the lawyer violated Del. Law. R. Prof. Conduct 1.5(f), 1.15(a), (b), (d), 8.4(b), (c), (d); as a result, the lawyer was suspended for 3 years. In re Garrett, 835 A.2d 514 (Del. 2003).

Attorney whose multiple federal actions for assorted clients were dismissed due to failure to respond to dismissal or summary judgment motions violated Law. R. Prof. Conduct 1.1, 1.3, 1.4, 1.5, and 8.4, warranting a 2-year suspension from the practice of law, with conditions where: (1) the attorney had an unblemished record; (2) the attorney had undergone 2 eye surgeries; (3) the attorney had suffered the loss of a half-sibling; but (4) the conduct was deemed "knowing" and evidenced engagement in a pattern of misconduct. In re Feuerhake, 998 A.2d 850 (Del. 2010).

There was substantial evidence to support the factual findings and conclusions of law of the Board on Professional Responsibility regarding an attorney's violations of Law Prof. Conduct R. 1.5(f), 1.15(a) and (b), and 8.4(c), based on the attorney's misappropriation of clients' fees on various occasions, and the attorney's failure to include the typical refund provision regarding unearned fees in the retainer agreements for other clients; a 1-year suspension was warranted. In re Vanderslice, 55 A.3d 322 (Del. 2012).

Attorney who committed numerous ethical violations, including neglecting multiple client matters, making misrepresentations to the court and failing to properly safeguard clients' funds, was suspended for 18 months, based on a determination that the mitigating factors significantly outweighed the aggravating factors. In re Carucci, 132 A.3d 1161 (Del. 2016).

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not

disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

[5] *Authorized disclosure.* — Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

[6] *Disclosure adverse to client.* — Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or a fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Disclosure is not permitted under paragraph (b)(3) when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense if that lawyer's services were not used in the initial crime or fraud; disclosure would be permitted, however, if the lawyer's services are used to commit a further crime or fraud, such as the crime of obstructing justice. While applicable law may provide that a completed act is regarded for some purposes as a continuing offense, if commission of the initial act has already occurred without the use of the lawyer's services, the lawyer does not have discretion under this paragraph to use or disclose the client's information.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law. See, e.g., 29 DEL. CODE ANN. § 9007A(c) (which

provides that an attorney acting as guardian ad litem for a child in child welfare proceedings shall have the "duty of confidentiality to the child unless the disclosure is necessary to protect the child's best interests").

[13] Paragraph (b)(6) also permits compliance with a court order requiring a lawyer to disclose information relating to a client's representation. If a lawyer is called as a witness to give testimony concerning a client or is otherwise ordered to reveal information relating to the client's representation, however, the lawyer must, absent informed consent of the client to do otherwise, assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a)

prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[15] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the

other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

[18] *Acting competently to preserve confidentiality.* — Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or it may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the

sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

[20] *Former client.* — The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

NOTES TO DECISIONS

Confidentiality.

Attorney's disclosure of a codefendant's statement to the attorney's client charged with murder and related offenses, after the attorney retrieved it from the codefendant's file, violated the codefendant's attorney-client privilege; the disclosure constituted a violation of the professional conduct rules relating to the confidentiality of information and conduct that was prejudicial to the administration of justice. In re Lyle, 74 A.3d 654 (Del. 2013).

Although the plaintiff's counsel should not have given the plaintiff a juror's phone number after trial, sanctions were not imposed on counsel because no convincing evidence showed that counsel suggested that plaintiff contact the juror; plaintiff was not sanctioned because no authority barred plaintiff from contacting the juror. Baird v. Owczarek, 2013 Del. Super. LEXIS 377 (Del. Super. Ct. Aug. 29, 2013).

There was no bona fide condition for the court's recusal limited to the issue of counsel's withdrawal, because counsel could strictly limit disclosures to the court to preserve the client's confidentiality pursuant to counsel's professional conduct obligations. State v. Pardo, — A.3d —, 2015 Del. Super. LEXIS 548 (Del. Super. Ct. Oct. 27, 2015).

Conflicts of interest.

Because the defendant did not object to a law firm's representation of the plaintiff during the negotiations of a merger agreement, and failed to point to information or confidences obtained by the firm in its prior work for the defendant that would have a material influence on the proceedings, there was no basis to disqualify the firm. Rohm & Haas Co. v. Dow Chem. Co., 2009 Del. Ch. LEXIS 249 (Del. Ch. Feb. 12, 2009).

Rule 1.7. Conflict of interest: Current clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

COMMENT

[1] *General Principles.* — Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek

court approval where necessary and take steps to minimize harm to the clients. See rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

[6] *Identifying conflicts of interest: Directly adverse.* — Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

[8] *Identifying Conflicts of Interest: Material Limitation.* — Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint

venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

[9] *Lawyer's Responsibilities to Former Clients and Other Third Persons.* — In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

[10] *Personal Interest Conflicts.* — The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client.In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10(personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the

lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10.

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

[13] *Interest of Person Paying for a Lawyer's Service.* — A lawyer may be paid from a source other than the client, including a coclient, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

[14] *Prohibited Representations.* — Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b) some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude

that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

[18] *Informed Consent.* — Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31](effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses

to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

[20] *Consent Confirmed in Writing.* — Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[21] *Revoking Consent.* — A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

[22] *Consent to Future Conflict.* — Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally

determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

[23] *Conflicts in Litigation.* — Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might

create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of there presentations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

[26] *Nonlitigation Conflicts.* — Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon

the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

[29] *Special Considerations in Common Representation.* — In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed

antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good.Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than

when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[34] *Organizational Clients.* — A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

NOTES TO DECISIONS

Analysis

Civil liability.

Client's claim that a lawyer and law firm acted in contravention of the client's best interest by maintaining representation (notwithstanding an alleged conflict of interest) was not actionable because the client's "conflict of interest" claim was predicated on this rule; a violation of the Rules of Professional Conduct did not provide the basis for civil liability, however the violation could be utilized as evidence in the client's negligence claim. Dickerson v. Murray, — A.3d —, 2015 Del. Super. LEXIS 49 (Del. Super. Ct. Feb. 3, 2015).

Client relations.

— Class actions.

Counsel representing a shareholder class in a derivative suit was not subject to being disqualified for advocating the adoption of a settlement proposal to which some members of the class objected. In re M&F Worldwide Corp. S'holders Litig., 799 A.2d 1164 (Del. Ch. 2002).

Assuming that there was a contract by which a law firm engaged a representative plaintiff to perform legal work in class action litigation, any purported contract would have been void and unenforceable as it was unethical and in violation of the principles governing representative actions in Delaware; in particular, the agreement would have violated Law. R. Prof. Conduct 1.7(a) as there was an inherent conflict of interest in the representative plaintiff serving both as the class representative and as an attorney for the class. Fuqua Indus. S'holder Litig. v. Abrams (In re Fuqua Indus.), 2006 Del. Ch. LEXIS 167 (Del. Ch. Sept. 7, 2006).

Appellant class representative's alleged contract to share fees with class counsel was unenforceable under Emerald Partners v. Berlin, 564 A.2d 670 (Del. Ch. 1989), because appellant succeeded appellant's wife as the representative plaintiff in the class action suit and did not obtain consent of all class members to waive the conflict of interest under Law. R. Prof. Conduct 1.7. Abrams v. Sachnoff & Weaver, Ltd., 922 A.2d 414 (Del. 2007).

— Conflicts of interest.

Duty involved in this rule is one of loyalty to client. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986).

This rule applies to both simultaneous representation of two clients, or successive representation, where the attorney-client relationship has been formally terminated. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986).

The threshold question in determining the applicability of subsection (a) is whether an attorney-client relationship existed. Kabi Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957 (D. Del. 1992).

In a matter before the Industrial Accident Board, attorney violated subsection (b) by representing a client in a particular motion when the client's position on the matter was directly adverse to the attorney's interests. In re Maguire, 725 A.2d 417 (Del. 1999).

Positional conflict of interest required granting of defense attorney's motion to withdraw, and appointment of new appellate counsel, where the attorney's representation of another client facing the death penalty required that attorney to take a contrary position before the Supreme Court of Delaware. Williams v. State, 805 A.2d 880 (Del. 2002).

Defense counsel's nomination, by the murder victim's aunt, for the position of a family court commissioner during the guilt phase of defendant's trial did not violate defendant's right to effective assistance of counsel free from conflicts of interest or divided loyalties, as the trial court properly determined that the attorney did not have a conflict of interest, under the former version of subsection (b) of this rule. Swan v. State, 820 A.2d 342 (Del. 2003), cert. denied, 540 U.S. 896, 124 S. Ct. 252, 157 L. Ed. 2d 174 (2003).

Plaintiffs, two directors of a family corporation and the corporation, failed to prove third director's use of long-time corporation and family attorneys to defend against that director's removal by shareholders in a declaratory judgment action threatened to undermine fairness and integrity of proceeding or violate Del. Law. R. Prof. Conduct 1.7, 1.9, 1.13(e), and 1.16(b)(1). Unanue v. Unanue, 2004 Del. Ch. LEXIS 37 (Del. Ch. Mar. 25, 2004).

Inmate's ineffective assistance of counsel claim failed, as: (1) the inmate offered no evidence that counsel had a conflict of interest under Law. R. Prof. Conduct 1.7(a)(2); (2) there was no evidence of counsel's innappropriate familiarity with the victims; (3) the inmate's plea colloquy stated that the plea was entered knowingly, voluntarily, and intelligently; (4) there was no significant risk that counsel's relationship with the victims materially affected counsel's representation of the inmate; and (5) the inmate was not prejudiced by receiving the minimum mandatory sentence. State v. Mobley, 2007 Del. Super. LEXIS 326 (Del. Super. Ct. Nov. 2, 2007).

There was no evidence that an attorney breached the duty under Law. R. Prof. Conduct 1.7-1.9 to an insolvent entity by obtaining any confidential information during the attorney's representation of the entity that would have been relevant to the audio business of a former director and officer of the insolvent entity; the attorney was thus free to act in an individual capacity as the attorney saw fit with respect to the former director's offer of a partnership in the audio business. Gen. Video Corp. v. Kertesz, 2008 Del. Ch. LEXIS 181 (Del. Ch. Dec. 17, 2008).

Because the defendant did not object to a law firm's representation of the plaintiff during the negotiations of a merger agreement, and failed to point to information or confidences obtained by the firm in its prior work for the defendant that would have a material influence on the proceedings, there was no basis to disqualify the firm. Rohm & Haas Co. v. Dow Chem. Co., 2009 Del. Ch. LEXIS 249 (Del. Ch. Feb. 12, 2009).

Denial of an inmate's postconviction relief motion was proper as there was no per se ethical bar, and no actual conflict under Law. R. Prof. Conduct 1.7(a)(2), to defense counsel representing an inmate where that counsel was married to the inmate's former attorney in an unrelated matter. Runyon v. State, 968 A.2d 492 (Del. 2009).

Attorney was suspended from the practice of law for 3 months, followed by a 1-year period of probation, for violating Law. R. Prof. Conduct 1.1, 1.4(b), 1.7, and 1.16(a) (Interpretative Guideline Re: Residential real estate transactions); the attorney failed to obtain the clients' consent to a conflict of interest that arose when the attorney represented both the borrower and the lender in a loan transaction, and failed to inform the clients of their 3-day right to rescind. In re Katz, 981 A.2d 1133 (Del. 2009).

Attorney was suspended for 3 months, followed by 18 months of conditional probation, for having violated Law Prof. Conduct R. 1.5(f), 1.7(a), 1.15(a), 1.16(d) by: (1) having a conflict of interest with 2 clients; (2) having a personal interest in a loan transaction; (3) failing to safeguard client funds; and (4) failing to provide a new client with a fee agreement. In re O'Brien, 26 A.3d 203 (Del. 2011).

Although an attorney who represented the State was married to the homicide unit chief at the public defender's office, there was no concurrent conflict of interest because: (1) the unit chief was not personally involved; and (2) the familial relationship was not imputed to other members of the public defender's office. State v. Swanson, — A.3d —, 2015 Del. Super. LEXIS 508 (Del. Super. Ct. Sept. 29, 2015).

There was no basis to disqualify a former paramour's attorney in a support action, because although the attorney was employed in a law firm also employing an attorney currently dating the former paramour: (1) there was no a significant risk of material limitation to the representation;

(2) there was no conflict of interest; and (3) the attorney's testimony about attorneys' fees was within an exception under the professional conduct rules. Bark v. May, — A.3d —, 2015 Del. Super. LEXIS 530 (Del. Super. Ct. Sept. 28, 2015).

Temporary stay of a garnishor's fraudulent transfer case, until issues in a judgment action to collect on a debt (Case #2) were resolved, was in the interest of justice and an effective safeguard of the parties' rights; although this section did not appear to prohibit a party from simultaneously proceeding in a fraudulent transfer action while a judgment/garnishment action was ongoing, the parties' roles in Case #2 created an unusual situation in relation to the fraudulent transfer case. White v. Preferred Inv. Servs., — A.3d —, 2019 Del. Super. LEXIS 297 (Del. Super. Ct. Apr. 26, 2019).

Temporary stay of a garnishor's fraudulent transfer case, until issues in a judgment action to collect on a debt (Case #2) were resolved, was in the interest of justice and an effective safeguard of the parties' rights because: (1) allowing the garnishor's action to proceed could cause potential conflicts in Case #2 to spill over and impact the orderly progress of the action; (2) the garnishor's dual roles were competing ones that could adversely affect the garnishor's, judgment debtor's and its debtor's rights in Case #2; (3) standing had not yet been finally determined; and (4) the garnishor's concurrent participation in more than 1 case created divided loyalties. White v. Preferred Inv. Servs., — A.3d —, 2019 Del. Super. LEXIS 297 (Del. Super. Ct. Apr. 26, 2019).

— Disqualification.

In determining whether to disqualify an attorney under this Rule, the court should balance the purposes to be served by the Rule against such countervailing interests as a litigant's right to retain counsel of his choice. In re ML-Lee Acquisition Fund II, 848 F. Supp. 527 (D. Del. 1994).

In a custody modification proceeding between parents of a minor child, a father's request to disqualify the mother's counsel due to counsel's prior representation of the father's mother was denied, as there was no conflict of interest under Law. R. Prof. Conduct 1.7(a) and Law R. Prof. Conduct 1.9(a) where counsel had previously represented the father's mother in estate and divorce matters, the representation for the most part had occurred prior to the child's birth, counsel had not met the father during representation of the mother, and a balancing of the competing interests was in favor of the mother's retention of her counsel rather than the possible minimal prejudice that the father might suffer; the father failed to show that he would suffer prejudice as a result of the continued representation, and accordingly, he did not meet his burden of showing the need for disqualification by clear and convincing evidence. G. M. v. E. T. W., 2006 Del. Fam. Ct. LEXIS 153 (Del. Fam. Ct. July 19, 2006).

As there was no other client, current or former, to cause a conflict of interest, the wife's attorney was not precluded from representing the wife, when another member of the attorney's firm took the stand as a witness for the wife during the hearing. L.L.L. v. W.B.L., 2007 Del. Fam. Ct. LEXIS 196 (Del. Fam. Ct. Jan. 17, 2007).

Lender was not entitled to disqualify the borrower's counsel due to failure to show by clear and convincing evidence the existence of any prejudice in the fairness of the proceedings or that an alleged conflict existed; an alleged corporate takeover of the borrower through the exercise of the lender's alleged rights under the pledge agreement did not form a proper basis for counsel's disqualification. Triumph Mortg. Corp. v. Glasgow Citgo, Inc., — A.3d —, 2018 Del. Super. LEXIS 178 (Del. Super. Ct. Apr. 19, 2018).

In an insolvent insurer's suit against its former president for breach of fiduciary duty and a declaratory ruling, the president's pro se motion to disqualify the insurer's counsel failed because: (1) the president could not show a violation of the rule so extreme it compromised the action; (2) the president could not be prejudiced by the president's own decision as acting controller to hire the firm; and (3) the firm was retained as company counsel, not as individual counsel. Indem. Ins. Corp., RRG v. Cohen, — A.3d —, 2019 Del. Ch. LEXIS 183 (Del. Ch. Apr. 22, 2019).

— Joint representation.

Where defendants are family members who may have varying levels of culpability in alleged conspiracy, the likelihood that a conflict will eventuate and that it will materially interfere with the lawyer's independent professional judgment in considering alternatives or will foreclose courses of action that reasonably should be pursued on behalf of each client is too great to permit joint representation. United States v. Cooper, 672 F. Supp. 155 (D. Del. 1987).

Enforcement.

A nonclient litigant has standing to enforce paragraph (a) when he or she can demonstrate that the opposing counsel's conflict somehow prejudiced his or her rights. The nonclient litigant does not have standing to merely enforce a technical violation of the Rules. In re Infotechnology, Inc., 582 A.2d 215 (Del. 1990).

In enforcing paragraph (a), the burden of proof must be on the nonclient litigant to prove by clear and convincing evidence the existence of a conflict and to demonstrate how the conflict will prejudice the fairness of the proceedings. In re Infotechnology, Inc., 582 A.2d 215 (Del. 1990).

District courts are authorized to supervise the conduct of attorneys who practice before them. This power includes the authority to disqualify those whose conduct breaches the norms as established by the bar. Kabi Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957 (D. Del. 1992).

Sanctions.

— Determining factors.

The maintenance of the integrity of the legal profession and its high standing in the community are important factors to be considered in determining the appropriate sanction for a code violation. The maintenance of public confidence in the propriety of the conduct of those associated with the administration of justice is so important a consideration that a court may disqualify an attorney for failing to avoid even the appearance of impropriety. Kabi Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957 (D. Del. 1992).

Rule 1.8. Conflict of interest: Current clients: Specific rules.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include aspouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigations, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

COMMENT

[1] *Business transactions between client and lawyer.* — A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2)

requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosureis satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

[5] *Use of Information Related to Representation.* — Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information isused to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a

client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

[6] *Gifts to Lawyers.* — A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in

the appointment, as well as the availability of alternative candidates for the position.

[9] *Literary Right.* — An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

[10] *Financial Assistance.* — Lawyers may not subsidize law suits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue law suits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

[11] *Person Paying for a Lawyer's Services.* — Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting

interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

[13] *Aggregate Settlements.* — Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking there presentation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other

procedural requirements designed to ensure adequate protection of the entire class.

[14] *Limiting Liability and Settling Malpractice Claims.* — Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

[16] *Acquiring Proprietary Interest in Litigation.* — Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions

developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's feesor expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

[17] *Client-Lawyer Sexual Relationships.* — The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer

relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

[20] *Imputation of Prohibitions.* — Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

NOTES TO DECISIONS

Analysis

Client relations.

— Business transactions.

Although any business transaction between an attorney and client is presumptively invalid unless there is clear and convincing evidence showing full and complete disclosure of all facts known to the attorney and absolute independence of action on the part of the client, the court declined to invalidate the transaction which would preclude the plaintiff from recovering feed moneys. Burger v. Level End Dairy Investors, 125 Bankr. 894 (Bankr. D. Del. 1991).

— Confidentiality.

Attorney's disclosure of a codefendant's statement to the attorney's client charged with murder and related offenses, after the attorney retrieved it from the codefendant's file, violated the codefendant's attorney-client privilege; the disclosure constituted a violation of the professional conduct rules relating to the confidentiality of information and conduct that was prejudicial to the administration of justice. In re Lyle, 74 A.3d 654 (Del. 2013).

— Gifts.

Attorney violated this Rule when, upon learning of client's intent to leave him ten percent of her estate, he did not advise her to obtain independent counsel to handle this matter. In re McCann, 669 A.2d 49 (Del. 1995).

— Sexual relations.

Three-year suspension, along with other conditions, was the appropriate sanction for an attorney who admitted having had a sexual relationship with a client (who claimed to have felt pressured into it) that had not pre-existed representation of the client, and where the attorney was also shown by clear and convincing evidence to have engaged in conduct with clients and employees of the firm that amounted to the Delaware misdemeanors of sexual harassment and offensive touching. In re Tenenbaum, 880 A.2d 1025 (Del. 2005).

Rule 1.9. Duties to former clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person

could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to there assignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a business person and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the

public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

[4] *Lawyers Moving Between Firms.* — When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later

joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

NOTES TO DECISIONS

Client relations.

— Conflicts of interest.

Because the defendant did not object to a law firm’s representation of the plaintiff during the negotiations of a merger agreement, and failed to point to information or confidences obtained by the firm in its prior work for the defendant that would have a material influence on the proceedings, there was no basis to disqualify the firm. Rohm & Haas Co. v. Dow Chem. Co., 2009 Del. Ch. LEXIS 249 (Del. Ch. Feb. 12, 2009).

Public defender’s office failed to prove an actual conflict of interest existed in the office’s prior representation of a State’s witness and defendant, and was not entitled to withdraw as counsel for defendant, because: (1) the office’s representation of the witness and defendant were not substantially related; and (2) the witness was represented by a different public defender than those representing defendant. State v. Kent, — A.3d —, 2014 Del. Super. LEXIS 558 (Del. Super. Ct. Sept. 3, 2014).

Law firm who had helped a corporate debtor sell a portfolio of leases, and who was later hired by real estate professionals, was not disqualified from representing the professionals in an adversary proceeding filed by California limited liability companies (LLCs) alleging that the professionals committed fraud to obtain a higher price for the portfolio merely because the firm had represented the LLCs in other cases; the LLCs failed to show that there was a substantial relationship between cases where the law firm served as the LLCs' counsel and the adversary proceeding the LLCs filed against the debtors' professionals, or that the law firm obtained information about the LLCs while representing them in other cases that it could not use without violating Law. Prof. Conduct R. 1.9. Alamo Group, LLC v. A&G Realty Partners, LLC (In re OSH 1 Liquidating Corp.), — Bankr. —, 2015 Bankr. LEXIS 467 (Bankr. D. Del. Feb. 2, 2015).

Trust beneficiaries' defense of counsel's conflict of interest was waived because the beneficiaries failed to raise this issue as a defense to the trustees' application for attorneys' fees in a timely manner, despite multiple opportunities to do so. In re Hawk Mt. Trust, — A.3d —, 2015 Del. Ch. LEXIS 236 (Del. Ch. Sept. 8, 2015).

— Disqualification.

An attorney's representation of a client who was suing a former client on a matter substantially related to one on which the attorney previously worked was an ethical violation resulting in the attorney's disqualification. Webb v. E.I. Du Pont De Nemours & Co., 811 F. Supp. 158 (D. Del. 1992).

Defendant's motion to disqualify plaintiff's counsel under the former version of this rule was denied, as defendant had no reasonable basis to conclude that an attorney-client relationship had been established with plaintiff's counsel at an earlier meeting, and defendant failed to show prejudice from disclosure of information exchanged at the meeting because defendant later disclosed much of this information in a proxy statement and in discussions with plaintiff. Benchmark Capital Ptnrs. IV, L.P. v. Vague, 2002 Del. Ch. LEXIS 108 (Del. Ch. Sept. 3, 2002).

Trial court denied a motion to disqualify plaintiff's counsel, as prior representation of a defendant by the same law firm involved a case that was not at all substantially related; any alleged release of confidential information was deemed minimal by the trial court. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

Violation of Law. Prof. Conduct R. 1.9 does not require automatic disqualification; a court reviewing the motion must weigh the effect of any alleged conflict upon the fairness and integrity of the proceedings before disqualifying the challenged counsel. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

Party seeking to disqualify opposing council based on council's prior representation of it is not required to point to specific confidential information that it believes the council possesses. Acierno v. Hayward, 2004 Del. Ch. LEXIS 138 (Del. Ch. July 1, 2004).

State Department of Transportation (DOT) presented evidence that arguably supported disqualification of plaintiff's lawyer based on a conflict of interest (in that the attoney inevitably would be placed in a position where confidential information obtained from prior representation of DOT would be used to its disadvantage in the litigation) under Law Prof. Conduct R. 1.9.; the threat to the fair and efficient administration of justice was sufficiently palpable to support the court's exercise of jurisdiction over DOT's motion to disqualify. Acierno v. Hayward, 2004 Del. Ch. LEXIS 138 (Del. Ch. July 1, 2004).

In a suit for a declaratory judgment as to a lessee's obligations under a lease, counsel for the lessor was not subject to disqualification under Model Rules Prof'l Conduct R. 1.9 because: (1) counsel's prior representation of the lessee was limited to regulatory findings and terminated upon the closing of a transfer of stock; (2) the nature of the current litigation was a landlord-tenant dispute that was unrelated to the prior representation; and (3) the information provided to counsel in the prior representation was not likely to be relevant to the current litigation. Integrated Health Servs. v. THCI, Co. LLC, 327 B.R. 200 (D. Del. 2005).

In a real estate dispute, the mere fact that counsel for one party had once advised a long-dead partner of an opposing party in entirely unrelated matters was not grounds for disqualification of counsel; there was simply no basis for supposing any impropriety or unfairness. Hendry v. Hendry, 2005 Del. Ch. LEXIS 187 (Del. Ch. Dec. 1, 2005).

Where attorney disqualification was sought under Model Rules of Prof'l Conduct R. 1.9, which Delaware had adopted, plaintiff's argument that no conflict arose from the representation of defendant by plaintiff's former attorney, until the earlier case involving plaintiff was brought up in a deposition, failed, as Rule 1.9 covered more than the disclosure of confidential information. Conley v. Chaffinch, 431 F. Supp. 2d 494 (D. Del. 2006).

In a custody modification proceeding between parents of a minor child, a father's request to disqualify the mother's counsel due to counsel's prior representation of the father's mother was denied, as there was no conflict of interest under Law. R. Prof. Conduct 1.7(a) and Law R. Prof. Conduct 1.9(a) where counsel had previously represented the father's mother in estate and divorce matters, the representation for the most part had occurred prior to the child's birth, counsel had not met the father during representation of the mother, and a balancing of the competing interests was in favor of the mother's retention of her counsel rather than the possible minimal prejudice that the father might suffer; the father failed to show that he would suffer prejudice as a result of the continued representation, and accordingly, he did not meet his burden of showing the need for disqualification by clear and convincing evidence. G. M. v. E. T. W., 2006 Del. Fam. Ct. LEXIS 153 (Del. Fam. Ct. July 19, 2006).

During challenge to merger process, defendant merger parties moved to disqualify the law firm retained to advise plaintiff merger challengers because the law firm had access to confidential information regarding 1 of the merger parties from a prior merger case; the court declined to determine whether a conflict of interest existed, but denied the motion to disqualify due to the delay in raising the issue, plus the harm that would result to 1 merger challenger if forced to change law firms. Express Scripts, Inc. v. Crawford, 2007 Del. Ch. LEXIS 18 (Del. Ch. Jan. 25, 2007).

Counsel representing the wife in a divorce proceeding did not have to be disqualified from that representation where a paralegal in the husband's firm stopped working for that firm and went to work for the law firm representing the wife as: (1) the paralegal had performed a minimal amount of work on the case; (2) the paralegal and wife's counsel had maintained a "cone of silence" on the matter by not speaking about it, minimizing the possibility that confidential information could be passed along; and (3) no showing had been made regarding a breach of client confidentiality in violation of Law R. Prof. Conduct 1.9(b) or 1.10(c). In re Marriage of C., 2008 Del. Fam. Ct. LEXIS 124 (Del. Fam. Ct. Oct. 6, 2008).

Attorney who previously represented a doctor in a medical negligence claim against the doctor was disqualified from representing a patient and that patient's spouse in their medical negligence claim against the doctor, as there was an irreconcilable conflict of interest under Law. R. Prof. Conduct 1.9(a); the 2 actions were substantially related and the gravamen of the claims were the same. Fernandez v. St. Francis Hosp., 2009 Del. Super. LEXIS 287 (Del. Super. Ct. Aug. 3, 2009).

In a patent infringement suit against an electronics company, an attorney and the attorney's firm were disqualified under Law. R. Prof. Conduct 1.9 from representing plaintiff where: (1) the attorney had represented the company in an earlier suit, while working at a second firm; (2) the subject matter of the earlier suit concerned the same memory chip technology at issue in instant suit; (3) the appearance of impropriety was reflected in the fact that the attorney's representation of the company was not thoroughly vetted at the time the attorney began working at the firm; (4) the firm's conflict review was limited to what amounted to a word search; and (5) the company was not alerted to the attorney's representation of plaintiff in the case at bar. Apeldyn Corp. v. Samsung Elecs. Co.., — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 93396 (D. Del. Sept. 30, 2009).

Even if there was a conflict between counsel's present and former clients' interests pursuant to Law. Prof. Conduct R. 1.9(a), where defendants failed to show a violation so extreme that it called into question the fairness or the efficiency of the proceeding involving the validity of a corporate loan, disqualification of counsel under Ch. Ct. R. 170 was not warranted. Manning v. Vellardita, 2012 Del. Ch. LEXIS 59 (Del. Ch. Mar. 28, 2012).

Nonparties were not entitled to disqualify an attorney or a law firm from representing a seized insurer based on the attorney's former representation of 1 of the nonparties, a limited liability company (LLC) that purportedly owned 99% of the insurer, because: (1) the firm would have acquired knowledge of who controlled the LLC through representation of the insurer; and (2) vague and unsupported allegations of what the attorney "knew" were insufficient to justify disqualification. In re Rehab. of Indem. Ins. Corp., — A.3d —, 2014 Del. Ch. LEXIS 23 (Del. Ch. Feb. 19, 2014).

No conflict of interest existed in a slip and fall case because counsel's previous representation of the property owner in an unrelated case was not shown to create a substantial risk of disclosure of material confidential information; indirect advantage from knowing the owner's settlement philosophy, and a likelihood the owner had mentioned the slip and fall incident, would be mitigated by an insurer's assuming the defense. Harper v. Beacon Air, Inc., — A.3d —, 2017 Del. Super. LEXIS 99 (Del. Super. Ct. Mar. 2, 2017).

Lender was not entitled to disqualify the borrower's counsel due to failure to show by clear and convincing evidence the existence of any prejudice in the fairness of the proceedings or that an alleged conflict existed; an alleged corporate takeover of the borrower through the exercise of the lender's alleged rights under the pledge agreement did not form a proper basis for counsel's disqualification. Triumph Mortg. Corp. v. Glasgow Citgo, Inc., — A.3d —, 2018 Del. Super. LEXIS 178 (Del. Super. Ct. Apr. 19, 2018).

— "Former client status".

In order to disqualify an attorney more facts of a relationship are needed than a simple statement of prior work done in a superficially similar area. Satellite Fin. Planning Corp. v. First Nat'l Bank, 652 F. Supp. 1281 (D. Del. 1987).

Attorney who represented a parent in a custody hearing violated this Rule where the attorney had previously represented the opposing parent in a custody matter involving the same child and no consent was obtained from the opposing parent. In re Mekler, 689 A.2d 1171 (Del. 1996).

General information regarding a corporate client's business practices is not enough to deny representation by a present party's chosen counsel; knowledge of specific facts gained in a prior representation, relevant to the matter in question, ordinarily will preclude representation. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

An appropriate test for determining whether matters are substantially related for conflict purposes involves a court considering the nature and scope of the prior representation, the nature and scope of the present lawsuit, and whether the client may have revealed relevant confidential information to its counsel during the prior representation, and if so, whether the confidential information could be used against the former client in the current lawsuit; two matters may also be substantially related if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

— Shareholders' derivative suits.

Counsel representing a shareholder class in a derivative suit was not subject to being disqualified for advocating the adoption of a settlement proposal to which some members of the class objected. In re M&F Worldwide Corp. S'holders Litig., 799 A.2d 1164 (Del. Ch. 2002).

Plaintiffs, two directors of a family corporation and the corporation, failed to prove third director's use of long-time corporation and family attorneys to defend against that director's removal by shareholders in a declaratory judgment action threatened to undermine fairness and integrity of proceeding or violate Del. Law. R. Prof. Conduct 1.7, 1.9, 1.13(e), and 1.16(b)(1). Unanue v. Unanue, 2004 Del. Ch. LEXIS 37 (Del. Ch. Mar. 25, 2004).

In a derivative action, defendants' assertions failed to demonstrate that representation by the former chief legal counsel of a parent company was substantially related to the instant lawsuit involving a sale of the parent's and non-wholly owned subsidiary's assets, because the counsel was not challenging a series of transactions in which counsel was a key participant, but rather was challenging the allocation in a single transaction from whose negotiations counsel was actively excluded; additionally, counsel had a role as a member of the subsidiary in approving the transactions, distinct from the role as counsel of the parent. Bakerman v. Sidney Frank Importing Co., 2006 Del. Ch. LEXIS 180 (Del. Ch. Oct. 10, 2006).

Professional conduct.

— Candor to the tribunal.

Even though there was no cause to disqualify counsel or revoke counsel's admission pro hac vice status, where counsel failed to disclose a colorable claim of conflict between former and present clients pursuant to Law. Prof. Conduct R. 1.9(a), such evidenced a lack of candor to the court and warranted referral to the disciplinary authorities. Manning v. Vellardita, 2012 Del. Ch. LEXIS 59 (Del. Ch. Mar. 28, 2012).

Rule 1.10. Imputation of conflicts of interest: General rule.

(a) Except as otherwise provided in this rule, while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a client in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the affected former client.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

COMMENT

[1] *Definition of "firm".* — For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2]-[4].

[2] *Principles of imputed disqualification.* — The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter

to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Where the conditions of paragraph (c) are met, imputation is removed, and consent to the new representation is not required. Lawyers should be aware, however, that courts may impose more stringent obligations in ruling upon motions to disqualify a lawyer from pending litigation.

[7] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(2) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the

effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[10] Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11 (b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[11] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

NOTES TO DECISIONS

Analysis

Conflicts of interest.

Where a driver's parent had been previously represented by a member of the injured parties' law firm, but the driver was not previously represented by the injured parties' attorney or the attorney's law firm, the driver did not show a sufficient basis to disqualify the attorney or the firm based on a conflict of interest. Deptula & Swontek v. Steiner, 2003 Del. Super. LEXIS 412 (Del. Super. Ct. Dec. 15, 2003).

An appropriate test for determining whether matters are substantially related for conflict purposes involves a court considering the nature and scope of the prior representation, the nature and scope of the present lawsuit, and whether the client may have revealed relevant confidential information to its counsel during the prior representation, and if so, whether the confidential information could be used against the former client in the current lawsuit; 2 matters may also be substantially related if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

General information regarding a corporate client's business practices is not enough to deny representation by a present party's chosen counsel; knowledge of specific facts gained in a prior representation, relevant to the matter in question, ordinarily will preclude representation. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

Trial court denied a motion to disqualify plaintiff's counsel, as prior representation of a defendant by the same law firm involved a case that was not at all substantially related; any alleged release of confidential information was deemed minimal by the trial court. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

Counsel representing the wife in a divorce proceeding did not have to be disqualified from that representation where a paralegal in the husband's firm stopped working for that firm and went to work for the law firm representing the wife as: (1) the paralegal had performed a minimal amount of work on the case; (2) the paralegal and wife's counsel had maintained a "cone of silence" on the matter by not speaking about it, minimizing the possibility that confidential information could be passed along; and (3) no showing had been made regarding a breach of client confidentiality in violation of Law R. Prof. Conduct 1.9(b) or 1.10(c). In re Marriage of C., 2008 Del. Fam. Ct. LEXIS 124 (Del. Fam. Ct. Oct. 6, 2008).

Public defender's office failed to prove an actual conflict of interest existed in the office's prior representation of a State's witness and defendant, and was not entitled to withdraw as counsel for defendant, because: (1) the office's representation of the witness and defendant were not substantially related; and (2) the witness was represented by a different public defender than those representing defendant. State v. Kent, — A.3d —, 2014 Del. Super. LEXIS 558 (Del. Super. Ct. Sept. 3, 2014).

Imputed conflicts.

Where plaintiff had an attorney-client relationship for almost two years before entering into a service agreement for dairy farm with another attorney in the same firm, the original attorney-client relationship must be imputed to the second contracting attorney. Burger v. Level End Dairy Investors, 125 Bankr. 894 (Bankr. D. Del. 1991).

Duty of loyalty to a former client not only applies to the individual attorney, but is imputed to the law firm, as a firm of lawyers is essentially considered one lawyer for purposes of the rules governing loyalty to the client; as members of the same law firm, attorneys are expected to avoid conflicts of interests that arise not only with their own former clients, but all former clients of the firm. Sanchez-Caza v. Estate of Whetstone, 2004 Del. Super. LEXIS 300 (Del. Super. Ct. Sept. 16, 2004).

There was no basis to disqualify a former paramour's attorney in a support action, because although the attorney was employed in a law firm also employing an attorney currently dating the former paramour: (1) there was no a significant risk of material limitation to the representation; (2) there was no conflict of interest; and (3) the attorney's testimony about attorneys' fees was within an exception under the professional conduct rules. Bark v. May, — A.3d —, 2015 Del. Super. LEXIS 530 (Del. Super. Ct. Sept. 28, 2015).

Disqualification of a patient's chosen law firm was warranted because: (1) the patient's attorney and another attorney were partners during previous representation of the doctor at issue in a separate matter; (2) the attorneys continued to be partners in the instant matter; and (3) the remedy of "screening off" did not apply in cases of a long-standing partnership. Bleacher v. Bose, — A.3d —, 2017 Del. Super. LEXIS 223 (Del. Super. Ct. May 3, 2017).

Screening.

An appropriate screening mechanism, in the proper circumstances, may rebut the presumption of shared confidences that arises under this rule in cases where the disqualified attorney's conflict of interest originated in private practice. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986).

The screening procedure relating to lawyers in conflict of interest areas should be referred to figuratively as a "cone of silence" rather than a "Chinese wall"; the conical image more appropriately describes the responsibility of the individual attorney to guard the secrets of his former client. He is commanded by the ethical rules to seal, or encase, these particular confidences within his own conscience. The latter term is suggestive of attempts in the context of a large law firm to physically cordon off attorneys possessing information from the other members of the firm who represent clients whose interests are adverse to interests of these attorneys' former clients. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986).

Although an attorney who previously represented a doctor in a medical negligence claim against the doctor was disqualified from representing a patient and that patient's husband in their medical negligence claim against the doctor, there was no conflict that prevented the attorney's firm from continuing to represent the patient and the patient's husband provided that the appropriate steps were taken to "wall off" the attorney from further representation pursuant to Law. R. Prof. Conduct 1.10(c). Fernandez v. St. Francis Hosp., 2009 Del. Super. LEXIS 287 (Del. Super. Ct. Aug. 3, 2009).

Rule 1.11. Special conflicts of interest for former and current government officers and employees.

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term “confidential government information” means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or

employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer’s professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client’s adversary obtainable only through the lawyer’s government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and

substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

NOTES TO DECISIONS

Conflicts of interest.

Although sentencing counsel had personally prosecuted defendant in defendant's original criminal case, counsel was not involved as a prosecutor in the violation of probation (VOP) case in which defendant was found to have violated defendant's probation, and the VOP case was not the same "matter" as the original criminal case for purposes of Law. Prof. Conduct R. 1.11(e), as the VOP case involved defendant's subsequent conduct; even assuming that the VOP proceeding involved the same matter, defendant failed to show actual prejudice as defendant admitted that counsel vigorously represented defendant. Hitchens v. State, 931 A.2d 437 (Del. 2007).

Screening.

An appropriate screening mechanism, in the proper circumstances, may rebut the presumption of shared confidences that arises under Rule 1.10 in cases where the disqualified attorney's conflict of interest originated in private practice. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986).

The screening procedure relating to lawyers in conflict of interest areas should be referred to figuratively as a "cone of silence" rather than a "Chinese wall"; the conical image more appropriately describes the responsibility of the individual attorney to guard the secrets of his former client. He is commanded by the ethical rules to seal, or encase, these particular confidences within his own conscience. The latter term is suggestive of attempts in the context of a large law firm to physically cordon off attorneys possessing information from the other members of the firm who represent clients whose interests are adverse to interests of these attorneys' former clients. Nemours Found. v. Gilbane, Aetna, Fed. Ins. Co., 632 F. Supp. 418 (D. Del. 1986).

Rule 1.12. Former judge, arbitrator, mediator or other third-party neutral.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

COMMENT

[1] This Rule generally parallels Rule 1.11. The term "personally and substantially" signifies that a judge who was a member of a multi-member

court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

Rule 1.13. Organization as client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking for reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) If, despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with Rule 1.16.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

[1] *The Entity as the Client.* — An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or

prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

[4] The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

[5] *Relation to Other Rules.* — The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.6, 1.8, 1.16, 3.3 or 4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rule 1.2(d) can be applicable.

[6] *Government Agency.* — The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of

these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

[7] *Clarifying the Lawyer's Role.* — There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[8] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

[9] *Dual Representation.* — Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

[10] *Derivative Actions.* — Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the

organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[11] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

NOTES TO DECISIONS

Shareholders' derivative suits.

Plaintiffs, two directors of a family corporation and the corporation, failed to prove third director's use of long-time corporation and family attorneys to defend against that director's removal by shareholders in a declaratory judgment action threatened to undermine fairness and integrity of proceeding or violate Del. Law. R. Prof. Conduct 1.7, 1.9, 1.13(e), and 1.16(b)(1). Unanue v. Unanue, 2004 Del. Ch. LEXIS 37 (Del. Ch. Mar. 25, 2004).

Del. Rules of Prof'l Conduct Rule 1.14

Rule 1.14. Client with diminished capacity.

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some

persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must to look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

[5] *Taking Protective Action.* — If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective

agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decisionmaking autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

[8] *Disclosure of the Client's Condition.* — Disclosure of the client's diminished capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the

risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

[9] *Emergency Legal Assistance.* — In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unableto establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

NOTES TO DECISIONS

Basis for inquiry.

Where a lawyer's actions appear contrary to the client's stated decision, the lawyer who moves for a determination of his client's competency, presumably in good faith, must, at a minimum, demonstrate an objective and reasonable basis for believing that the client cannot act in his own interest. Red Dog v. State, 625 A.2d 245 (Del. 1993).

Protective action.

Although members of defendant's defense team did not act in bad faith nor were motivated by other than the best interests of their client, the differences of opinion among the members led to inconsistent positions and a changing strategy, and did not meet the requirements of reasonableness under subsection (b) of this Rule. Red Dog v. State, 625 A.2d 245 (Del. 1993).

Rule 1.15. Safekeeping property.

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account designated solely for funds held in connection with the practice of law in this jurisdiction. Except as provided in (g) with respect to IOLTA-eligible funds, such funds shall be maintained in the state in which the lawyer's office is situated or elsewhere with the consent of the client or third person. Funds of the lawyer that are reasonably sufficient to pay financial institution charges may be deposited in the separate account; however, such amount may not exceed $2,000 and must be separately stated and accounted for in the same manner as clients' funds deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the completion of the events that they record.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer engaged in the private practice of law in this jurisdiction, whether in an office situated in this jurisdiction or otherwise, must maintain on a current basis financial books and records relating to such practice, and shall preserve the books and records for at least five years following the completion of the year to which they relate, or, as to fiduciary books and records, five years following the completion of that fiduciary obligation. The maintenance of books and records must conform with the following provisions:

(1) All bank statements, cancelled checks (or images and/or copies thereof as provided by the bank), records of electronic transfers, and duplicate deposit slips relating to fiduciary and non-fiduciary accounts must be preserved. Records of all electronic transfers from fiduciary accounts shall include the name of the person authorizing transfer, the date of transfer, the name of recipient and confirmation from the banking institution confirming the number of the fiduciary account from which the funds are withdrawn and the date and time the request for transfer was completed.

(2) Bank accounts maintained for fiduciary funds must be specifically designated as “Rule 1.15A Attorney Trust Account” or “1.15A Trust Account” or “Rule 1.15A Attorney Escrow Account” or “1.15A Escrow Account,” and must be used only for funds held in a fiduciary capacity. A designation of the account as a “Rule 1.15A Attorney Trust Account” or “1.15A Trust Account” or “Rule 1.15A Attorney Escrow Account” or “1.15A Escrow Account,” must appear in the account title on the bank statement. Other related statements, checks, deposit slips, and other documents maintained for fiduciary funds, must contain, at a minimum, a designation of the account as “Attorney Trust Account” or “Attorney Escrow Account.”

(3) Bank accounts and related statements, checks, deposit slips, and other documents maintained for non-fiduciary funds must be specifically designated as “Attorney Business Account” or “Attorney Operating Account,” and must be used only for funds held in a non-fiduciary capacity. A lawyer in the private practice of law shall maintain a non-fiduciary account for general operating purposes, and the account shall be separate from any of the lawyer’s personal or other accounts.

(4) All records relating to property other than cash received by a lawyer in a fiduciary capacity shall be maintained and preserved. The records must describe with specificity the identity and location of such property.

(5) All billing records reflecting fees charged and other billings to clients or other parties must be maintained and preserved.

(6) Cash receipts and cash disbursement journals must be maintained and preserved for each bank account for the purpose of recording fiduciary and non-fiduciary transactions. A lawyer using a manual system for such purposes must total and balance the transaction columns on a monthly basis.

(7) A monthly reconciliation for each bank account, matching totals from the cash receipts and cash disbursement journals with the ending check register balance, must be performed. The reconciliation procedures, however, shall not be required for lawyers using a computer accounting system or a general ledger.

(8) The check register balance for each bank account must be reconciled monthly to the bank statement balance.

(9) Copies of retainer and compensation agreements with clients shall be maintained and preserved as required by Rule 1.5.

(10) Copies of accountings to clients or third persons showing the disbursement of funds to them or on their behalf shall be maintained and preserved.

(11) Copies of records showing disbursements on behalf clients shall be maintained and preserved.

(12) With respect to all fiduciary accounts:

(A) A subsidiary ledger must be maintained and preserved with a separate account for each client or third party in which cash receipts and cash disbursement transactions and monthly balances are recorded.

(B) Monthly listings of client or third party balances must be prepared showing the name and balance of each client or third party, and the total of all balances.

(C) No funds disbursed for a client or third party must be in excess of funds received from that client or third party. If, however, through error funds disbursed for a client or third party exceed funds received from that client or third party, the lawyer shall transfer funds from the non-fiduciary account in a timely manner to cover the excess disbursement.

(D) The reconciled total cash balance must agree with the total of the client or third party balance listing. There shall be no unidentified client or third party funds. The bank reconciliation for a fiduciary account is not complete unless there is agreement with the total of client or third party accounts.

(E) If a check has been issued in an attempt to disburse funds, but remains outstanding (that is, the check has not cleared the trust or escrow bank account) six months or more from the date it was issued, a lawyer shall promptly take steps to contact the payee to determine the reason the check was not deposited by the payee, and shall issue a replacement check, as necessary and appropriate. With regard to abandoned or unclaimed trust funds, a lawyer shall comply with requirements of Supreme Court Rule 73.

(F) No funds of the lawyer shall be placed in or left in the account except as provided in Rule 1.15(a).

(G) No funds which should have been disbursed shall remain in the account, including, but not limited to, earned legal fees, which must be transferred to the lawyer's non-fiduciary account on a prompt and timely basis when earned.

(H) When a separate real estate bank account is maintained for settlement transactions, and when client or third party funds are received but not yet disbursed, a listing must be prepared on a monthly basis showing the name of the client or third party, the balance due to each client or third party, and the total of all such balances. The total must agree with the reconciled cash balance.

(I) Only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or authorize transfers from a client trust account.

(J) Withdrawals from a client trust account shall be made only by check payable to a named payee and not to cash, or by authorized electronic transfer.

(13) If a lawyer maintains financial books and records using a computer system, the lawyer must cause to be printed each month a hard copy of all monthly journals, ledgers, reports, and reconciliations, and/or cause to be created each month an electronic backup of these documents to be stored

in such a manner as to make them accessible for review by the lawyer and/or the auditor for the Lawyers' Fund for Client Protection.

(e) A lawyer's financial books and records must be subject to examination by the auditor for the Lawyers' Fund for Client Protection, for the purpose of verifying the accuracy of a certificate of compliance filed each year by the lawyer pursuant to Supreme Court Rule 69. The examination must be conducted so as to preserve, insofar as is consistent with these Rules, the confidential nature of the lawyer's books and records. If the lawyer's books and records are not located in Delaware, the lawyer may have the option either to produce the books and records at the lawyer's office in Delaware or to produce the books and records at the location outside of Delaware where they are ordinarily located. If the production occurs outside of Delaware, the lawyer shall pay any additional expenses incurred by the auditor for the purposes of an examination.

(f) A lawyer holding client or third-person funds must initially and reasonably determine whether the funds should or should not be placed in an interest or dividend-bearing account for the benefit of the client or third person. In making such a determination, the lawyer must consider the financial interests of the client or third person, the costs of establishing and maintaining the account, any tax reporting procedures or requirements, the nature of the transaction involved, the likelihood of delay in the relevant proceedings, and whether the funds are of a nominal amount or are expected to be held by the lawyer for a short period of time such that the costs incurred to secure income for the client or third person would exceed such income. A lawyer must at reasonable intervals consider whether changed circumstances would warrant a new determination with respect to the deposit of client or third-person funds. Except as provided in these Rules, interest or dividends earned on client or third-person funds placed into an interest or dividend-bearing account for the benefit of the client or third person (less any deductions for service charges or other fees of the depository institution) shall belong to the client or third person whose funds are deposited, and the lawyer shall have no right or claim to such interest or dividends, and may not otherwise receive any financial benefit or other economic concessions relating to a banking relationship with the institution where any account is maintained pursuant to this Rule.

(g) A lawyer holding client or third person funds who has reasonably determined, pursuant to subsection (f) of this Rule, that such funds need not be deposited into an interest or dividend-bearing account for the benefit of the client or third-person must establish and maintain one or more pooled trust/escrow accounts in a financial institution in Delaware for the deposit of all client or third person funds held in connection with the practice of law in this jurisdiction that are nominal in amount or to be held by the lawyer for a short period such that the costs incurred to secure income for the client or third person would exceed such income (IOLTA-eligible funds). This requirement shall not apply to a lawyer who either has obtained inactive status pursuant to Supreme Court Rule 69(d) or has obtained a Certificate of Retirement pursuant to Supreme Court Rule 69(f). Each pooled trust/escrow account must be established as a pooled interest or dividend-bearing account (IOLTA Account) in compliance with the provisions of this Rule, except those accounts exempted under section (h)(7) below. The lawyer shall have no right or claim to such interest or dividends, and may not otherwise receive any financial benefit or other economic concessions relating to a banking relationship with the institution where any account is maintained pursuant to this Rule.

(h) Lawyers may maintain IOLTA Accounts only in financial institutions that are approved by the Lawyers Fund For Client Protection pursuant to Rule 1.15A of these Rules, and are determined by the Delaware Bar Foundation (the Foundation) to be “eligible institutions”. Eligible institutions are defined as those institutions that voluntarily offer a comparable interest rate on IOLTA Accounts and meet the other requirements of this Rule. A comparable interest rate on IOLTA Accounts means a rate that is no less than the highest rate of interest or dividends generally available from the institution to its non-IOLTA customers when IOLTA Accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any. In determining the comparable interest rate or dividend, an eligible institution may consider factors, in addition to the IOLTA Account balance, customarily considered by the institution when setting rates of interest or dividends for its customers, provided that such factors do not discriminate against IOLTA Accounts.

(1) An eligible institution may satisfy the comparable interest rate requirement by electing one of the following three options:

(A) establish the IOLTA Account as the comparable interest rate product;

(B) pay the comparable interest rate on the IOLTA Account in lieu of actually establishing the IOLTA Account as the comparable interest rate product; or

(C) pay the "Safe Harbor Rate" on the IOLTA Account (as posted on the Foundation's website). Until redetermined by the Foundation, the Safe Harbor Rate is the higher of 0.65% per annum or 65% of the Federal Funds Target Rate as of the first day of the IOLTA Account earnings period, net of Allowable Reasonable Service Charges and Fees (as defined in section (h)(5) below). The Safe Harbor Rate shall be reevaluated periodically, but no more frequently than every six months, by the Foundation to reflect an overall comparable interest rate offered by financial institutions in Delaware and may be redetermined by the Foundation following such reevaluation. Upon any such redetermination, the Foundation shall give at least 90 days advance written notice of the effective date of such redetermination to all eligible institutions maintaining any IOLTA Accounts and by posting on its website. Election of the Safe Harbor Rate is optional and eligible institutions may instead choose to satisfy compliance with this Rule by electing instead either option (A) or (B) above.

(2) IOLTA Accounts may be established as:

(A) a business checking account with an automated investment feature in overnight daily financial institution repurchase agreements or money market funds. A daily financial institution repurchase agreement shall be fully collateralized by U. S. Government Securities (meaning U.S. Treasury obligations and obligations issued or guaranteed as to principal and interest by the United States government), and may be established only with an eligible institution that is "well-capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. A "money market fund" is an investment company registered under the Investment Company Act of 1940, as amended, that is qualified to hold itself out to investors as a money market fund under Rules and Regulations adopted by the Securities and Exchange Commission pursuant to said Act. A money market fund shall be invested solely in U.S.

Government Securities, or repurchase agreements fully collateralized by U.S. Government Securities, and, at the time of the investment, shall have total assets of at least two hundred fifty million dollars ($250,000,000).

(B) a checking account paying preferred interest rates, such as market based or indexed rates;

(C) a public funds interest-bearing checking account such as an account used for governmental agencies and other non-profit organizations;

(D) an interest-bearing checking account such as a negotiable order of withdrawal (NOW) account; or business checking with interest; or

(E) any other interest or dividend-bearing account offered by the eligible institution to its non-IOLTA customers, which is commercially reasonable to use for a pooled account of short term or nominal amount funds.

(3) Nothing in this rule shall preclude an eligible institution from paying a higher rate of interest or dividends on IOLTA Accounts than described above or electing to waive service charges or fees on IOLTA Accounts.

(4) Interest and dividends on IOLTA Accounts shall be calculated in accordance with the eligible institution's standard practice for non-IOLTA customers.

(5) "Allowable Reasonable Service Charges or Fees" for IOLTA Accounts are defined as per check charges, per deposit charges, an account maintenance fee, automated transfer ("sweep") fees, FDIC insurance fees, and a reasonable IOLTA administrative fee for the direct costs of complying with the reporting and payment requirements of this rule. Allowable Reasonable Service Charges or Fees may only be deducted from interest or dividends on an IOLTA account at the rates and in accordance with the customary practices of the eligible institution for non-IOLTA customers. No service charges or fees other than Allowable Reasonable Service Charges and Fees may be assessed against or deducted from the interest or dividends on an IOLTA Account. No Allowable Reasonable Service Charges or Fees on an IOLTA Account for any reporting period shall be taken from interest or dividends earned on other IOLTA Accounts, or from the principal balance of any IOLTA Account.

Any fees and services charges (other than Allowable Reasonable Service Charges and Fees deducted from interest on an IOLTA Account), including but not limited to bank overdraft fees, wire transfer fees, remote deposit fees and fees for checks returned for insufficient funds, shall be the sole responsibility of, and may be charged to, the lawyer or law firm maintaining the IOLTA Account. Nothing in this Rule shall prohibit a lawyer or law firm maintaining an IOLTA account from recouping fees charged to their IOLTA account from the appropriate client on whose behalf the fee was incurred and as otherwise provided for in the Rules of Professional Conduct.

(6) Lawyers or law firms depositing client or third party funds in an IOLTA Account under this paragraph (h) shall direct the eligible institution:

(A) to remit interest monthly, or, with the consent of the Foundation, quarterly (net of any Allowable Reasonable Service Charges or Fees), computed on the average monthly balance in the account or otherwise computed in accordance with the institution's standard practices, provided that the eligible institution may elect to waive any or all such charges and fees;

(B) to transmit with each remittance to the Foundation a report in a form and through any reasonable manner of transmission approved by the Foundation showing the name of the lawyer or law firm on each IOLTA Account whose remittance is sent, the IOLTA Account number for each account, the amount of interest attributable to each IOLTA Account, the time period covered by the report, the rate of interest or dividend applied, the amount and type of Allowable Reasonable Service Charges or Fees deducted, if any, the average account balance for the period for which the report was made, the net amount of interest remitted for the period and such other information as may be reasonably required by the Foundation; and

(C) to transmit to the depositing lawyer or law firm a statement in accordance with normal procedures for reporting to depositors of the eligible institution.

(7) Any IOLTA account which has not or cannot reasonably be expected to generate interest or dividends in excess of Allowable Reasonable

Service Charges or Fees, may, under criteria established by the Foundation, be exempted by the Foundation from required participation in the IOLTA program. Exemption of an IOLTA account from the IOLTA program revokes the permission to use the Foundation's tax identification number for that account. The lawyer or law firm whose account has been exempted will annually certify to the Supreme Court, as part of its Annual Certificate of Compliance, that the lawyer or law firm expects no material increase in activity in its exempted trust/escrow account during the 12 months following the date of the filing of the Certificate. The Foundation will review exempted accounts and may revoke the exemption if it determines that the account can generate interest or dividends in excess of Allowable Reasonable Service Charges and Fees.

(8) In order for the Foundation to be able to determine that all pooled trust/escrow accounts are properly identified by the eligible institutions, each lawyer or law firm that maintains a pooled trust/escrow account is deemed to have authorized the Foundation to have access to the pooled trust/escrow account-related information contained within its Annual Certificate of Compliance, filed annually with the Supreme Court. In addition, when a lawyer or law firm requests an eligible institution to open an IOLTA account, the lawyer or law firm will submit the request in writing to the institution, using the designated form letter located on the Foundation's website, with a copy of said letter to be sent to the Foundation by the lawyer or law firm.

(9) Should the Foundation determine that an IOLTA Account of a financial institution has failed to comply with the provisions of this Rule, the Foundation shall notify the affected lawyer or law firm and the financial institution of such failure to comply, specifying the corrective action needed, with a reasonable time specified by the Foundation for the compliance to be achieved, but no longer than 90 days. Should compliance not be achieved within the time specified, the Foundation shall notify the affected lawyer or law firm, the financial institution and the Office of Disciplinary Counsel.

(i) The funds transmitted to the Foundation shall be available for distribution for the following purposes:

(1) To improve the administration of justice;

(2) To provide and to enhance the delivery of legal services to the poor;

(3) To support law related education;

(4) For such other purposes that serve the public interest.

The Delaware Bar Foundation shall recommend for the approval of the Supreme Court of the State of Delaware, such distributions as it may deem appropriate. Distributions shall be made only upon the Court's approval.

(j) Lawyers or law firms, depositing client or third party funds in a pooled trust/escrow account under this paragraph shall not be required to advise the client or third party of such deposit or of the purposes to which the interest accumulated by reason of such deposits is to be directed.

(k) A lawyer shall not disburse fiduciary funds from a bank account unless the funds deposited in the lawyer's fiduciary account to be disbursed, or the funds which are in the lawyer's unrestricted possession and control and are or will be timely deposited, are good funds as hereinafter defined. "Good funds" shall mean:

(1) cash;

(2) electronic fund ("wire") transfer;

(3) certified check;

(4) bank cashier's check or treasurer's check;

(5) U.S. Treasury or State of Delaware Treasury check;

(6) Check drawn on a separate trust or escrow account of an attorney engaged in the private practice of law in the State of Delaware held in a fiduciary capacity, including his or her client's funds;

(7) Check of an insurance company that is authorized by the Insurance Commissioner of Delaware to transact insurance business in Delaware;

(8) Check in an amount no greater than $10,000.00;

(9) Check greater than $10,000.00, which has been actually and finally collected and may be drawn against under federal or state banking regulations then in effect;

(10) Check drawn on an escrow account of a real estate broker licensed by the state of Delaware up to the limit of guarantee provided per

transaction by statute. (Amended, effective Jan. 1, 2004; Oct. 20, 2008, effective Jan. 1, 2009; Dec. 12, 2008, effective Jan. 1, 2009; Feb. 16, 2010, effective May 1, 2010; June 10, 2010, effective Nov. 1, 2010; effective Apr. 25, 2012; effective Jan. 21, 2015.)

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] Lawyers often receive funds from third parties from which the lawyer's fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[3] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.

[4] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

[5] The extensive provisions contained in Rule 1.15(d) represent the financial recordkeeping requirements that lawyers must follow when engaged in the private practice of law in this jurisdiction. These provisions are also reflected in a certificate of compliance that is included in each lawyer's registration statement, filed annually pursuant to Delaware Supreme Court Rule 69.

[6] Compliance with these provisions provides the necessary level of control to safeguard client and third party funds, as well as the lawyer's operating funds. When these recordkeeping procedures are not performed on a prompt and timely basis, there will be a loss of control by the lawyer, resulting in insufficient safeguards over client and other property.

[7] Rule 1.15(d)(12)(I) and (J) enumerate minimal accounting controls for client trust accounts. They also enunciate the requirement that only a lawyer admitted to the practice of law in Delaware or a person who is under the direct supervision of the lawyer shall be the authorized signatory or authorize electronic transfers from a client trust account. While it is permissible to grant limited nonlawyer access to a client trust account, such access should be limited and closely monitored by the lawyer. The lawyer has a non-delegable duty to protect and preserve the funds in a client trust account and can be disciplined for failure to supervise subordinates who misappropriate client funds. See, Rules 5.1 and 5.3 of the Delaware Lawyers Rules of Professional Conduct.

[8] Authorized electronic transfers shall be limited to

(1) money required for payment to a client or third person on behalf of a client;

(2) expenses properly incurred on behalf of a client, such as filing fees or payment to third persons for services rendered in connection with the representation;

(3) money transferred to the lawyer for fees that are earned in connection with the representation and are not in dispute; or

(4) money transferred from one client trust account to another client trust account.

[9] Some of the essential financial recordkeeping issues for lawyers under this Rule include the following:

(a) Segregation of funds. Improper commingling occurs when the lawyer's funds are deposited in an account intended for the holding of client and third party funds, or when client funds are deposited in an account intended for the holding of the lawyer's funds. The only exception is found in Rule 1.15(a), which allows a lawyer to maintain $500 of the lawyer's funds in the fiduciary account in order to cover possible bank service charges. Keeping an accurate account of each client's funds is more difficult if client funds are combined with the lawyer's own funds. The requirement of separate bank accounts for lawyer funds and non-lawyer funds, with separate bookkeeping procedures for each, is intended to avoid commingling.

(b) Deposits of legal fees. Unearned legal fees are the property of the client until earned, and therefore must be deposited into the lawyer's fiduciary account. Legal fees must be withdrawn from the fiduciary account and transferred to the operating or business account promptly upon being earned, to avoid improper commingling. The monthly listing of client and third party funds in the fiduciary account should therefore be carefully reviewed in order to determine whether any earned legal fees remain in the account.

(c) Identity of property. The identity and location of client funds and other property must be maintained at all times. Accordingly, every cash receipt and disbursement transaction in the fiduciary account must be specifically identified by the name of the client or third party. If financial books and records are maintained in the manner, the resultant control should ensure that there are no unidentified funds in the lawyer's possession.

(d) Disbursement of funds. Funds due to clients or third parties must be disbursed without unnecessary delay. The monthly listing of client funds in the fiduciary account should therefore be reviewed carefully in order to determine whether any balances due to clients or third parties remain in the account.

(e) Negative balances. The disbursement of client or third party funds in an amount greater than the amount being held for such client or third party results in a negative balance in the fiduciary account. This should never occur when the proper controls are in place. However, if a negative balance occurs by mistake or oversight, the lawyer must make a timely transfer of funds from the operating account to the fiduciary account in order to cover the excess disbursement and cure the negative balance. Such mistakes can be avoided by making certain that the client balance sufficiently covers a potential disbursement prior to making the actual disbursement.

(f) Reconciliations. Reconciled cash balances in the fiduciary accounts must agree with the totals of client balances held. Only by performing a reconciliation procedure will the lawyer be assured that the cash balance in the fiduciary account exactly covers the balance of client and third party funds that the lawyer is holding.

(g) Real estate accounts. Bank accounts used exclusively for real estate settlement transactions are fiduciary accounts, and are therefore subject to the same recordkeeping requirements as other such accounts, except that cash receipts and cash disbursements journals are not required.

[10] Illustrations of some of the accounting terms that lawyers need to be aware of, as used in this Rule, include the following:

(a) Financial books and records include all paper documents or computer files in which fiduciary and non-fiduciary transactions are individually recorded, balanced, reconciled, and totalled. Such records include cash receipts and cash disbursements journals, general and subsidiary journals, periodic reports, monthly reconciliations, listings, and so on.

(b) The cash receipts journal is a monthly listing of all deposits made during the month and identified by date, source name, and amount, and in distribution columns, the nature of the funds received, such as “fee income” or “advance from client,” and so on. Such a journal is maintained for each bank account.

(c) The cash disbursements journal is a listing of all check payments made during the month and identified by date, payee name, check number, and amount, and in distribution columns, the nature of funds disbursed, such as “rent” or “payroll,”and so on. Such a journal is maintained for each bank account. Cash receipts and cash disbursement records may be maintained in one consolidated journal.

(d) Totals and balances refer to the procedures that the lawyer needs to perform when using a manual system for accounting purposes, in order to ensure that the totals in the monthly cash receipts and cash disbursements journal are correct. The cash and distribution columns must be added up for each month, then the total cash received or disbursed must be compared with the total of all of the distribution columns.

(e) The ending check register balance is the accumulated net cash balance of all deposits, check payments, and adjustments for each bank account. This balance will not normally agree with the bank balance appearing on the end-of-month bank statement because deposits and checks may not clear with the bank until the next statement period. This is why a reconciliation is necessary.

(f) The reconciled monthly cash balance is the bank balance conformed to the check register balance by taking into account the items recorded in the check register which have not cleared the bank. For example:

Account balance, per bank statement	$2,000.00
Add — deposits in transit (deposits in check register that do not appear on bank statement)	$1,500.00
Less — outstanding checks (checks entered in check register that do not appear on bank statement)	(1,800.00)
Reconciled cash balance	$1,700.00

(g) The general ledger is a yearly record in which all of a lawyer's transactions are recorded and grouped by type, such as cash received, cash disbursed, fee income, funds due to clients, and so on. Each type of transaction recorded in the general ledger is also summarized as an aggregate balance. For example, the ledger shows cash balances for each bank account which represent the accumulation of the beginning balance, all of the deposits in the period, and all of the checks issued in the period.

(h) The subsidiary ledger is the list of transactions shown by each individual client or third party, with the individual balances of each (as contrasted to the general ledger, which lists the total balances in an aggregate amount "due to clients"). The total of all of the individual client and third party balances in the subsidiary ledger should agree with the total account balance in the general ledger.

(i) A variance occurs in a reconciliation procedure when two figures which should agree do not in fact agree. For example, a variance occurs when the reconciled cash balance in a fiduciary account does not agree with the total of client and third party funds that the lawyer is actually holding.

[11] Accrued interest on client and other funds in a lawyer's possession is not the property of the lawyer, but is generally considered to be the property of the owner of the principal. An exception to this legal principle relates to nominal amounts of interest on principal. A lawyer must reasonably determine if the transactional or other costs of tracking and transferring such interest to the owners of the principal are greater than the amount of the interest itself. The lawyer's proper determination along these lines will result in the lawyer's depositing of fiduciary funds into an interest-bearing account for the benefit of the owners of the principal, or into a pooled interest-bearing account. If funds are deposited into a pooled account, the interest is to be transferred (with some exception) to the Delaware Bar Foundation pursuant to the Delaware Supreme Court's Interest On Lawyer Trust Accounts Program ("IOLTA").

[12] Implicit in the principles underlying Rule 1.15 is the strict prohibition against the misappropriation of client or third party funds. Misappropriation of fiduciary funds is clearly a violation of the lawyer's obligation to safeguard client and other funds. Moreover, intentional or knowing misappropriation may also be a violation Rule 8.4(b) (criminal conduct in the form of theft) and Rule 8.4(c) (general dishonest or deceptive conduct). Intentional or knowing misappropriation is considered to be one of the most serious acts of professional misconduct in which a lawyer can engage, and typically results in severe disciplinary sanctions.

[13] Misappropriation includes any unauthorized taking by a lawyer of client or other property, even for benign reasons or where there is an intent to replenish such funds. Although misappropriation by mistake, neglect, or recklessness is not as serious as intentional or knowing misappropriation, it can nevertheless result in severe disciplinary sanctions. See, e.g. Matter of Figliola, Del. Supr., 652 A.2d 1071, 1076-78 (1995).

Revisor's note. — The Report on compliance with Rule 1.15 of the Delaware Rules of Professional Conduct and the applicable guidelines and audit program appear as Rule VII of the Regulations of the Trustees of the Lawyer's Fund for Client Protection.

The bracketed paragraph designation "(g)" in paragraph (h) and the bracketed letter "s" at the end of the word "accounts" in subdivision (l) were inserted by the publisher.

Effect of amendments. — The 2015 amendment, effective Jan. 21, 2015, substituted "$2,000" for "$1000" in the fourth sentence of (a).

NOTES TO DECISIONS

Analysis

Client relations.

— Client funds.

—— Delivery.

Respondent violated subsection (b) of this Rule by negligently failing to account for and deliver to daughter, upon her majority, the net proceeds of the wrongful death settlement arising from her mother's fatal automobile accident. In re Barrett, 630 A.2d 652 (Del. 1993).

When an attorney failed to distribute estate funds from the estate account to beneficiaries and other third persons for almost 3 years after the deceased's death, the attorney violated Law. R. Prof. Conduct 1.15(b). In re Wilson, 886 A.2d 1279 (Del. 2005).

—— Safeguarding.

The Client's Security Trust Fund's (CSTF) efforts to assist lawyers do not absolve lawyers of the duty to read and follow Interpretive Guideline No. 2, which provides for the preservation of funds and property of clients; compliance checks performed under CSTF's direction are not audits and are not intended to verify the correctness of entries in an attorney's books and records. In re Figliola, 652 A.2d 1071 (Del. 1995).

Attorney's failing to preserve complete records of account funds, his failing to safeguard a client's funds, and his loss of a file violated subsection (a). In re Maguire, 725 A.2d 417 (Del. 1999).

Attorney's failing to comply with requirements for keeping books and records as set forth in Interpretive Guideline No. 2 violated subsection (d). In re Maguire, 725 A.2d 417 (Del. 1999).

Lawyer was disbarred for the misappropriation of client funds for the lawyer's personal use, and the failure to establish a separate account for the proceeds of the sale of a client's house, despite evidence of the lawyer's personal and emotional problems. In re Carey, 809 A.2d 563 (Del. 2002).

When an attorney admitted that he had failed to keep his property separate from that of his clients, as there were negative balances in 41 client escrow accounts and significant unidentified client funds, and he failed to pay payroll taxes for his employees for five years, totaling approximately $64,000, with estimated penalties, he was suspended from the practice of law for 3 years, with the right to seek reinstatement in 6 months. In re Landis, 850 A.2d 291 (Del. 2004).

Attorney's acceptance of a retainer of $250 from a client through a prepaid legal plan, while never contacting the client and refusing to refund the retainer until after the first disciplinary hearing, was held to have violated Law. Prof. Conduct R. 1.3, with regard to acting with reasonable diligence and promptness, Law. Prof. Conduct R. 1.4(a) and (b), with regard to failing to keep the client reasonably informed to the extent reasonably necessary to permit the client to make informed decisions, and, Law. Prof. Conduct R. 1.15(b) and (d), with regard to failing to safeguard the client's funds and deliver them upon request; the prepaid legal firm had refused to refund the retainer and, in fact, showed no record of the amount, which had been paid directly to the attorney. In re Chasanov, 869 A.2d 327 (Del. 2005).

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

Attorney was disbarred after having been found to have violated Law. R. Prof. Conduct 1.15 and Law. R. Prof. Conduct 8.4 by misappropriating clients funds and failing to identify a bank account as a law practice account; the attorney's conduct was found to have been intentional and no mitigating factors were present where it was shown that the attorney took a long time to provide a client with refinancing proceeds and, when the attorney did, the check was returned for insufficient funds, and the attorney used a septic system escrow deposit to cover another check that the attorney had written. In re Garrett, 909 A.2d 103 (Del. 2006).

Attorney violated Law. R. Prof. Conduct 1.15(a) by failing to deposit and safeguard an advance fee of $1,500 in a client trust account until earned. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Attorney whose child stole funds from the attorney's escrow account was publicly reprimanded for violating, inter alia, Law. Prof. Conduct R. 1.15(a), (b), and (d), by failing to safeguard client funds, failing to promptly deliver funds to clients and failing to maintain the attorney's books and records. In re Otlowski, 976 A.2d 172 (Del. 2009).

Attorney was suspended for 1 year, with the suspension to run retroactively to the date the attorney was transferred to disability inactive status, for violating Law. R. Prof. Conduct 1.15 by: (1) permitting checks to be issued to the attorney's operating account from client escrow accounts that were not earned; (2) transferring unearned funds to the attorney's own self from client escrow accounts; and (3) failing to properly maintain books and records. In re Nowak, 5 A.3d 631 (Del. 2010).

Attorney was suspended for 3 months, followed by 18 months of conditional probation, for having violated Law Prof. Conduct R. 1.5(f), 1.7(a), 1.15(a), 1.16(d) by: (1) having a conflict of interest with 2 clients; (2) having a personal interest in a loan transaction; (3) failing to safeguard client funds; and (4) failing to provide a new client with a fee agreement. In re O'Brien, 26 A.3d 203 (Del. 2011).

Attorney did not violate Law. Prof. Conduct R. 1.15, where the attorney not only refunded to a client the entire retainer of $1,500, but used $750 in personal funds to reimburse the client so that the client would not have to await the outcome of a receivership; the attorney undertook the burden of awaiting the outcome of the receivership from the client. In re Sisk, 54 A.3d 257 (Del. 2012).

Attorney who was involved in various real estate closings committed violations of the professional conduct rules by using other clients' funds in the firm's trust account to fund all or part of the buyer's contribution in certain settlements. In re Sanclemente, 86 A.3d 1119 (Del. 2014).

Attorney violated the Rules of Professional Conduct in handling real estate closings by using other clients' funds in the firm's trust account to fund part (or all) of the buyer's contribution in certain settlements. In re Sullivan, 86 A.3d 1119 (Del. 2014).

Based on a report by the Board on Professional Responsibility, there was clear and convincing evidence that an attorney engaged in criminal conduct worthy of suspension by: (1) misappropriating funds from the attorney's employer over a 5-year period; (2) engaging in dishonest conduct by lying to the attorney's mortgage company; and (3) forging the employer's signature. In re Lankenau, 138 A.3d 1151 (Del. 2016).

The Delaware Supreme Court accepted the Board on Professional Responsibility's findings and recommendation for discipline, publicly reprimanding and placing the attorney on a 2-year period of probation with the imposition of specific conditions, because the attorney failed to provide the client with a fee agreement and/or statement of earned fees withdrawn from the trust account, to identify and safeguard client fund, to maintain financial books and records or to supervise nonlawyer assistants; the attorney had engaged in conduct involving misrepresentation, prejudicial to the administration of justice. In re Malik, 167 A.3d 1189 (Del. 2017).

Former client failed to sufficiently plead a counterclaim claim for misappropriation of client funds against the attorney because: (1) the instant action sought declaratory relief regarding the distribution of certain funds being lawfully held in the attorney's IOLTA trust account according to the retainer agreement; and (2) while the attorney attempted to distribute the funds in the account, the client contested the attorney's accounting. Pazuniak Law Office LLC v. Pi-Net Int'l, Inc., — A.3d —, 2017 Del. Super. LEXIS 419 (Del. Super. Ct. Aug. 25, 2017).

Board on Professional Responsibility correctly assigned a 6-month suspension with conditions for violation of Law. Prof. Conduct R. 1.15, 5.3 and 8.4 because: (1) the Board considered the attorney's state of mind and concluded the attorney, as managing partner, was at least negligent in overseeing 2 non-attorneys to ensure the books and records were maintained in compliance with the rules; (2) the attorney knew of rule violations due to the negative balances in the account; (3) the attorney filed an inaccurate 2015 Certificate of Compliance with the Delaware Supreme Court that misrepresented the law firm's compliance with the rule on safekeeping property; (4) the covering funds relied on by the Board on Professional Responsibility should not have been considered a substitute for negative balances in the client subsidiary ledger; (5) the law firm had a duty to safeguard the clients' property but failed to do so; and (6) as a managing partner who failed to supervise non-attorney employees, the attorney was responsible for those deficiencies. In re Beauregard, 189 A.3d 1236 (Del. 2018).

Law firms.

— Bookkeeping.

Attorney was publicly reprimanded and subject to a public two-year period of probation for her violations of subsections (b) and (d) of this Rule, former Interpretive Guideline No. 2, and Rule 8.4(d), for failing to pay various federal and state employee and employer payroll taxes in a timely manner, for failing to maintain her law practice books and records, by failing to file her 1998 and 1999 federal unemployment tax returns until October 2000, and by making consistently delinquent filings and payment in connection with other law practice payroll tax obligations, and for certifying to the court that her law practice books and records were in compliance with the requirements of this Rule and that her tax obligations were paid in a timely manner. In re Benson, 774 A.2d 258 (Del. 2001).

Where an attorney, the managing partner of a firm, admitted to violating Del. Law. R. Prof. Conduct 1.15 and multiple other provisions of the Rules of Professional Conduct, and where a witness testified unequivocally that the attorney instructed the witness to transfer escrow funds to the firm's operating account, and client trust funds had to be, and were, invaded, the Office of Disciplinary Counsel's recommended public reprimand was rejected, and the attorney was suspended from the practice of law for six months and one day; a managing partner of a law firm had enhanced duties to ensure that the law firm complied with its recordkeeping and tax obligations, and the managing partner had to discharge those responsibilities faithfully and with the utmost diligence. In re Bailey, 821 A.2d 851 (Del. 2003).

Attorney was publicly reprimanded and was ordered to serve a public 2-year probation period for violating Law. R. Prof. Conduct 1.15(d) by failing to properly maintain the attorney's law practice books, records and bank accounts; the attorney's substantial experience, multiple offenses and attitude toward the offenses offset the attorney's lack of a prior disciplinary record, extensive remedial efforts, full cooperation and lack of injury to a client. In re Member of the Bar of the Supreme Court, 985 A.2d 391 (Del. 2009).

Following a self-reported embezzlement by a member of the attorney's staff, the attorney failed to obtain court-ordered precertification by a licensed certified public accountant for 2 years of certificates of compliance, reporting the status of recordkeeping with regard to requirements of Law Prof. Conduct R. 1.15 and Law Prof. Conduct R. 1.15A; because the absence of any injury to clients did not excuse the misconduct, the attorney's repeated violations of Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 8.4(d) supported an imposition of a public reprimand with conditions. In re Holfeld, 74 A.3d 605 (Del. 2013).

Attorney violated various disciplinary rules because the results of an audit showed the attorney's failure to adequately maintain books and records, to safeguard client funds or to indicate in the retainer that unearned fees were refundable. In re A Member of the Bar of the Supreme Court of Delaware: Fred Bar, 99 A.3d 639 (Del. 2013).

Attorney's admissions and the record established that the attorney violated Law. Prof. Conduct R. 1.5, 5.3, 8.4(c) and (d), resulting in 2 years' probation, by: (1) misrepresenting to the court the attorney's maintenance of records; and (2) failing to properly maintain them, to safeguard client funds, to provide for reasonable safeguards to assure accurate accounting, to supervise nonlawyer staff, and to timely file and pay taxes. In re Gray, 152 A.3d 581 (Del. 2016).

— Reprimand.

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a) and (d), Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

Attorney was publicly reprimanded and was ordered to serve a public 2-year probation period for violating Law. R. Prof. Conduct 8.4(c) by filing certificates of compliance containing inaccurate representations as to compliance with R. Prof. Conduct 1.15 with reference to the attorney's law practice bank accounts; the attorney's substantial experience, multiple offenses and attitude toward the offenses offset the attorney's lack of a prior disciplinary record, extensive remedial efforts, full cooperation and lack of injury to a client. In re Member of the Bar of the Supreme Court, 985 A.2d 391 (Del. 2009).

Attorney was publicly reprimanded and ordered to serve a public 2-year probation period for violating Law. R. Prof. Conduct 1.15(a) by failing to timely transfer earned attorneys' fees from the attorney's escrow account to the attorney's operating account, and by failing to ensure that negative client balances in the escrow account were corrected monthly; the attorney's substantial experience, multiple offenses and attitude toward the offenses offset the attorney's lack of a prior disciplinary record, extensive remedial efforts, full cooperation and lack of injury to a client. In re Member of the Bar of the Supreme Court, 985 A.2d 391 (Del. 2009).

Attorney's failure to maintain law office books and records, filing certificates of compliance with annual registration statements that indicated maintenance of such documentation, and failure to file and pay taxes violated Law. R. Prof. Conduct 1.15(d) and Law. R. Prof. Conduct 8.4(c), (d); a public reprimand was imposed. In re Witherell, 998 A.2d 852 (Del. 2010).

Because an attorney neglected client's matters, failed to promptly disburse client funds, and failed to cooperate with disciplinary authorities, the attorney violated Law. R. Prof. Conduct 1.1, 1.3, 1.4(a)(3), (4), 1.15(d), and 8.1(b); accordingly, the attorney was publicly reprimanded and placed on probation for 18 months with the imposition of certain conditions. In re Member of the Bar of the Supreme Court of Del., 999 A.2d 853 (Del. 2010).

The appropriate sanction was a public reprimand and 1 year probation period where: (1) an attorney violated the conditions of a previously imposed private admonition by failing to provide a required precertification and not promptly paying various payroll taxes; (2) the attorney admitted to violating Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 1.15(b), 1.15(d), 5.3, 8.4(c), and 8.4(d); (3) the attorney's violations were not isolated incidents but were repeat violations; (4) the attorney failed to adequately supervise a nonlawyer assistant to assure an accurate accounting of the firm's books and records; and (5) the attorney disregarded the conditions imposed on the private admonition. In re Martin, 35 A.3d 419 (Del. 2011).

Attorney was publicly reprimanded and placed on conditional probation for violating Law. Prof. Conduct R. 1.1, 1.3, 1.4(a)(3), (4), 1.15(b), and 8.1(b) where the attorney: (1) failed to timely distribute settlement funds; (2) failed to communicate with a personal injury client; and (3) failed to keep the Office of Disciplinary Counsel informed of changes. In re Siegel, 47 A.3d 523 (Del. 2012).

— Taxes.

Attorney who was delinquent in the payment of the attorney's law practice's federal, state, and local payroll tax obligations violated Law. R. Prof. Conduct 1.15(b), 5.3, 8.4(c) and (d); due to the attorney's prior disciplinary history with delinquent taxes, a public reprimand, 18-month probation and implementation of internal accounting controls were warranted. In re Finestrauss, 32 A.3d 978 (Del. 2011).

Charge that an attorney's failure to pay taxes violated the professional conduct rule regarding the handling of third-party funds was properly withdrawn; it did not apply to an attorney's failure to pay a personal obligation. In re Bria, 86 A.3d 1118 (Del. 2014).

Sanctions.

— Disbarment.

Disbarment is a possible sanction for knowing or reckless misappropriation of firm or client funds. In re Figliola, 652 A.2d 1071 (Del. 1995).

Lawyer who violated numerous professional duties in real estate practice, and caused over $500,000 in damages to clients, was disbarred. In re Spiller, 788 A.2d 114 (Del. 2001).

Court accepted the findings by a panel of the Board on Professional Responsibility that an attorney committed multiple ethical violations by misappropriating fees received for legal services to clients while the attorney was engaged in the private practice of law and failing to disclose the fees during prior disciplinary proceedings; disbarment was warranted. In re Vanderslice, 116 A.3d 1244 (Del. 2015).

— Reprimand.

Attorney committed professional misconduct by failing to comply with the conditions of private probation, by failing to maintain the firm's books and records properly, and by filing false certifications with respect to compliance with that obligation; public reprimand and probation for 3 years with conditions were imposed upon the attorney's immediate reinstatement to the practice of law. In re Woods, 143 A.3d 1223 (Del. 2016).

When respondent violated Law. Prof. Conduct R. 1.5(f), 1.15(a) and (d), 8.4(c) and (d) by failing to properly maintain law firm's books and records for 3 consecutive years, filing inaccurate certificates of compliance for 3 consecutive years, and failing to give flat fee clients proper notice that the fee was refundable if not earned, a public reprimand with a 2-year period of probation was appropriate; this was true, even considering the mitigating factors, given a lawyer's obligation to maintain orderly books and records. In re Castro, 160 A.3d 1134 (Del. 2017).

— Suspension.

A six month and one day suspension from the practice of law was proper punishment for unlawful disbursements from trust accounts. In re Figliola, 652 A.2d 1071 (Del. 1995).

Where a lawyer engaged in a pattern of knowing misconduct over a period of several years by commingling client funds, failing to maintain the lawyer's law practice accounts, failing to pay taxes, falsely representing on certificates of compliance that the lawyer complied with the record-keeping requirements and paid taxes, the lawyer violated Del. Law. R. Prof. Conduct 1.5(f), 1.15(a), (b), (d), 8.4(b), (c), (d); as a result, the lawyer was suspended for 3 years. In re Garrett, 835 A.2d 514 (Del. 2003).

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in Certificates of Compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Attorney whose misconduct involved false notarizations, failure to safeguard fiduciary funds, failure to pay taxes on real estate transactions, and other misrepresentations committed violations Law. R. Prof. Conduct 1.15(a), (b), and 8.4(a), (c), and (d); based on knowing, rather than negligent, conduct in committing the violations, a 1-year suspension as well as a public reprimand and permanent practice restrictions were deemed appropriate sanctions to impose. In re Member of the Bar of the Supreme Court, 974 A.2d 170 (Del. 2009).

There was substantial evidence to support the factual findings and conclusions of law of the Board on Professional Responsibility regarding an attorney's violations of Law Prof. Conduct R. 1.5(f), 1.15(a) and (b), and 8.4(c), based on the attorney's misappropriation of clients' fees on various occasions, and the attorney's failure to include the typical refund provision regarding unearned fees in the retainer agreements for other clients; a 1-year suspension was warranted. In re Vanderslice, 55 A.3d 322 (Del. 2012).

Attorney who committed numerous ethical violations, including neglecting multiple client matters, making misrepresentations to the court and failing to properly safeguard clients' funds, was suspended for 18 months, based on a determination that the mitigating factors significantly outweighed the aggravating factors. In re Carucci, 132 A.3d 1161 (Del. 2016).

Rule 1.15A. Trust account overdraft notification.

(a) Every attorney practicing or admitted to practice in this jurisdiction shall designate every account into which attorney trust or escrow funds are deposited either as "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," pursuant to Rule 1.15(d)(2).

(b) Bank accounts designated as "Rule 1.15A Attorney Trust Account" or "1.15A Trust Account" or "Rule 1.15A Attorney Escrow Account" or "1.15A Escrow Account," pursuant to Rule 1.15(d)(2) shall be maintained only in financial institutions approved by the Lawyers' Fund for Client Protection (the "Fund"). A financial institution may not be approved as a depository for attorney trust and escrow accounts unless it shall have filed with the Fund an agreement, in a form provided by the Fund, to report to the Office of Disciplinary Counsel ("ODC") in the event any instrument in properly payable form is presented against an attorney trust or escrow account containing insufficient funds, irrespective of whether or not the instrument is honored.

(c) The Supreme Court may establish rules governing approval and termination of approved status for financial institutions and the Fund shall annually publish a list of approved financial institutions. No trust or escrow account shall be maintained in any financial institution that does not agree to make such reports. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days notice in writing to the Fund.

(d) The overdraft notification agreement shall provide that all reports made by the financial institution shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and shall include a copy of the dishonored instrument to the ODC no later than seven (7) calendar days following a request for the copy by the ODC.

(2) In the case of instruments that are presented against insufficient funds, but which instruments are honored, the report shall identify the

financial institution, the attorney or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of the overdraft created thereby.

(e) Reports shall be made simultaneously with, and within the time provided by law for, notice of dishonor. If an instrument presented against insufficient funds is honored, then the report shall be made within seven (7) calendar days of the date of presentation for payment against insufficient funds.

(f) Every attorney practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the reporting and production requirements mandated by this rule.

(g) Nothing herein shall preclude a financial institution from charging a particular attorney or law firm for the reasonable costs of producing the reports and records required by this rule.

(h) The terms used in this section are defined as follows:

(1) “Financial institution” includes banks, savings and loan associations, credit unions, savings banks and any other business or persons which accept for deposit funds held in trust by attorneys.

(2) “Properly payable” refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of Delaware.

(3) “Notice of dishonor” refers to the notice which a financial institution is required to give, under the laws of Delaware, upon presentation of an instrument which the institution dishonors. (Amended, effective Jan. 1, 2009.)

Revisor’s note. — As adopted July 17, 2002, this rule was to become effective October 1, 2002. By order of the Supreme Court dated October 1, 2002, the effective date of this rule was extended to January 1, 2003, “in order to allow sufficient time for the preparation of the necessary forms and for the notification of all Delaware lawyers and financial institutions.”

NOTES TO DECISIONS

Analysis

Bookkeeping.

Failure to designate account.

Fraud.

Bookkeeping.

Following a self-reported embezzlement by a member of the attorney's staff, the attorney failed to obtain court-ordered precertification by a licensed certified public accountant for 2 years of certificates of compliance, reporting the status of recordkeeping with regard to requirements of Law Prof. Conduct R. 1.15 and Law Prof. Conduct R. 1.15A; because the absence of any injury to clients did not excuse the misconduct, the attorney's repeated violations of Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 8.4(d) supported an imposition of a public reprimand with conditions. In re Holfeld, 74 A.3d 605 (Del. 2013).

Failure to designate account.

By failing to designate an estate account as a Law R. Prof. Conduct 1.15A account with the attorney's financial institution, thereby reducing the likelihood that the Office of Disciplinary Counsel would receive notice of any overdraft balances in this account, the attorney violated Law R. Prof. Conduct 1.15A. In re Wilson, 886 A.2d 1279 (Del. 2005).

Fraud.

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

Rule 1.16. Declining or terminating representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's service to perpetrate a crime or fraud;

(4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

[2] *Mandatory Withdrawal.* — A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

[4] *Discharge.* — A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's

services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

[7] *Optional Withdrawal.* — A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

[9] *Assisting the Client upon Withdrawal.* — Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

INTERPRETIVE GUIDELINE.
Re: Residential real estate transactions.

The following statements of principles are promulgated as interpretive guidelines in the application to residential real estate transactions in The Delaware Lawyers' Rules of Professional Conduct:

(a) Before accepting representation of a buyer or mortgagor of residential property (including condominiums under the Unit Property Act of the State of Delaware), upon referral by the seller, lender, real estate agent, or other person having an interest in the transaction, it is the ethical duty of a lawyer to inform the buyer or mortgagor in writing at the earliest practicable time:

(1) That the buyer or mortgagor has the absolute right (regardless of any preference that the seller, real estate agent, lender, or other person may have and regardless of who is to pay attorney's fees) to retain a lawyer of his own choice to represent him throughout the transaction, including the examination and certification of title, the preparation of documents, and the holding of settlement; and

(2) As to the identity of any other party having an interest in the transaction whom the lawyer may represent, including a statement that such other representation may be possibly conflicting and may adversely affect the exercise of the lawyer's professional judgment on behalf of the buyer or mortgagor in case of a dispute between the parties. For the purpose of this Guideline, a lawyer shall be deemed to have a "possibly conflicting" representation if he represents the seller or has represented the seller on a continuing basis in the past; or if he represents the real estate agent or has represented the real estate agent on a continuing basis in the past; or if he represents the lender or has represented the lender on a continuing basis in the past.

(b) Unless a lawyer has been freely and voluntarily selected by the buyer or mortgagor after he has made to the buyer or mortgagor the statements and disclosures hereinabove required, the lawyer may not ethically:

(1) Certify, report, or represent for any purpose that the buyer or mortgagor is his client, or that the buyer or mortgagor is or was obligated

for any legal service rendered by him in the transaction; or

(2) Participate in causing the buyer or mortgagor, directly or indirectly, to bear any charge for his legal service; except that the lawyer for a lender may receive from the buyer or mortgagor, directly or indirectly, payment of the lender's reasonable and necessary legal expenses for preparation of documents at the request of the buyer's or mortgagor's lawyer, for attendance at settlement, and for title insurance properly specified by the lender (within the provisions of 18 Del. C. § 2305(a)(1)) but unobtainable by the buyer's or mortgagor's lawyer, provided that the buyer's or mortgagor's obligation to pay each such legal expense is particularized as a term and condition of the loan; or

(3) Participate as the buyer's or mortgagor's lawyer in any transaction in which his representation of the buyer or mortgagor has been made a term or condition of the transaction, directly or indirectly.

(c) The information supplied to the buyer or mortgagor in writing shall contain a description of the attorney's interest or interests sufficient to enable the buyer or mortgagor to determine whether he should obtain a different attorney.

NOTES TO DECISIONS

Analysis

— Suspension.

Attorneys' fees.

— Retaining lien.

Based on multiple factors, including the financial situations of the parties, the client's sophistication in dealing with lawyers, and the reasonableness of counsel's disputed fee, a former law client's subpoena and motion to compel production of documents obtained by former counsel through discovery in an underlying matter had merit, despite counsel's assertion of a retaining lien due to a fee dispute pursuant to Law Prof. Conduct R. 1.16(d). Judy v. Preferred Commun. Sys., 29 A.3d 248 (Del. Ch. 2011).

In determining the scope of a retaining lien due to a fee dispute between a former client and counsel pursuant to Law Prof. Conduct R. 1.16(d) with respect to the client's motion to compel counsel's production of documents secured in an underlying action through discovery, the ethics standard ("fraud and or gross imposition by the client") did not govern the legal question of whether the retaining lien could be maintained. Judy v. Preferred Commun. Sys., 29 A.3d 248 (Del. Ch. 2011).

Client relations.

— Conflicts of interest.

It was plain error for the scrivener of a contested will to testify at trial and also participate in the proceedings as an attorney for one of the parties. In re Estate of Waters, 647 A.2d 1091 (Del. 1994).

Attorney was suspended from the practice of law for 3 months, followed by a 1-year period of probation, for violating Law. R. Prof. Conduct 1.1, 1.4(b), 1.7, and 1.16(a)(Interpretative Guideline Re: Residential real estate transactions); the attorney failed to obtain the clients' consent to a conflict of interest that arose when the attorney represented both the borrower and the lender in a loan transaction, and failed to inform the clients of their 3-day right to rescind. In re Katz, 981 A.2d 1133 (Del. 2009).

Where an attorney committed violations of Law. R. Prof. Conduct 1.1, 1.4(b), and 1.16 during the course of 10 closings for a private money lender, a public reprimand was deemed the appropriate sanction; the attorney had ethical duties to disclose to the borrowers a conflict of interest and the fact that the loan documents were inadequate, even though the attorney did not represent them, as they had no attorneys. In re Goldstein, 990 A.2d 404 (Del. 2010).

— Shareholders' derivative suit.

Plaintiffs, two directors of a family corporation and the corporation, failed to prove third director's use of long-time corporation and family attorneys to defend against that director's removal by shareholders in a declaratory judgment action threatened to undermine fairness and integrity of proceedingor violate Del. Law. R. Prof. Conduct 1.7, 1.9, 1.13(e), and 1.16(b)(1). Unanue v. Unanue, 2004 Del. Ch. LEXIS 37 (Del. Ch. Mar. 25, 2004).

— Withdrawal.

Lawyer dismissed by client violated this Rule by failing to: (1) Promptly move to withdraw or execute a stipulation for substitution; (2) promptly surrender the client's file; (3) provide an accounting of the client's funds, or refund the unearned portion of the advance fee paid by the client. In re Tos, 576 A.2d 607 (Del. 1990).

Appointed attorney's motion for leave to withdraw from representing a father in a dependency proceeding was denied, despite the attorney's claims that the father harassed, annoyed, cursed, and threatened the attorney and his staff, refused to heed legal recommendations, and verbally fired the attorney on several occasions; though the father's behavior could be considered repugnant or unreasonably difficult enough to allow permissive withdrawal under Law. Prof. Conduct R. 1.16(b)(4) and (6), the concern that withdrawal could materially adversely affect the father's interests, and the child advocate's suggestion that allowing the attorney to withdraw could have an adverse impact on the best interests of the child, led to denial of the motion. In re Div. of Family Servs. v. M. P., 2005 Del. Fam. Ct. LEXIS 111 (Del. Fam. Ct. May 25, 2005).

Court adopted Special Master's report that recommended that the motion of plaintiffs' counsel to withdraw from representation be granted, as there was abundant evidence to support the finding that adequate grounds existed for withdrawal of counsel under Law. R. Prof. Conduct

1.16(b)(4), (6), and (7), based on plaintiffs' own communications with counsel. Parfi Holding AB v. Mirror Image Internet, Inc., 2006 Del. Ch. LEXIS 69 (Del. Ch. Apr. 3, 2006).

Where, after appellants' counsel withdrew, the trial court dismissed their case with prejudice on grounds that their new counsel would not enter an unconditional appearance that could not be withdrawn, the nonwithdrawable appearance order was an abuse of discretion because Law. R. Prof. Conduct 1.16(a)(1) requires attorneys to withdraw under specified circumstances. Parfi Holding AB v. Mirror Image Internet, Inc., 926 A.2d 1071 (Del. 2007).

Chancery Court permitted a law firm to withdraw as counsel for a client because the tenor of an opposition to the withdrawal which the client filed, in which the client excoriated lawyers from firm, especially when coupled with the history of frustration between the law firm and the client and an apparent disagreement over how to move forward with the client's actions, amply demonstrated that the attorney-client relationship between the parties could no longer function in any practical fashion; although the client suggested that there were other lawyers at the firm with whom the client might not had a problem, the notion that a law firm could not withdraw because not every lawyer in the firm had had problems with the client could not be the standard. Binks v. Megapath, Inc., 2008 Del. Ch. LEXIS 83 (Del. Ch. July 2, 2008).

There was no bona fide condition for the court's recusal limited to the issue of counsel's withdrawal, because counsel could strictly limit disclosures to the court to preserve the client's confidentiality pursuant to counsel's professional conduct obligations. State v. Pardo, — A.3d —, 2015 Del. Super. LEXIS 548 (Del. Super. Ct. Oct. 27, 2015).

Trial court granted the motion to withdraw as counsel filed by plaintiff's attorney because: (1) an allegation of a material breakdown in the attorney's relationship with plaintiff and lead counsel, and their unjustifiable refusal to communicate with the attorney, established good cause for withdrawal; and (2) defendant did not oppose the motion. Griffith v. Wawa, Inc., — A.3d —, 2017 Del. Super. LEXIS 344 (Del. Super. Ct. July 14, 2017).

Sanctions.

— Reprimand.

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a),(d), and Interpretive Guideline No. 2., Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

— Suspension.

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

As a result of a lawyer's repeated unethical conduct and admitted violation of Law. R. Prof. Conduct 1.16(d) in representation of a client while the attorney was on probation, the lawyer's failure to take the necessary and reasonable steps to protect that client's interest in withdrawing from representation, and due to lawyer's past disciplinary record, a 3-year suspension was ordered; further, said sanction protected the public by ensuring that prior to any reinstatement, the lawyer was required to establish rehabilitation before returning to active status. In re Solomon, 886 A.2d 1266 (Del. 2005).

Attorney was suspended for 3 months, followed by 18 months of conditional probation, for having violated Law Prof. Conduct R. 1.5(f), 1.7(a), 1.15(a), 1.16(d) by: (1) having a conflict of interest with 2 clients; (2) having a personal interest in a loan transaction; (3) failing to safeguard client funds; and (4) failing to provide a new client with a fee agreement. In re O'Brien, 26 A.3d 203 (Del. 2011).

Rule 1.17. Sale of law practice.

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold in the jurisdiction in which the practice has been conducted;

(b) The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and

(3) the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

In a matter of pending litigation, if a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file. If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale.

(d) The fees charged clients shall not be increased by reason of the sale.

(e) The seller shall make appropriate arrangements for the maintenance of records specified in Rule 1.15(d). (Amended, July 1, 2003; effective Apr. 25, 2012.)

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

[2] *Termination of Practice by the Seller.* — The requirement that all of the private practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that the sale be attendant to cessation of practice if the lawyer later resumes private practice upon failing to be reappointed or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a

substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves the jurisdiction typically would sell the entire practice, this rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

[6] *Sale of Entire Practice or Entire Area of Practice.* — The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

[7] *Client Confidences, Consent and Notice.* — Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidentiality provisions of Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. See Rule 1.6(b)(7). Providing the purchaser access to detailed information relating to the representation, such as the client's file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser, and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of th files, the Rule requires an

order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered in camera.

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

[10] *Fee Arrangements Between Client and Purchaser.* — The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

[11] Rule 1.17(a)(5) provides for the preservation of a lawyer's client trust account records in the event of sale of a law practice. Regardless of the arrangements the partners or shareholders make among themselves for maintenance of the client trust records, each partner may be held responsible for ensuring the availability of these records. For the purposes of these Rules, the terms "law firm," "partner," and "reasonable" are defined in accordance with Rules 1.0(c), (g) and (h) of the Delaware Lawyers Rules of Professional Conduct.

[12] *Other Applicable Ethical Standards.* — Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent); and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[13] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is

pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

[14] *Applicability of the Rule.* — This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a nonlawyer representative not subject to these Rules. Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[15] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[16] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Rule 1.17A. Dissolution of law firm.

Upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of the client trust account records specified in Rule 1.15(d). (Added, effective Apr. 25, 2012.)

COMMENT

[1] Rule 1.17A provides for the preservation of a lawyer's client trust account records in the event of dissolution of a law practice. Regardless of the arrangements the partners or shareholders make among themselves for maintenance of the client trust records, each partner may be held responsible for ensuring the availability of these records. For the purposes of these Rules, the terms "law firm," "partner," and "reasonable" are defined in accordance with Rules 1.0(c), (g) and (h) of the Delaware Lawyers Rules of Professional Conduct.

Rule 1.18. Duties to prospective client.

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. See also Comment [4]. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement, under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures

employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

Rule 2.1. Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

[1] *Scope of Advice.* — A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social

work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

[5] *Offering Advice.* — In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Rule 2.2. Intermediary [Deleted].

Revisor's note. — Former Rule 2.2, which pertained to an intermediary, was deleted effective July 1, 2003.

Rule 2.3. Evaluation for use by third persons.

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

COMMENT

[1] *Definition.* — An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this rule.

The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

[3] *Duties Owed to Third Person and Client.* — When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

[4] *Access to and Disclosure of Information.* — The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding

circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

[5] *Obtaining Client's Informed Consent.* — Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

[6] *Financial Auditors' Request for Information.* — When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's response may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American Bar Association Statement of policy Regarding Lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

Rule 2.4. Lawyer serving as third-party neutral.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COMMENT

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration

Association or the Model standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

Rule 3.1. Meritorious claims and contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

NOTES TO DECISIONS

Frivolous claims.

Evidence held sufficient to establish a violation of this Rule where attorney and her clients demonstrated a history of bringing claims in one court intended to interfere with another court's jurisdiction and orders. In re Shearin, 721 A.2d 157 (Del. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1776, 143 L. Ed. 2d 805 (1999).

Rule 3.2. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial orother benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

NOTES TO DECISIONS

Frivolous claims.

Evidence held sufficient to establish a violation of this Rule where attorney demonstrated a history of bringing frivolous collateral claims. In re Shearin, 721 A.2d 157 (Del. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1776, 143 L. Ed. 2d 805 (1999).

Attorney's failure to respond to the Com. P. Ct. Civ. R. 41(e) notice of dismissal of the no-fault case, resulting in dismissal of the case for which the relevant limitations period had passed, was in violation of this rule. In re Becker, 788 A.2d 527 (Del. 2001).

Rule 3.3. Candor toward the tribunal.

(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 paragraph (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 which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an

ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

[3] *Representations by a Lawyer.* — An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the comment to Rule 8.4(b).

[4] *Legal Argument.* — Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed

by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

[5] *Offering Evidence.* — Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to

discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

[10] *Remedial Measures.* — Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

[12] *Preserving Integrity of Adjunctive Process.* — Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

[13] *Duration of Obligation.* — A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

[14] *Ex parte Proceedings.* — Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

[15] *Withdrawal.* — Normally, a lawyer's compliance with the duty of candor imposed by this rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for

the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

NOTES TO DECISIONS

Analysis

Attorneys' fees.

— Retainers.

Attorney's acceptance of a retainer of $250 from a client through a prepaid legal plan, while never contacting the client and refusing to refund the retainer until after the first disciplinary hearing, was held to have violated Law. Prof. Conduct R. 1.3, with regard to acting with reasonable diligence and promptness, Law. Prof. Conduct R. 1.4(a) and (b), with regard to failing to keep the client reasonably informed to the extent reasonably necessary to permit the client to make informed decisions, and, Law. Prof. Conduct R. 1.15(b) and (d), with regard to failing to safeguard the client's funds and deliver them upon request; the prepaid legal firm had refused to refund the retainer and, in fact, showed no record of the amount, which had been paid directly to the attorney. In re Chasanov, 869 A.2d 327 (Del. 2005).

Client relations.

— Effective representation.

Attorney's misrepresentation to a Family Court that a client was not in arrears with regard to alimony and had paid the debt in full was determined to have been an act of dishonesty, fraud, deceit, or misrepresentation in violation of Law. Prof. Conduct R. 8.4(c) and (d), a failure to provide competent representation to the client, in violation of Law. Prof. Conduct R. 1.1, and a failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions, in violation of Law. Prof. Conduct R. 1.4(b); the misrepresentation was found to have been knowingly made, but the recommended suspension of 2 years was reduced to 6 months, because mitigating circumstances were found in the nature of the attorney providing the Family Court with correspondence, which would have permitted the Family Court and the adverse party an opportunity to verify the debt. In re Chasanov, 869 A.2d 327 (Del. 2005).

— Perjury.

An attorney should have knowledge beyond a reasonable doubt before determining under this Rule that his client has committed or is going to commit perjury. Shockley v. State, 565 A.2d 1373 (Del. 1989).

Counsel adequately performed his duty as officer of court by disclosing to the court what he believed beyond a reasonable doubt to be his client's proposed perjury; counsel's resort to narrative testimony when client insisted on testifying was reasonable under the circumstances and did not prejudice client's case. Shockley v. State, 565 A.2d 1373 (Del. 1989).

Disbarment was the appropriate sanction for an attorney's intentional misconduct in a medical negligence case, which included failing to disclose altered medical records, failing to supplement discovery responses and failing to correct a client's false testimony (despite multiple opportunities for corrective action); although the attorney had no prior disciplinary record and presented evidence of good character and reputation, dishonesty and other aggravating factors outweighed the mitigating factors. In re McCarthy, 173 A.3d 536 (Del. 2017).

Professional conduct.

— Candor toward the tribunal.

An attorney, acting as an officer of the court, has a duty to respond with complete candor to court inquiries; counsel may not, knowingly or otherwise, engage in conduct which may reasonably be perceived as misleading either to the court or to opposing counsel. State v. Guthman, 619 A.2d 1175 (Del. 1993).

Attorney violated subsection (a)(1) of this Rule and Prof. Cond. Rules 3.4(b) and 8.4(c) when he identified himself as client's "nephew" and submitted falsified evidence to the tribunal in the form of a petition which identified him as such. In re McCann, 669 A.2d 49 (Del. 1995).

Defense counsel has a responsibility not only to the defendant-client, but to the trial court, as well. State v. Grossberg, 705 A.2d 608 (Del. Super. Ct. 1997).

An attorney's duty to respond with complete candor to the court includes a responsibility to promptly inform the court and opposing counsel of any development that renders a material representation to the court inaccurate. State v. Grossberg, 705 A.2d 608 (Del. Super. Ct. 1997).

The Sixth Amendment right to counsel was never intended to override the court's broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied. State v. Grossberg, 705 A.2d 608 (Del. Super. Ct. 1997).

Evidence held sufficient to establish a violation of subsections (a)(1) and (4) of this Rule where attorney inconsistently informed the trial court that she did as to whether she did or did not represent a client. In re Shearin, 721 A.2d 157 (Del. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1776, 143 L. Ed. 2d 805 (1999).

Although a trial court did not abuse its discretion in denying defendant's motion to withdraw defendant's guilty plea, defendant, defense counsel, and the prosecutor improperly failed to disclose an oral side agreement as required by Super. Ct. Crim. R. 11(e)(2), as the failure to disclose the side agreement violated Law. R. Prof. Conduct 3.3(a)(3) in the face of defendant's misrepresentation, under oath, about the plea agreement's actual terms in open court; if defendant proved that the terms of the oral side agreement were fulfilled, then the State could be barred from requesting that defendant be declared a habitual offender. Scarborough v. State, 938 A.2d 644 (Del. 2007).

Based on an attorney's false statements to a Virginia court regarding delivery of legal documents to a party-opponent, and misleading statements in a Virginia disciplinary proceeding constituting violations of Law. Prof. Conduct R. 3.3(a)(1), 4.1, and 8.4(c), a 30-day suspension was imposed; rather than imposing an "admonishment with terms," as Virginia did, a "substantially different discipline" was warranted pursuant to Bd. Prof. Resp. 18(4). In re Amberly, 996 A.2d 793 (Del. 2010).

Claim by automobile purchasers that a dealership and a financing company committed a "fraud upon the court" in violation of Law. Prof. Conduct R. 3.3(a)(2) lacked merit; the purchasers actually alleged that lawyers for the dealership and financing company failed to inform the court of a third-party beneficiary theory for recovery prior to dismissing a party for lack of standing, but the dealership and financing company did not misinform the court regarding the law. Gibson v. Car Zone, 2011 Del. Super. LEXIS 627 (Del. Super. Ct. May 3, 2011).

Where an attorney engaged in lateness or failure to appear at scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and wasted judicial resources in 3 Delaware Courts, in addition to violating the duty of candor to the Supreme Court of Delaware, the attorney violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Suspension for 6 months and 1 day was warranted where an attorney: (1) violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4; (2) had a record of 2 prior private admonitions; (3) engaged in a pattern of misconduct consisting of multiple offenses; (4) suffered from personal or emotional problems; (5) cooperated with the Office of Disciplinary Counsel in connection with the hearing; (6) was generally of good character, as evidenced by willingness to represent those who might not otherwise have had representation; and (7) exhibited remorse. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Deputy attorney general was suspended from the practice of law for 6 months and 1 day for 7 ethical violations because the attorney initially falsely denied making statements (corroborated by a prothonotory also present) threatening a criminal defendant by implying that the State would brand that defendant an informant; the attorney admitted only part of the substance, falsely accusing the defendant of eavesdropping, although later admitting that the attorney intended for the defendant to hear the intimidating statements about possible prison reprisals. In re Favata, 119 A.3d 1283 (Del. 2015).

There was no bona fide condition for the court's recusal limited to the issue of counsel's withdrawal, because counsel could strictly limit disclosures to the court to preserve the client's confidentiality pursuant to counsel's professional conduct obligations. State v. Pardo, — A.3d —, 2015 Del. Super. LEXIS 548 (Del. Super. Ct. Oct. 27, 2015).

Attorney was suspended for an additional 6 months where: (1) the attorney filed 2 complaints in Superior Court without maintaining a Delaware office, conduct prejudicial to the administration of justice; (2) the attorney created a false impression by testifying in a prior disciplinary matter that the attorney did not currently have any suits pending in Delaware; (3) the violations were knowing and caused potential harm to the legal system; (4) suspension was the presumptive sanction; and (5) the aggravating factors did not sufficiently outweigh the mitigating factors to warrant disbarment. In re Lankenau, 158 A.3d 451 (Del. 2017).

— Frivolous claims.

Where the bulk of the claims and legal contentions asserted by the attorney had no foundation in existing law, nor were they supported by a nonfrivolous argument for reversal or modification of existing law, the attorney proceeding pro se failed to act appropriately as an officer of the Superior Court of Delaware by violating Super. Ct. Civ. R. 11 and Law. Prof. Conduct R. 3.3(a)(1); as neither the county nor county officials which the attorney sued requested sanctions or a fee-shifting award in the case, the trial court did not impose any. Abbott v. Gordon, 2008 Del. Super. LEXIS 103 (Del. Super. Ct. Mar. 27, 2008), aff'd, 957 A.2d 1 (Del. 2008).

— Illegal conduct.

Attorney violated Law. R. Prof. Conduct 3.3(a)(1) by filing with the Family Court a petitioner's answer to a respondent's counterclaim, on which the attorney had signed the client's name and had falsely notarized the signature. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Court accepted the findings by a panel of the Board on Professional Responsibility that an attorney committed multiple ethical violations by misappropriating fees received for legal services to clients while the attorney was engaged in the private practice of law and failing to disclose the fees during prior disciplinary proceedings; disbarment was warranted. In re Vanderslice, 116 A.3d 1244 (Del. 2015).

— Opposing counsel.

Because Law. R. Prof. Conduct 3.3(a)(2) did not require defense counsel to develop and advance potential legal claims for the plaintiff, there was no support for a finding of fraud or other misconduct by opposing counsel. Gibson v. Car Zone, 31 A.3d 76 (Del. 2011).

Rule 3.4. Fairness to opposing party and counsel.

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 efforts 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.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by the prohibitions against destruction or concealment of evidence, improperly

influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

NOTES TO DECISIONS

Analysis

Professional conduct.

— Candor toward the tribunal.

— Illegal conduct.

— Obligations to tribunal.

— Opposing counsel.

— Witnesses.

Client relations.

— Conflicts of interest.

It was plain error for the scrivener of a contested will to testify at trial and also participate in the proceedings as an attorney for one of the parties. In re Estate of Waters, 647 A.2d 1091 (Del. 1994).

Enforcement.

When a plaintiff, acting pro se, alleged that plaintiff's former spouse's attorney had violated the Lawyers' Rules of Professional Conduct, the plaintiff did not have standing to recover damages, even if there had been ethical violations; there was no basis for enforcement of a lawyer's ethical duties outside the framework of disciplinary proceedings. Buchanan v. Gay, 2006 Del. Super. LEXIS 382 (Del. Super. Ct. Sept. 20, 2006).

Attorney who had knowingly violated a protective order was properly sanctioned to public reprimand because the misconduct was serious, caused potential injury to the vulnerable teenage victim and caused actual injury to the legal system. In re Koyste, 111 A.3d 581 (Del. 2015).

Because the integrity of the proceedings and the court's truth-finding function involving company management disputes between the parties was threatened by plaintiffs' actions, based on their payments to witnesses in exchange for certain testimony, threats against witnesses and threats of civil litigation on baseless claims, their conspiracy claims were dismissed against all defendants; certain adverse inferences were also drawn as to other claims. OptimisCorp v. Waite, — A.3d —, 2015 Del. Ch. LEXIS 222 (Del. Ch. Aug. 26, 2015).

Professional conduct.

— Candor toward the tribunal.

Attorney violated subsection (b) of this Rule and Prof. Cond. Rules 3.3(a)(1) and 8.4(c) when he identified himself as client's "nephew" and submitted falsified evidence to the tribunal in the form of a petition that identified him as such. In re McCann, 669 A.2d 49 (Del. 1995).

Deputy attorney general was suspended from the practice of law for 6 months and 1 day for 7 ethical violations because the attorney initially falsely denied making statements (corroborated by a prothonotory also present) threatening a criminal defendant by implying that the State would brand that defendant an informant; the attorney admitted only part of the substance, falsely accusing the defendant of eavesdropping, although later admitting that the attorney intended for the defendant to hear the intimidating statements about possible prison reprisals. In re Favata, 119 A.3d 1283 (Del. 2015).

Attorney was suspended for an additional 6 months where: (1) the attorney filed 2 complaints in Superior Court without maintaining a Delaware office, conduct prejudicial to the administration of justice; (2) the attorney created a false impression by testifying in a prior disciplinary matter that the attorney did not currently have any suits pending in Delaware; (3) the violations were knowing and caused potential harm to the legal system; (4) suspension was the presumptive sanction; and (5) the aggravating factors did not sufficiently outweigh the mitigating factors to warrant disbarment. In re Lankenau, 158 A.3d 451 (Del. 2017).

Disbarment was the appropriate sanction for an attorney's intentional misconduct in a medical negligence case, which included failing to disclose altered medical records, failing to supplement discovery responses and failing to correct a client's false testimony (despite multiple opportunities for corrective action); although the attorney had no prior disciplinary record and presented evidence of good character and reputation, dishonesty and other aggravating factors outweighed the mitigating factors. In re McCarthy, 173 A.3d 536 (Del. 2017).

— Illegal conduct.

Court imposed an 18-month suspension from the practice of law upon a lawyer who, inter alia, had concealed or destroyed potential evidence relevant to criminal charges against lawyer. In re Melvin, 807 A.2d 550 (Del. 2002).

In an attorney disciplinary matter, an attorney was disbarred as a result of committing various felonies (violently physically attacking that attorney's spouse in front of their children, destruction of evidence and continual violation of a protective order) in the State of Maine which violated Law. R. Prof. Conduct 3.4(a) and (c) and 8.4(b), (c), and (d); the Supreme Court of Delaware rejected the attorney's defense that the conduct was the result of 2 brain injuries, as the medical evidence did not address mental state at the time of the crimes and there was nothing in the record to suggest that the attorney raised any defense to those crimes based on the claimed infirmity. In re Enna, 971 A.2d 110 (Del. 2009).

Because there was evidence to support the finding that a suspended attorney knowingly practiced law multiple times over more than 1 year during a disciplinary suspension, the lawyer violated multiple disciplinary rules; the appropriate sanction in the circumstances was disbarment. In re Member of the Bar of the Supreme Court of Del. Feuerhake, 89 A.3d 1058 (Del. 2014).

— Obligations to tribunal.

Failure to comply with directions of Court in relation to pleadings is a violation of this Rule. In re Tos, 576 A.2d 607 (Del. 1990).

Attorney violated subsection (c) when, in connection with the receivership of his law practice, he failed to cooperate with the receiver's efforts to gain control over the books and records of the practice. In re Maguire, 725 A.2d 417 (Del. 1999).

Where attorney violated Rule 1.2(a), Rule 1.3, Rule 1.4(a) and (b), Rule 1.15(a) and (d), Rule 1.16(b) and (d), and Rule 3.4 (c), attorney agreed to pay all the costs of the disciplinary proceedings, the costs of the investigatory audits performed by the Lawyers' Fund for Client Protection, the restitution noted in the parties stipulation, and consented to the imposition of a public reprimand with a public four-year probation with conditions. In re Solomon, 745 A.2d 874 (Del. 1999).

Where attorney failed to timely file the affidavit required by Rule 4(a)(1) of the Delaware Rules for Mandatory Continuing Legal Education, he violated subsection (c) of this section; thus, a public reprimand was the appropriate sanction, as the attorney had received a prior private admonition for similar misconduct in the past. In re McDonald, 755 A.2d 389 (Del. 2000).

Where attorney who had practiced for over 20 years and was found to be a good lawyer committed professional misconduct by failing to appear at a scheduled family court hearing and by failing to reschedule two other teleconferences in family court, which constituted violations of Del. Law. R. Prof. Conduct 3.4(c) and 8.4(d), the public probation period that attorney was already serving for prior misconduct was extended for an additional year. In re Solomon, 847 A.2d 1122 (Del. 2004).

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

When an attorney handling 2 estates, inter alia, failed to probate the estates in a timely manner, the attorney violated Law. R. Prof. Conduct 3.4(c). In re Wilson, 886 A.2d 1279 (Del. 2005); In re Wilson, 900 A.2d 102 (Del. 2006).

Attorney, who was not authorized to practice law in Delaware, was disbarred for violating Law. R. Prof. Conduct 3.4(c) as, even if the attorney contacted Pennsylvania authorities to determine whether the attorney's conduct violated Delaware law, the attorney was told to contact Delaware authorities, and did not do so; the attorney knowingly violated a cease and desist order that prohibited the conduct. In re Tonwe, 929 A.2d 774 (Del. 2007).

While an attorney's violation of a cease and desist order would have supported a finding of contempt under Bd. Unauthorized Prac. L. R. 19, the Delaware Office of Disciplinary Counsel did not abuse its discretion in proceeding under the attorney disciplinary rules as the same conduct also constituted knowing disobedience of a court order in violation of Law. R. Prof. Conduct 3.4(c). In re Tonwe, 929 A.2d 774 (Del. 2007).

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. 3.4(c). In re Davis, 43 A.3d 856 (Del. 2012).

The Board on Professional Responsibility did not find by clear and convincing evidence a violation of Law Prof. Conduct R. 3.4(c) where: (1) the attorney constructively refused court-ordered appointments by presenting that attorney's own abilities in such a poor light to clients as to encourage them to seek other representation; but (2) the attorney requested documentation and continuances in both cases, a nominal sign of a willingness to proceed as attorney of record. In re Murray, 47 A.3d 972 (Del. 2012).

Where an attorney engaged in lateness or failure to appear at scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and wasted judicial resources in 3 Delaware Courts, in addition to violating the duty of candor to the Supreme Court of Delaware, the attorney violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Suspension for 6 months and 1 day was warranted where an attorney: (1) violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4; (2) had a record of 2 prior private admonitions; (3) engaged in a pattern of misconduct consisting of multiple offenses; (4) suffered from personal or emotional problems; (5) cooperated with the Office of Disciplinary Counsel in connection with the hearing; (6) was generally of good character, as evidenced by willingness to represent those who might not otherwise have had representation; and (7) exhibited remorse. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Attorney admittedly committed disciplinary violations by failing to comply with continuing legal education (CLE) requirements, and by failing to respond to communications with the CLE Commission about that deficiency. In re Poverman, 80 A.3d 960 (Del. 2013).

Attorney who committed various disciplinary violations with respect to the failure to complete continuing legal education requirements and reporting obligations relating thereto was publicly reprimanded with conditions, because: (1) the attorney acted knowingly and had no remorse; (2) the attorney did not cause injury to a client; and (3) the aggravating factors outweighed the mitigating ones. In re Poverman, 80 A.3d 960 (Del. 2013).

Where an attorney, in order to benefit a client, knowingly violated the Chancery Court's seizure order enjoining persons from bringing claims relating to an insurer except in that Court, thereby causing injury to the insurer and the Insurance Commissioner and prejudice to the judicial system, the presumptive sanction of suspension was nevertheless reduced to public reprimand; mitigating factors outweighed the aggravating factors in the case. In re Brown, 103 A.3d 515 (Del. 2014).

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).

It was prosecutorial misconduct to vouch for 1 of the State's 2 key witnesses, a friend of the victim, by stating in an objection during cross-examination that the witness had not spoken to defendant since the point in time defendant shot the victim. McCoy v. State, 112 A.3d 239 (Del. 2015).

Office of Disciplinary Counsel proved by clear and convincing evidence that an attorney committed professional conduct violations by knowingly causing images from a sexual abuse victim's cell phone to be shown to both the victim's parent and defendant in violation of a protective order. In re Koyste, 111 A.3d 581 (Del. 2015).

— Opposing counsel.

While an attorney has duties of fairness to an opposing party and may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, an attorney need not affirmatively reveal the weakness of his case to his opponent. In re Enstar Corp., 593 A.2d 543 (Del. Ch. 1991), rev'd on other grounds, 604 A.2d 404 (Del. 1992).

New trial was granted where defense counsel's comments to jury included an unjustified attack on the integrity of opposing counsel. Putney v. Rosin, 791 A.2d 902 (Del. Super. Ct. 2001).

— Witnesses.

All Delaware lawyers are bound by the Delaware Lawyers' Rules of Professional Conduct to refrain at trial from expressing a personal opinion on the credibility of a witness. Trump v. State, 753 A.2d 963 (Del. 2000).

Defense counsel did not violate subsection (e) of this rule when, during closing argument, counsel made comments which compared a witness' testimony on the stand to information provided during meetings conducted prior to trial. Russo v. Medlab Clinical Testing, Inc., 2001 Del. Super. LEXIS 464 (Del. Super. Ct. Nov. 14, 2001).

First corporation's motion to approve its designation of a consultant was granted because, although the consultant was also to be a fact witness, the compensation the first corporation proposed to pay to the consultant related to that consultant's work as such, and not to any willingness to testify as to the facts underlying the claims; there was no Prof. Conduct R. 3.4(b) violation. BAE Sys. Info. & Elec. Sys. Integration v. Lockheed Martin Corp., 2011 Del. Ch. LEXIS 117 (Del. Ch. Aug. 10, 2011).

Rule 3.5. Impartiality and decorum of the tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate or cause another to communicate ex parte with such a person or members of such person's family during the proceeding unless authorized to do so by law or court order; or

(c) communicate with a juror or prospective juror after discharge of the jury unless the communication is permitted by court rule;

(d) engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to void contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate or cause another to communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, or with members of such person's family, unless authorized to do so by law or court order. Furthermore, a lawyer shall not conduct or cause another to conduct a vexatious or harassing investigation of such persons or their family members.

[3] A lawyer may not communicate with a juror or prospective juror after the jury has been discharged unless permitted by court rule. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on

behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive, undignified or discourteous conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

NOTES TO DECISIONS

Analysis

Decorum toward tribunal.

Revocation of an attorney's admission pro hac vice was authorized for his failure to control his client's behavior during a deposition. State v. Mumford, 731 A.2d 831 (Del. Super. Ct. 1999).

Evidence held sufficient to establish a violation of subsection (c) of this Rule where attorney filed a reply brief castigating the trial judge in personal terms. In re Shearin, 721 A.2d 157 (Del. 1998), cert. denied, 526 U.S. 1122, 119 S. Ct. 1776, 143 L. Ed. 2d 805 (1999).

In an appeal taken to the trial court from a licensing board, attorney's written arguments suggesting that the trial court would not rule on the merits, an unfounded accusation, violated Law R. Prof. Conduct 3.5(d), conduct degrading to a tribunal, and Law R. Prof. Conduct 8.4(d), conduct prejudicial to the administration of justice; the trial court had to waste judicial resources striking the offending arguments sua sponte and writing an opinion explaining its actions, and warranted a public reprimand of the attorney. In re Abbott, 925 A.2d 482 (Del. 2007), cert. denied, — U.S. —, 128 S. Ct. 381, 169 L. Ed. 2d 263 (2007).

Attorney engaged in undignified and discourteous conduct, in violation of Law Prof. Conduct R. 3.5(d), through: (1) the language and tenor of the attorney's communications with the court and with clients; (2) persistent efforts to be excused from appointments; (3) failure to obtain substitute counsel; and (4) actions which were disruptive to the tribunal. In re Murray, 47 A.3d 972 (Del. 2012).

While it was true that an attorney's language did not amount to the inflammatory language of other cases where public reprimand was ordered, the attorney did send discourteous letters to the court in 3 different cases and violated Law Prof. Conduct R. 3.5 and 6.2 in each of those cases; because the Law Prof. Conduct R. 8.4(d) violation for the wasting of judicial resources in attempting to avoid court appointment was not de minimus, public reprimand was appropriate. In re Murray, 47 A.3d 972 (Del. 2012).

Prosecutor's conduct did not comport with fundamental professional requirements because, rather than ensure that justice be done, the prosecutor: (1) appeared to prevent a self-representing defendant's proper defense; (2) mocked defendant during cross-examination; (3) attempted to prevent defendant from using standby counsel for legal research and logistical assistance; and (4) actively generated a level of cynicism that permeated the trial. McCoy v. State, 112 A.3d 239 (Del. 2015).

Deputy attorney general was suspended from the practice of law for 6 months and 1 day for 7 ethical violations because the attorney initially falsely denied making statements (corroborated by a prothonotory also present) threatening a criminal defendant by implying that the State would brand that defendant an informant; the attorney admitted only part of the substance, falsely accusing the defendant of eavesdropping, although later admitting that the attorney intended for the defendant to hear the intimidating statements about possible prison reprisals. In re Favata, 119 A.3d 1283 (Del. 2015).

Thirty-day suspension of a deputy attorney general was appropriate because the attorney's conduct, cajoling a bailiff to enter a room in a courthouse brandishing a firearm as an ill-conceived prank, involved breaches of duties owed to the legal system and to the legal profession. In re Gelof, 142 A.3d 506 (Del. 2016).

Ex parte communications.

Attorney for a family did not have to be disqualified pursuant to Law R. Prof. Conduct 3.5 for sending ex parte communications to the prior trial court, as the prior trial court recused itself based on such communications and no such communications were made to the current trial court in a case involving the family's claim that an insurer breached the implied covenant of good faith and fair dealing. Dunlap v. State Farm Fire & Cas. Co., 955 A.2d 132 (Del. Super. Ct. 2007), rev'd and remanded on other grounds, 950 A.2d 658 (Del. 2008).

Superior Court properly affirmed the Delaware State Public Integrity Commission's dismissal of a state attorney's complaint because the Commission did not commit a manifest error in law in concluding a state's attorney's allegations of ex parte communications failed to state a violation; ex parte communications in a matter pending before a state tribunal are not the type of misconduct that the State Ethics Code is designed to cover. Abbott v. Del. State Pub. Integrity Comm'n, 206 A.3d 260 (Del. 2019).

Opposing counsel.

An attorney who referred to opposing counsel in a crude, but graphic, anal term while in an office conference with a judge violated subsection (c) of this Rule and 11 Del. C. § 1271(1). In re Ramunno, 625 A.2d 248 (Del. 1993).

Reply brief filled with abusive references to the opposing party and its counsel was so unprofessional and degrading to the court that it struck much of the brief, sua sponte, and directed the party to draft and submit a new one. 395 Assocs., LLC v. New Castle County, 2005 Del. Super. LEXIS 386 (Del. Super. Ct. Nov. 28, 2005).

Standard of review.

When the alleged misconduct of a state employee directly relates to a lawyer's conduct before a tribunal, the standard governing the lawyer's conduct is likely to be supplied by the Lawyers' Rules of Professional Conduct; any violation of those rules should be addressed by that tribunal or the Board of Professional Responsibility. Abbott v. Del. State Pub. Integrity Comm'n, 206 A.3d 260 (Del. 2019).

Witnesses.

Although the State's questioning of the witnesses was improper to the extent that the witnesses indicated that defendant was on probation, as the trial court had specifically instructed the State not to reveal that fact, the error was harmless under an analysis pursuant to Baker v. State, 906 A.2d 139 (Del. 2006), as defendant's substantial rights were not affected and doubt was not cast on the integrity of the judicial process. Bunting v. State, 907 A.2d 145 (Del. 2006).

Rule 3.6. Trial publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding inthe matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such Rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial

likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects which are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party of witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the

likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

NOTES TO DECISIONS

Gag orders.

Court denied motion for a gag order where the disputed statements were made to protect the plaintiff from the substantial undue prejudicial effect of recent publicity initiated when an email containing a confidential Internal Affairs file was released to a Delaware newspaper, in violation of the confidentiality provisions of 11 Del. C. § 9200(c)(12); as such, plaintiff's attorney's statements fell under the "safe haven" of the Law. Prof. Conduct R. 3.6. Conley v. Chaffinch, — F. Supp. 2d —, 2005 U.S. Dist. LEXIS 3279 (D. Del. Mar. 2, 2005).

While keeping a court record sealed was not warranted, an order limiting publicity was entered; given the subject matter of the case, child sex abuse, media coverage was certainly possible. Sokolove v. Marenberg, 2013 Del. Super. LEXIS 598 (Del. Super. Ct. Dec. 20, 2013).

Commissioner properly issued a limited gag order prohibiting property owners, operators of chicken processing plants, attorneys, experts, consultants, witnesses and any persons or entities acting on behalf of the operators in a public relations capacity from publicly commenting on a case, except in accordance with Law. Prof. Conduct R. 3.6; the order was balanced and was designed to ensure a fair trial by restricting language designed to influence the potential jury pool. Cuppels v. Mountaire Corp., — A.3d —, 2019 Del. Super. LEXIS 66 (Del. Super. Ct. Feb. 5, 2019).

Public facts.

There was no showing, and no factual assertion to support, that the prosecution knew or reasonably should have known that the statements, referring to defendant as a "cold-blooded killer," would have a substantial likelihood of materially prejudicing the proceedings nor that the proceedings were likely to be prejudiced, and the statements mirrored language used by the prosecution in its closing argument and did not appear in the newspaper until after defendant was found guilty of first-degree murder; therefore, the statement that was published in the newspaper described information that the prosecution had put into the public record of the trial. State v. Ploof, 2003 Del. Super. LEXIS 285 (Del. Super. Ct. Aug. 20, 2003).

Rule 3.7. Lawyer as witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

COMMENT

[1] Combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

[2] *Advocate-Witness Rule.* — The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to

testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest.

[6] *Conflict of Interest.* — In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the

client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.

NOTES TO DECISIONS

Analysis

Employer and employee relations.

In an unemployment benefits matter the employer's attorney was not disqualified under a former version of this rule from serving as counsel even though the attorney was a part-time employee of the employer because the attorney did not serve in any managerial capacity and could not provide testimony regarding any of the contested issues in the case, therefore, was not a necessary witness in the case. Brighton Hotels v. Gennett, 2002 Del. Super. LEXIS 372 (Del. Super. Ct. Oct. 23, 2002).

Enforcement.

A non-client litigant does have standing to enforce the Delaware Rules of Professional Conduct in a trial court when he or she can demonstrate to the trial judge that the opposing counsel's conflict somehow prejudiced his or her rights and calls into question the fair or efficient administration of justice. In re Estate of Waters, 647 A.2d 1091 (Del. 1994).

There was no basis to grant a protective order precluding the testimony of an attorney as a rebuttal witness because: (1) the attorney was timely identified on the trial witness list based on a reservation of right; (2) there was no prejudice shown with respect to a sequestration order; and (3) the attorney's testimony as a fact witness did not violate the witness-as-advocate rule where the attorney did not serve as an advocate at trial. In re Oxbow Carbon LLC Unitholder Litig., — A.3d —, 2017 Del. Ch. LEXIS 135 (Del. Ch. July 28, 2017).

Ex parte communications.

Attorney for a family did not have to be disqualified pursuant to Law R. Prof. Conduct 3.5 for sending ex parte communications to the prior trial court, as the prior trial court recused itself based on such communications and no such communications were made to the current trial court in a case involving the family's claim that an insurer breached the implied covenant of good faith and fair dealing; however, that attorney did have to be disqualified pursuant to Law R. Prof. Conduct 3.7 because the attorney could be called to testify about negotiations that occurred related to the family's claim. Dunlap v. State Farm Fire & Cas. Co., 955 A.2d 132 (Del. Super. Ct. 2007), rev'd and remanded on other grounds, 950 A.2d 658 (Del. 2008).

Family law.

Chancery Court denied a former husband's motion to disqualify his former wife's attorney, on the ground that the attorney may have been required to testify in the husband's action to rescind transfers of property between the former husband and his former wife; Law. Prof. Conduct R. 3.7(a) was not so rigid as to require the counsel's immediate withdrawal or to deny her the opportunity to present a motion on behalf of the former wife to dismiss for lack of subject matter jurisdiction. Benge v. Oak Grove Motor Court, Inc., 2006 Del. Ch. LEXIS 5 (Del. Ch. Jan. 13, 2006).

As there was no other client, current or former, to cause a conflict of interest, the wife's attorney was not precluded from representing the wife, when another member of the attorney's firm took the stand as a witness for the wife during the hearing. L.L.L. v. W.B.L., 2007 Del. Fam. Ct. LEXIS 196 (Del. Fam. Ct. Jan. 17, 2007).

There was no basis to disqualify a former paramour's attorney in a support action, because although the attorney was employed in a law firm also employing an attorney currently dating the former paramour: (1) there was no a significant risk of material limitation to the representation; (2) there was no conflict of interest; and (3) the attorney's testimony about attorneys' fees was within an exception under the professional conduct rules. Bark v. May, — A.3d —, 2015 Del. Super. LEXIS 530 (Del. Super. Ct. Sept. 28, 2015).

Personal injuries.

In a personal injury action wherein an adult child alleged childhood sexual abuse by a parent, the child was not entitled to disqualify the parent's attorney under this rule because: (1) the child did not present clear and convincing evidence that the attorney had information regarding alleged abuse of the child's sibling; (2) there was no evidence the attorney became friends with the sibling; and (3) the child failed to demonstrate the attorney's testimony would be necessary to the resolution of the suit. McLeod v. McLeod, — A.3d —, 2014 Del. Super. LEXIS 662 (Del. Super. Ct. Dec. 20, 2014).

Standard of review.

In determining whether to disqualify an attorney under this Rule, the court should balance the purposes to be served by the Rule against such countervailing interests as a litigant's right to retain counsel of his choice. In re ML-Lee Acquisition Fund II, 848 F. Supp. 527 (D. Del. 1994).

Stock derivative suits.

When, in a derivative action, plaintiffs' counsel was disqualified because of the possibility that he could be a witness in the action, and plaintiffs did not subsequently retain substitute counsel or appear at the trial court's calendar call, resulting in the dismissal of their action, the trial court's prior disqualification of counsel was not evidence of plaintiffs' bad faith justifying an award to defendant of attorney's fees or costs. Mainiero v. Tanter, 2003 Del. Ch. LEXIS 43 (Del. Ch. Apr. 25, 2003).

When, in a derivative action, plaintiffs' counsel was disqualified because of the possibility that he could be a witness in the action, the failure of plaintiffs to appear, through counsel, more than four months later, at the trial court's calendar call, as required by Del. Ch. Ct. R. 40(c), justified dismissal of plaintiffs' case, under Del. Ch. Ct. R. 41(b), due to their failure to comply with the Delaware Chancery Court Rules. Mainiero v. Tanter, 2003 Del. Ch. LEXIS 43 (Del. Ch. Apr. 25, 2003).

Trusts and estates.

It was plain error for the scrivener of a contested will to testify at trial and also participate in the proceedings as an attorney for one of the parties. In re Estate of Waters, 647 A.2d 1091 (Del. 1994).

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d)(1) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(2) when the prosecutor comes to know of new, credible and material evidence establishing that a convicted defendant did not commit the offense for which the defendant was convicted, the prosecutor shall, unless a court authorizes delay, make timely disclosure of that evidence to the convicted defendant and any appropriate court, or, where the conviction was obtained outside the prosecutor's jurisdiction, to the chief prosecutor of the jurisdiction where the conviction occurred;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:

(1) the information sought is not protected from disclosure by any applicable privilege;

(2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and

(3) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule. (Amended, effective Sept. 21, 2009.)

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The duty of disclosure described in paragraph (d) does not end with the conviction of the criminal defendant. The prosecutor also is bound to disclose after-acquired evidence that casts doubt upon the correctness of the conviction. If a prosecutor becomes aware of new, material and

credible evidence which leads him or her to reasonably believe a defendant may be innocent of a crime for which the defendant has been convicted, the prosecutor should disclose such evidence to the appropriate court and, unless the court authorizes a delay, to the defense attorney, or, if the defendant is not represented by counsel, to the defendant. If the conviction was obtained outside the prosecutor's jurisdiction, disclosure should be made to the chief prosecutor of the jurisdiction where the conviction occurred. A prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligation of paragraph (d), even if subsequently determined to have been erroneous, does not constitute a violation of this Rule. The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) is intended to limit the issuance of lawyer subpoenas in grand jury and other criminal proceedings to those situations in which there is a genuine need to intrude into the client-lawyer relationship.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extra judicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments that have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making

improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

NOTES TO DECISIONS

Hindering defense.

Prosecutor's conduct did not comport with fundamental professional requirements because, rather than ensure that justice be done, the prosecutor: (1) appeared to prevent a self-representing defendant's proper defense; (2) mocked defendant during cross-examination; (3) attempted to prevent defendant from using standby counsel for legal research and logistical assistance; and (4) actively generated a level of cynicism that permeated the trial. McCoy v. State, 112 A.3d 239 (Del. 2015).

Lend-A-Prosecutor Program.

Under 29 Del. C. § 2505, the Attorney General is authorized to appoint a part-time prosecutor employed and compensated by a private law firm to prosecute criminal cases for the state. There is no bar to this Lend-A-Prosecutor Program on ethical grounds where no actual conflict between the public and private interest is presented. Seth v. State, 592 A.2d 436 (Del. 1991).

Rule 3.9. Advocate in nonadjudicative proceedings.

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through(c) and 3.5(a) and (c).

COMMENT

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

Rule 3.10. Communication with or investigation of jurors [Deleted].

Revisor's note. — Former Rule 3.10, which concerned communication with or investigation of jurors, was deleted effective July 1, 2003.

Cross references. — As to current provisions concerning communication with (or investigation of) jurors, see Rule 3.5.

Rule 4.1. Truthfulness in statements to others.

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT

[1] *Misrepresentation.* — A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

[2] *Statement of Fact.* — This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

[3] *Crime or Fraud by Client.* — Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation.

Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

NOTES TO DECISIONS

Candor toward the tribunal.

Based on an attorney's false statements to a Virginia court regarding delivery of legal documents to a party-opponent, and misleading statements in a Virginia disciplinary proceeding constituting violations of Law. Prof. Conduct R. 3.3(a)(1), 4.1, and 8.4(c), a 30-day suspension was imposed; rather than imposing an "admonishment with terms," as Virginia did, a "substantially different discipline" was warranted pursuant to Bd. Prof. Resp. 18(4). In re Amberly, 996 A.2d 793 (Del. 2010).

Disbarment was the appropriate sanction for an attorney's intentional misconduct in a medical negligence case, which included failing to disclose altered medical records, failing to supplement discovery responses and failing to correct a client's false testimony (despite multiple opportunities for corrective action); although the attorney had no prior disciplinary record and presented evidence of good character and reputation, dishonesty and other aggravating factors outweighed the mitigating factors. In re McCarthy, 173 A.3d 536 (Del. 2017).

Truthfulness.

Attorney committed violations of the professional conduct rules by making false statements of material fact to lenders on Department of Housing and Urban Development settlement statements ("HUD-1 statements") filed on behalf of the attorney and the attorney's clients as borrowers in residential real estate matters; the attorney's certification of the HUD-1 statements was not a true and accurate account of the transactions. In re Sanclemente, 86 A.3d 1119 (Del. 2014).

Attorney who violated the Delaware Rules of Professional Conduct, as well as 18 U.S.C. § 1010, by making false certifications in Department of Housing and Urban Development settlement statements (HUD-1 statements) was disbarred; the attorney acted with the intent of facilitating 22 real estate closings that defrauded those who relied on the accuracy of the HUD-1 statements. In re Sullivan, 86 A.3d 1119 (Del. 2014).

Inmate did not show ineffective assistance of counsel; the inmate did not allege a specific instance in which counsel violated this rule or prove that the guilty plea at issue was unknowingly or involuntarily entered. State v. Pickle, — A.3d —, 2017 Del. Super. LEXIS 634 (Del. Super. Ct. Dec. 4, 2017).

Rule 4.2. Communication with person represented by counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may

communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

NOTES TO DECISIONS

Analysis

Applicability.

This Rule relates only to present principals, officers, employees, agents, etc., of a represented entity and does not prohibit ex parte communications with former employees of a represented entity. DiOssi v. Edison, 583 A.2d 1343 (Del. Super. Ct. 1990).

A relevant inquiry is whether an individual is represented since this Rule is only applicable if the lawyer "knows" that the individual is "represented by another lawyer." Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. Super. Ct. 1990).

Intent of rule.

The clear purpose of this Rule is to foster and protect the attorney-client relationship, and not to provide protection to a party in civil litigation nor place a limit on discoverable material. DiOssi v. Edison, 583 A.2d 1343 (Del. Super. Ct. 1990).

This Rule is intended to preclude ex parte communications with those who could currently bind or admit liability for the represented entity. DiOssi v. Edison, 583 A.2d 1343 (Del. Super. Ct. 1990).

Represented parties.

When investigators did not determine if former employees were represented by counsel, did not clearly identify themselves as working for attorneys who were representing a client which was involved in litigation against their former employer, did not clearly state the purpose of the interview, and where affirmative misrepresentations regarding these matters were made, this Rule and Rule 4.3 were violated. Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. Super. Ct. 1990).

Rule 4.3, read in conjunction with this Rule, requires more than a simple disclosure by an investigator of his identity qua investigator. Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. Super. Ct. 1990).

Requiring that counsel representing a creditor in a bankruptcy proceeding be served with notice of a debtor's objections to the creditor's claim is consistent with this rule. In re Lomas Fin. Corp., 212 Bankr. 46 (Bankr. D. Del. 1997).

Addresses and phone numbers of a corporation's employee eyewitnesses to an explosion were properly discoverable and motion to compel was granted where the employees were not deemed to be represented by corporate counsel, as there was no assertion that the employees at issue served in any type of managerial capacity and there were no allegations that any of these employees were negligent or that their acts or omissions contributed to the explosion; the claimant's need to uncover the truth and prepare for trial outweighed the corporation's interest in withholding the information. Showell v. Mountaire Farms, Inc., 2002 Del. Super. LEXIS 492 (Del. Super. Ct. Nov. 18, 2002).

Because a codefendant was represented by counsel, the public defender's office was not permitted to interview the codefendant. State v. Coleman, 2003 Del. Super. LEXIS 492 (Del. Super. Ct. Feb. 19, 2003).

Defendant's motion to suppress statements and derivative evidence was denied where, inter alia, the prosecutor disclosed that there was a potential conflict of interest between defendant and defendant's counsel, and the record did not reflect that the government's knowledge of counsel's possible breach of his ethical duties tainted defendant's interviews. United States v. Kossak, 275 F. Supp. 2d 525 (D. Del. 2003).

Purchasing corporation's (PC) motion for a protective order to preclude former shareholders of a sold corporation (SC) from conducting ex parte interviews with the PC's former management employees, who previously held shares in the SC and who were privy to privileged information regarding a merger agreement and a lawsuit by the shareholders thereunder, was denied where only key non-privileged information was sought from the former employees, they were key witnesses, and there was no violation of Law. R. Prof. Conduct 4.2. LaPoint v. Amerisourcebergen Corp., 2006 Del. Ch. LEXIS 134 (Del. Ch. July 18, 2006).

Attorneys for the buyers were guilty of litigation misconduct by failing to provide the necessary cautionary instructions to former employees of the sellers, whom the attorneys contacted, so that their actions at least created the appearance of violating the Delaware Rules of Professional Conduct, and undermined the integrity of the proceedings. Although the court did not conclude that the attorneys, in fact, violated the applicable Delaware Rules of Professional Conduct, the court found that the actions of the attorneys created a sufficient threat to the integrity of the proceedings that some form of sanction was warranted; accordingly, the court disqualified the attorneys, but not the attorneys' law firm, from representing the buyers and awarded the sellers a portion of the sellers' attorneys' fees and costs in bringing the sellers' motion for sanctions. Postorivo v. AG Paintball Holdings, Inc., 2008 Del. Ch. LEXIS 120 (Del. Ch. Aug. 20, 2008).

Rule 4.3. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter

into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

NOTES TO DECISIONS

Analysis

Employer and employee relations.

Addresses and phone numbers of a corporation's employee eyewitnesses to an explosion were properly discoverable and motion to compel was granted where employees were considered to be unrepresented by counsel; however, any interviews of such employees would have to be conducted in accordance with a former version of this rule. Showell v. Mountaire Farms, Inc., 2002 Del. Super. LEXIS 492 (Del. Super. Ct. Nov. 18, 2002).

Family law.

Given the inequity that would result if petitioner were forced to comply with a Commissioner's order to pay respondent's attorney's fees, as the respondent reasonably believed that an attorney from the Division of Child Support Enforcement was providing representation (even though the signed application for contained boilerplate language to the contrary), the order was rejected; the Division was relieved from the Commissioner's order despite its possible bad faith. DCSE v. W.C., 2007 Del. Fam. Ct. LEXIS 62 (Del. Fam. Ct. Sept. 21, 2007).

Wife's interpretation of a letter by the husband's attorney — that the attorney had accepted the role of securing the wife's interest in the husband's pension — was reasonable; however, the attorney made no efforts to correct this foreseeable misunderstanding when the qualified domestic relations order was not completed. Greater vigilance was necessary with regard to communications between attorneys and those unrepresented by counsel. J. T. E. v. D. K., 2008 Del. Fam. Ct. LEXIS 106 (Del. Fam. Ct. June 13, 2008).

Insurance.

When investigators did not determine if former employees were represented by counsel, did not clearly identify themselves as working for attorneys who were representing a client which was involved in litigation against their former employer, did not clearly state the purpose of the interview, and where affirmative misrepresentations regarding these matters were made, this Rule and Rule 4.2 were violated. Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. Super. Ct. 1990).

This Rule, read in conjunction with Rule 4.2, requires more than a simple disclosure by an investigator of his identity qua investigator. Monsanto Co. v. Aetna Cas. & Sur. Co., 593 A.2d 1013 (Del. Super. Ct. 1990).

Rule 4.4. Respect for rights of third persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the

privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, e-mail and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

NOTES TO DECISIONS

Attorney-client privilege.

Attorneys for the buyers were guilty of litigation misconduct in failing to act sooner to provide appropriate notice to the sellers and to take reasonable steps in the meantime to avoid unwarranted intrusions upon the sellers' colorable claims of privilege. Although the court did not conclude that either attorney, in fact, violated the applicable Delaware Rules of Professional Conduct, the court found that the actions of the attorneys created a sufficient threat to the integrity of the proceedings that some form of sanction was warranted; accordingly, the court disqualified the attorneys, but not the attorneys' law firm, from representing the buyers and awarded the sellers a portion of the sellers' attorneys' fees and costs in bringing the sellers' motion for sanctions. Postorivo v. AG Paintball Holdings, Inc., 2008 Del. Ch. LEXIS 120 (Del. Ch. Aug. 20, 2008).

Attorney's disclosure of a codefendant's statement to the attorney's client charged with murder and related offenses, after the attorney retrieved it from the codefendant's file, violated the codefendant's attorney-client privilege; the disclosure constituted a violation of the professional conduct rules relating to the confidentiality of information and conduct that was prejudicial to the administration of justice. In re Lyle, 74 A.3d 654 (Del. 2013).

Disrespectful communications.

Attorney was publicly reprimanded with conditions because the offensive portions of emails sent by the attorney to 4 different Deputy Attorneys Generals (DAGs) had no substantial purpose other than to embarrass, delay or burden opposing counsel; the comments included, calling a male DAG "a certified asshole," calling a female DAG "another beautiful, but arrogant female" and referring to another female DAG as "Kurvacious" and "Kooky." In re Memebr of the Bar of the Supreme Court: Hurley, 183 A.3d 703 (Del. 2018).

Rule 5.1. Responsibilities of partners, managers, and supervisory lawyers.

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question off act. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of

misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional conduct. See Rule 5.2(a).

NOTES TO DECISIONS

Law firms.

— Managing partners.

Effective on July 1, 2003, lawyers with managerial authority within a firm are required to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Delaware Lawyers' Rules of Professional Conduct; such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property, and ensure that inexperienced lawyers are properly supervised. In re Bailey, 821 A.2d 851 (Del. 2003).

An attorney committed professional conduct violations with respect to engaging in various real estate closings because that attorney was the sole owner and managing partner of the firm and had supervisory authority over the questionable conduct of a second attorney (as well as over nonlawyer employees). In re Sanclemente, 86 A.3d 1119 (Del. 2014).

Rule 5.2. Responsibilities of a subordinate lawyer.

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

COMMENT

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

Rule 5.3. Responsibilities regarding non-lawyer assistance.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See Comment [6] to Rule 1.1 (retaining lawyers outside the firm) and Comment [1] to Rule 5.1 (responsibilities with respect to lawyers within a firm). Paragraph (b) applies to lawyers who have supervisory authority over such

nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

[2] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[3] *Nonlawyers outside the firm.* — A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

NOTES TO DECISIONS

Analysis

Law firms.

— Managing co-counsel.

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).

— Managing of employees.

Attorney whose child stole funds from the attorney's escrow account was publicly reprimanded for violating Law. Prof. Conduct R. 5.3 by failing to have reasonable safeguards in place to assure accurate accounting and by failing to supervise the attorney's child (who was working for the attorney). In re Otlowski, 976 A.2d 172 (Del. 2009).

Attorney was suspended for 1 year, with the suspension to run retroactively to the date the attorney was transferred to disability inactive status, for violating Law. R. Prof. Conduct 5.3 by: (1) failing to have reasonable safeguards in place to assure accurate accounting of the financial books and records; and (2) failing to supervise nonlawyer assistants. In re Nowak, 5 A.3d 631 (Del. 2010).

The appropriate sanction was a public reprimand and 1 year probation period where: (1) an attorney violated the conditions of a previously imposed private admonition by failing to provide a required precertification and not promptly paying various payroll taxes; (2) the attorney admitted to violating Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 1.15(b), 1.15(d), 5.3, 8.4(c), and 8.4(d); (3) the attorney's violations were not isolated incidents but were repeat violations; (4) the attorney failed to adequately supervise a nonlawyer assistant to assure an accurate accounting of the firm's books and records; and (5) the attorney disregarded the conditions imposed on the private admonition. In re Martin, 35 A.3d 419 (Del. 2011).

Attorney handling real estate closings violated the Rules of Professional Conduct by taking took no action to prevent a paralegal from issuing checks inconsistent with the disbursement amounts listed on Department of Housing and Urban Development settlement statements, while knowing that the checks received from the buyers (in most instances were never cashed) and that the lenders were not notified of any of these actions. In re Sullivan, 86 A.3d 1119 (Del. 2014).

Attorney's admissions and the record established that the attorney violated Law. Prof. Conduct R. 1.5, 5.3, 8.4(c) and (d), resulting in 2 year's probation, by: (1) misrepresenting to the court the attorney's maintenance of records; and (2) failing to properly maintain them, to safeguard client funds, to provide for reasonable safeguards to assure accurate accounting, to supervise nonlawyer staff, and to timely file and pay taxes. In re Gray, 152 A.3d 581 (Del. 2016).

The Delaware Supreme Court accepted the Board on Professional Responsibility's findings and recommendation for discipline, publicly reprimanding and placing the attorney on a 2-year period of probation with the imposition of specific conditions, because the attorney failed to provide the client with a fee agreement and/or statement of earned fees withdrawn from the trust account, to identify and safeguard client fund, to maintain financial books and records or to supervise nonlawyer assistants; the attorney had engaged in conduct involving misrepresentation, prejudicial to the administration of justice. In re Malik, 167 A.3d 1189 (Del. 2017).

— Managing partners.

Where an attorney, the managing partner of a firm, admitted to violating Del. Law. R. Prof. Conduct 1.15(a) by keeping more than $1700 of the firm's funds in the client escrow account for almost a year, admitted to violating Del. Law. R. Prof. Conduct 1.15(d), by failing, for almost a year, to maintain the firm's books and records in compliance with the rule's requirements, admitted to violating Del. Law. R. Prof. Conduct 5.3 by failing to have reasonable safeguards in place to ensure an accurate accounting of the firm's financial books and records in compliance with the Rules, by failing to supervise employees' conduct in reconciling books and records and filing and paying payroll taxes, and by knowing that payroll, gross receipts, and corporate taxes were not being timely filed and paid, admitted to violating Del. Law. R. Prof. Conduct 8.4(c) by filing a Certificate of Compliance for the year 2000, which falsely stated that the law practice's books and records were maintained in compliance with Del. Law. R. Prof. Conduct 1.15 and by falsely stating on the Certificates of Compliance for 1998, 1999, and 2000 that the attorney was meeting tax filing and payment obligations, admitted to violating Del. Law. R. Prof. Conduct 8.4(d) by failing to file and pay various taxes and by filing false Certificates of Compliance for the years 1997, 1998, 1999, 2000, and 2001, and where a witness testified unequivocally that the attorney instructed the witness to transfer escrow funds to the firm's operating account, and client trust funds had to be, and were, invaded, the Office of Disciplinary Counsel's recommended public reprimand was rejected, and the attorney was suspended from the practice of law for six months and one day; a managing partner of a law firm had enhanced duties to ensure that the law firm complied with its recordkeeping and tax obligations, and the managing partner had to discharge those responsibilities faithfully and with the utmost diligence. In re Bailey, 821 A.2d 851 (Del. 2003).

An attorney committed professional conduct violations with respect to engaging in various real estate closings because that attorney was the sole owner and managing partner of the firm and had supervisory authority over the questionable conduct of a second attorney (as well as over nonlawyer employees). In re Sanclemente, 86 A.3d 1119 (Del. 2014).

Board on Professional Responsibility correctly assigned a 6-month suspension with conditions for violation of Law. Prof. Conduct R. 1.15, 5.3 and 8.4 because: (1) the Board considered the attorney's state of mind and concluded the attorney, as managing partner, was at least negligent in overseeing 2 non-attorneys to ensure the books and records were maintained in compliance with the rules; (2) the attorney knew of rule violations due to the negative balances in the account; (3) the attorney filed an inaccurate 2015 Certificate of Compliance with the Delaware Supreme Court that misrepresented the law firm's compliance with the rule on safekeeping property; (4) the covering funds relied on by the Board on Professional Responsibility should not have been considered a substitute for negative balances in the client subsidiary ledger; (5) the law firm had a duty to safeguard the clients' property but failed to do so; and (6) as a managing partner who failed to supervise non-attorney employees, the attorney was responsible for those deficiencies. In re Beauregard, 189 A.3d 1236 (Del. 2018).

— Taxes.

Attorney who was delinquent in the payment of the attorney's law practice's federal, state, and local payroll tax obligations violated Law. R. Prof. Conduct 1.15(b), 5.3, 8.4(c) and (d); due to the attorney's prior disciplinary history with delinquent taxes, a public reprimand, 18-month probation and implementation of internal accounting controls were warranted. In re Finestrauss, 32 A.3d 978 (Del. 2011).

Rule 5.4. Professional independence of a lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer;

(3) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of

the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

NOTES TO DECISIONS

Attorneys' fees.

— Fee splitting.

The fact that at the time of the fee splitting agreement the law firm had not registered with the Supreme Court of the state or that it was not registered to do business in the state pursuant to 8 Del. C. § 371 does not change its status as "lawyer." Tomar, Seliger, Simonoff, Adourian & O'Brien v. Snyder, 601 A.2d 1056 (Del. Super. Ct. 1990).

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).

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).

Rule 5.6. Restrictions on right to practice.

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

COMMENT

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

NOTES TO DECISIONS

Mootness agreement.

Even if the parties had a meeting of the minds regarding a fee award, the parties' purported fee agreement based on "mootness" of a failed merger attempt was void and unenforceable because the contract restricted the law firm's right to practice and, as such, violated this rule; the firm's initiation of some sort of litigation prevented or terminated the mootness fee arrangement. La. Mun. Police Emples. Ret. Sys. v. Black, — A.3d —, 2016 Del. Ch. LEXIS 36 (Del. Ch. Feb. 19, 2016).

Rule 5.7. Responsibilities regarding law-related services.

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

COMMENT

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional

Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the rules of Professional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-

related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship,

the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

Rule 6.1. Voluntary pro bono publico service.

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

COMMENT

[1] The ABA House of Delegates has formally acknowledged "the basic responsibility of each lawyer engaged in the practice of law to provide public interest legal services" without fee, or at a substantially reduced fee, in one or more of the following areas: poverty law, civil rights law, public rights law, charitable organization representation and the administration of justice. This Rule expresses that policy but is not intended to be enforced through the disciplinary process.

[2] The rights and responsibilities of individuals and organizations in the United states are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do.

[3] The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in or otherwise support the provision of legal services to the disadvantaged. The provision of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer as well as the profession generally, but the efforts of individual lawyers are often not enough to meet the need. Thus, it has been necessary for the profession and government to institute additional programs to provide legal services.

Accordingly, legal aid offices, lawyer referral services and other related programs have been developed, and others will be developed by the profession and government. Every lawyer should support all proper efforts to meet this need for legal services.

Rule 6.2. Accepting appointments.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

[2] *Appointed Counsel.* — For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

NOTES TO DECISIONS

Avoiding appointment.

The Board on Professional Responsibility found that the Office of Disciplinary Counsel established by clear and convincing evidence that an attorney sought to avoid appointment by the Family Court on 3 occasions, without good cause, in violation of Law Prof. Conduct R. 6.2. In re Murray, 47 A.3d 972 (Del. 2012).

While it was true that an attorney's language did not amount to the inflammatory language of other cases where public reprimand was ordered, the attorney did send discourteous letters to the court in 3 different cases and violated Law Prof. Conduct R. 3.5 and 6.2 in each of those cases; because the Law Prof. Conduct R. 8.4(d) violation for the wasting of judicial resources in attempting to avoid court appointment was not de minimus, public reprimand was appropriate. In re Murray, 47 A.3d 972 (Del. 2012).

While an attorney appointed by a Family Court possessed qualified immunity under 10 Del. C. § 4001, because a malpractice claim was subject to dismissal based upon that qualified immunity, the lack of professional malpractice insurance coverage by the attorney would not constitute good cause under Law Prof. Conduct R. 6.2(b) to withdraw from court-appointed service. Hanson v. Morton, 67 A.3d 437 (Del. 2013).

Public service.

The Board on Professional Responsibility found that the Office of Disciplinary Counsel established by clear and convincing evidence that an attorney sought to avoid appointment by the Family Court on 3 occasions, without good cause, in violation of Law Prof. Conduct R. 6.2. In re Murray, 47 A.3d 972 (Del. 2012).

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Rule 6.3. Membership in legal services organization.

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

Rule 6.4. Law reform activities affecting client interests.

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules governing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

Rule 6.5. Non-profit and court-annexed limited legal-service programs.

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

COMMENT

[1] Legal-service organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services—such as advice or the completion of legal forms—that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circumstances, the lawyer may offer advice to the client but must also advise the client of the need for further

assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2) requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

Rule 7.1. Communications concerning a lawyer's services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] See also Rule 8.4(e) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to

achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 7.2. Advertising.

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.

(b) Except as permitted by Rule 1.5(e), a lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and

(3) pay for a law practice in accordance with Rule 1.17.

(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

COMMENT

[1] To assist the public in learning about and obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading or overreaching.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television and other forms of advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television, the Internet, and other forms of electronic communication are now among the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television, Internet, and other forms of electronic advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant. But see Rule 7.3(a) for the prohibition against a solicitation through a real-time electronic exchange initiated by the lawyer.

[4] Neither this Rule nor Rule 7.3 prohibits communications authorized by law, such as notice to members of a class in class action litigation.

[5] *Paying Others to Recommend a Lawyer.* — Except as permitted under paragraphs (b)(1)-(b)(3), lawyers are not permitted to pay others for recommending the lawyer's services or for channeling professional work in a manner that violates Rule 7.3. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Paragraph (b)(1), however, allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or

client development services, such as publicists, public-relations personnel, business development staff and website designers. Moreover, a lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Such referral services are understood by the public to be consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act (requiring that organizations that are identified as lawyer referral services (i) permit the participation of all lawyers who are licensed and eligible to practice in the jurisdiction and who meet reasonable objective eligibility requirements as may be established by the referral service for the protection of the public; (ii) require each participating lawyer to carry reasonably adequate malpractice insurance;

(iii) act reasonably to assess client satisfaction and address client complaints; and (iv) do not make referrals to lawyers who own, operate or are employed by the referral service.)

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. See Rule 5.3. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association. Nor could the lawyer allow in-person, telephonic, or real-time contacts that would violate Rule 7.3.

Rule 7.3. Solicitation of clients.

(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

(1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan. (Amended, effective Mar. 1, 2013.)

COMMENT

[1] A solicitation is a targeted communication initiated by the lawyer that is directed to a specific person and that offers to provide, or can reasonably be understood as offering to provide, legal services. In contrast, a lawyer's communication typically does not constitute a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to Internet searches.

[2] There is a potential for abuse when a solicitation involves direct in-person, live telephone or real-time electronic contact by a lawyer with someone known to need legal services. These forms of contact subject a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and over-reaching.

[3] This potential for abuse inherent in direct in-person, live telephone or real time electronic solicitation justifies its prohibition, particularly since lawyers have alternative means of conveying necessary information to those who may be in need of legal services. In particular, communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations. These forms of communications and solicitations make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person's judgment.

[4] The use of general advertising and written, recorded or electronic communications to transmit information from lawyer to the public, rather than direct in-person, live telephone or real-time electronic contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 can be permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal

review is itself likely to help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person, live telephone or real-time electronic contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in abusive practices against a former client, or a person with whom the lawyer has a close personal or family relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for abuse when the person contacted is a lawyer. Consequently, the general prohibition in rule 7.3(a) and the requirements of Rule 7.3(c) are not applicable in those situations. Also, paragraph (a) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal- service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress or harassment within the meaning of Rule 7.3(b)(2), or which involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(b)(1) is prohibited. Moreover, if after sending a letter or other communication as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rule 7.3(b).

[7] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal

services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] The requirement in Rule 7.3(c) that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[9] Paragraph (d) of this Rule permits a lawyer to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (d) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(b). See 8.4(a).

Rule 7.4. Communication of fields of practice and specialization.

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation;

(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

COMMENT

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer’s recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Rule 7.5. Firm names and letterheads.

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

COMMENT

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law

firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer.

[2] With regard to paragraph (d), lawyers sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, “Smith and Jones,” for that title suggests that they are practicing law together in a firm.

Rule 7.6. Political contributions to obtain government legal engagements or appointments by judges.

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

COMMENT

[1] Lawyers have a right to participate fully in the political process, which includes making and soliciting political contributions to candidates for judicial and other public office. Nevertheless, when lawyers make or solicit political contributions in order to obtain an engagement for legal work awarded by a government agency, or to obtain appointment by a judge, the public may legitimately question whether the lawyers engaged to perform the work are selected on the basis of competence and merit. In such a circumstance, the integrity of the profession is undermined.

[2] The term "political contribution" denotes any gift, subscription, loan, advance or deposit of anything of value made directly or indirectly to a candidate, incumbent, political party or campaign committee to influence or provide financial support for election to or retention in judicial or other government office. Political contributions in initiative and referendum elections are not included. For purposes of this rule, the term "political contribution" does not include uncompensated services.

[3] Subject to the exceptions below, (i) the term "government legal engagement" denotes any engagement to provide legal services that a public official has the direct or indirect power to award; and (ii) the term "appointment by a judge" denotes an appointment to a position such as referee, commissioner, special master, receiver, guardian or other similar position that is made by a judge. Those terms do not, however, include (a) substantially uncompensated services; (b) engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from

influence based upon political contributions; and (c) engagements or appointments made on a rotational basis from a list compiled without regard to political contributions.

[4] The term “lawyer or law firm” includes a political action committee or other entity owned or controlled by a lawyer or law firm.

[5] Political contributions are for the purpose of obtaining or being considered for a government legal engagement or appointment by a judge if, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer’s firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

[6] If a lawyer makes or solicits a political contribution under circumstances that constitute bribery or another crime, Rule 8.4(b) is implicated.

Rule 8.1. Bar admission and disciplinary matters.

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or

proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

NOTES TO DECISIONS

Analysis

Office for law practice.

Attorney who failed to maintain a bona fide office for the practice of law in Delaware violated various disciplinary rules because the attorney's assurance to disciplinary counsel that the bona fide office requirement was satisfied was knowingly false and dishonest; merely being reachable by phone was not sufficient. In re A Member of the Bar of the Supreme Court of Delaware: Fred Bar, 99 A.3d 639 (Del. 2013).

Public service.

— Disbarment.

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

When an attorney handling 2 estates, inter alia, failed to provide information and documents in a timely manner in response to a request by the Office of Disciplinary Counsel, the attorney violated Law. R. Prof. Conduct 8.1(b). In re Wilson, 886 A.2d 1279 (Del. 2005).

Where the attorney was aware that the Office of Disciplinary Counsel was investigating the attorney's estate practice, and was aware of a particular estate because the attorney transferred its funds before preparing an inventory of open cases for the Office of Disciplinary Counsel, the attorney knew or should have known that the attorney was withholding information in violation of Law. R. Prof. Conduct 8.1. In re Wilson, 900 A.2d 102 (Del. 2006).

Attorney violated Law. Prof. Conduct R. 8.1(a) when the attorney knowingly made a false statement of material fact concerning a motor vehicle accident in a reinstatement questionnaire; with respect to the statement, "At the time of the accident I did not have my cell phone with me, so I walked home;" the police report indicated that the attorney informed the investigating officer that the attorney was distracted by talking on the cell phone. In re Davis, 43 A.3d 856 (Del. 2012).

Court accepted the findings by a panel of the Board on Professional Responsibility that an attorney committed multiple ethical violations by misappropriating fees received for legal services to clients while the attorney was engaged in the private practice of law and failing to disclose the fees during prior disciplinary proceedings; disbarment was warranted. In re Vanderslice, 116 A.3d 1244 (Del. 2015).

Sanctions.

— Public reprimand.

Because an attorney neglected client's matters, failed to promptly disburse client funds, and failed to cooperate with disciplinary authorities, the attorney violated Law. R. Prof. Conduct 1.1, 1.3, 1.4(a)(3), (4), 1.15(d), and 8.1(b); accordingly, the attorney was publicly reprimanded and placed on probation for 18 months with the imposition of certain conditions. In re Member of the Bar of the Supreme Court of Del., 999 A.2d 853 (Del. 2010).

Attorney was publicly reprimanded and placed on conditional probation for violating Law. Prof. Conduct R. 1.1, 1.3, 1.4(a)(3), (4), 1.15(b), and 8.1(b) where the attorney: (1) failed to timely distribute settlement funds; (2) failed to communicate with a personal injury client; and (3) failed to keep the Office of Disciplinary Counsel informed of changes. In re Siegel, 47 A.3d 523 (Del. 2012).

— Suspension.

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in Certificates of Compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Tribunals.

Attorney's false statement to the Office of Disciplinary Council regarding his distribution of settlement funds to a client violated this rule. In re Maguire, 725 A.2d 417 (Del. 1999).

Where attorney's prior disciplinary record included public reprimands and private admonitions and attorney was found to have violated subsection (b) in five instances, attorney was suspended from the practice of law for seven months. In re Guy, 756 A.2d 875 (Del. 2000).

Attorney's failure to timely respond to the Office of Disciplinary Counsel's (ODC) letter, or to contact the client as requested by the ODC, violated subsection (b) of this rule. In re Becker, 788 A.2d 527 (Del. 2001).

Rule 8.2. Judicial and legal officials.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

Rule 8.3. Reporting professional misconduct.

(a) A lawyer who knows that another lawyer has committed a violation of the rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by rule 1.6.

(d) Notwithstanding anything in this or other of the rules to the contrary, the relationship between members of either (i) the Lawyers Assistance Committee of the Delaware State Bar Association and counselors retained by the Bar Association, or (ii) the Professional Ethics Committee of the Delaware State Bar Association, or (iii) the Fee dispute Conciliation and Mediation Committee of the Delaware State Bar Association, or (iv) the Professional Guidance Committee of the Delaware State Bar Association, and a lawyer or a judge shall be the same as that of attorney and client.

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term “substantial” refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer’s or judge’s misconduct or fitness may be received by a lawyer in the course of that lawyer’s participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

NOTES TO DECISIONS

Conflicts of interest.

Defendant's motion to suppress statements and derivative evidence was denied where, inter alia, the prosecutor disclosed that there was a potential conflict of interest between defendant and defendant's counsel, and the record did not reflect that the government's knowledge of counsel's possible breach of his ethical duties tainted defendant's interviews. United States v. Kossak, 275 F. Supp. 2d 525 (D. Del. 2003).

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the 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 lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, which have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy

respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

INTERPRETIVE GUIDELINE.
Lawyer's income taxes.

The following statements of principles are promulgated as Interpretive Guidelines in the application of the Delaware Lawyers' Rules of Professional Conduct:

Criminal acts that reflect adversely on a lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, as construed under these Rules, shall be deemed to include, but not limited to, the following:

(1) Willful failure to make and file federal, state, or city income tax returns or estimated income tax returns, or to pay such estimated tax or taxes, or to supply information in connection therewith at the time or times required by law or regulation;

(2) Willful attempt in any manner to evade any federal, state, or city income tax.

NOTES TO DECISIONS

Analysis

Attorneys' fees.

— Fee splitting.

Attorney violated subsection (a) by attempting to divide a prospective fee in violation of Prof. Cond. R. 1.5(e). In re Maguire, 725 A.2d 417 (Del. 1999).

Client relations.

— Client funds.

—— Accounting.

Law. R. Prof. Conduct 1.15(a), 1.15(d), 1.15A, 1.16(d), 3.4(c), 8.1(b), 8.4(d) were violated when for several years the attorney mishandled and improperly accounted for the attorney's client's funds and the attorney's escrow account and inaccurately completed certificates of compliance; the attorney was suspended for 3 years, could apply for reinstatement after 2 years if the attorney fulfilled conditions, and could not return to solo practice. In re Fountain, 878 A.2d 1167 (Del. 2005).

—— Misappropriation.

Attorney violated subsection (c) through his misappropriation of client's funds, failure to pay off a judgment, and signing client's name to a check without indicating he was signing for her. In re Maguire, 725 A.2d 417 (Del. 1999).

There was substantial evidence to support the factual findings and conclusions of law of the Board on Professional Responsibility regarding an attorney's violations of Law Prof. Conduct R. 1.5(f), 1.15(a) and (b), and 8.4(c), based on the attorney's misappropriation of clients' fees on various occasions, and the attorney's failure to include the typical refund provision regarding unearned fees in the retainer agreements for other clients; a 1-year suspension was warranted. In re Vanderslice, 55 A.3d 322 (Del. 2012).

There was substantial evidence to support the factual findings and conclusions of law of the Board on Professional Responsibility regarding an attorney's violation of Law Prof. Conduct R. 8.4(b), based on the attorney's theft by misappropriating firm funds; such conduct reflected adversely on the attorney's honesty, trustworthiness, or fitness as a lawyer. In re Vanderslice, 55 A.3d 322 (Del. 2012).

Based on a report by the Board on Professional Responsibility, there was clear and convincing evidence that an attorney engaged in criminal conduct worthy of suspnsion by: (1) misappropriating funds from the attorney's employer over a 5-year period; (2) engaging in dishonest conduct by lying to the attorney's mortgage company; and (3) forging the employer's signature. In re Lankenau, 138 A.3d 1151 (Del. 2016).

—— Safeguarding.

When an attorney falsely represented that he had designated an estate account as an attorney trust or escrow account under Law. R. Prof. Conduct 1.15A, the attorney violated Law. R. Prof. Conduct 8.4(c) and (d). In re Wilson, 886 A.2d 1279 (Del. 2005).

Attorney was disbarred after having been found to have violated Law. R. Prof. Conduct 1.15 and Law. R. Prof. Conduct 8.4 by misappropriating clients funds and failing to identify a bank account as a law practice account; the attorney's conduct was found to have been intentional and no mitigating factors were present where it was shown that the attorney took a long time to provide a client with refinancing proceeds and, when the attorney did, the check was returned for insufficient funds, and the attorney used a septic system escrow deposit to cover another check that the attorney had written. In re Garrett, 909 A.2d 103 (Del. 2006).

Attorney whose child stole funds from the attorney's escrow account was publicly reprimanded for violating Law. Prof. Conduct R. 8.4(c) and (d) by filing an annual registration statement that inaccurately reported that the attorney had a precertification review. In re Otlowski, 976 A.2d 172 (Del. 2009).

Board on Professional Responsibility correctly assigned a 6-month suspension with conditions for violation of Law. Prof. Conduct R. 1.15, 5.3 and 8.4 because: (1) the Board considered the attorney's state of mind and concluded the attorney, as managing partner, was at least negligent in overseeing 2 non-attorneys to ensure the books and records were maintained in compliance with the rules; (2) the attorney knew of rule violations due to the negative balances in the account; (3) the attorney filed an inaccurate 2015 Certificate of Compliance with the Delaware Supreme Court that misrepresented the law firm's compliance with the rule on safekeeping property; (4) the covering funds relied on by the Board on Professional Responsibility should not have been considered a substitute for negative balances in the client subsidiary ledger; (5) the law firm had a duty to safeguard the clients' property but failed to do so; and (6) as a managing partner who failed to supervise non-attorney employees, the attorney was responsible for those deficiencies. In re Beauregard, 189 A.3d 1236 (Del. 2018).

— Diligence.

When an attorney handling 2 estates, inter alia, failed to probate the estates in a timely manner, the attorney violated Law. R. Prof. Conduct 8.4(d). In re Wilson, 886 A.2d 1279 (Del. 2005).

Lawyer violated Law. Prof. Conduct R. 8.4(c) because the lawyer falsely told a client: (1) a complaint was filed; (2) there was a tolling agreement; and (3) negotiations were ongoing. In re Wilks, 99 A.3d 228 (Del. 2014).

— Sexual.

Three-year suspension, along with other conditions, was the appropriate sanction for an attorney who admitted having had a sexual relationship with a client (who claimed to have felt pressured into it) that had not pre-existed representation of the client, and where the attorney was also shown by clear and convincing evidence to have engaged in conduct with clients and employees of the firm that amounted to the Delaware misdemeanors of sexual harassment and offensive touching. In re Tenenbaum, 880 A.2d 1025 (Del. 2005).

In a professional disciplinary proceeding, an attorney was disbarred as a result of engaging in a pattern of sexual misconduct with clients for more than 2 decades. In re Tenenbaum, 918 A.2d 1109 (Del. 2007).

Incapacity or incompetence of attorney.

— Defense to misconduct.

A pattern of taking mortgage payoff funds is strong evidence of deliberate wrongdoing during an extended period of time, and was grounds for finding a violation of this section notwithstanding the attorney's mental illness. In re Dorsey, 683 A.2d 1046 (Del. 1996).

— Reinstatement.

State Supreme Court approved the Professional Responsibility Board's report and recommended sanction as the attorney admitted violations of Law R. Prof. Conduct 8.4(b), and the 18-month suspension was properly made retroactive to the date that the State Supreme Court entered its order that the disciplinary proceedings be held in abeyance because the attorney had been transferred to disability inactive status and was later granted transfer to active status after rehabilitation. In re Amalfitano, 931 A.2d 1006 (Del. 2007).

Law firms.

— Bookkeeping.

Attorney was publicly reprimanded and subject to a public two-year period of probation for her violations of Rule 1.15(b) and (d), former Interpretive Guideline No. 2, and subsection (d) of this Rule, for failing to pay various federal and state employee and employer payroll taxes in a timely manner, for failing to maintain her law practice books and records, by failing to file her 1998 and 1999 federal unemployment tax returns until October 2000, and by making consistently delinquent filings and payment in connection with other law practice payroll tax obligations, and for certifying to the court that her law practice books and records were in compliance with the requirements of Rule 1.15 and that her tax obligations were paid in a timely manner. In re Benson, 774 A.2d 258 (Del. 2001).

Attorney was publicly reprimanded and was ordered to serve a public 2-year probation period for violating Law. R. Prof. Conduct 8.4(c) by filing certificates of compliance containing inaccurate representations as to compliance with Law. R. Prof. Conduct 1.15 with reference to the attorney's law practice bank accounts; the attorney's substantial experience, multiple offenses and attitude toward the offenses offset the attorney's lack of a prior disciplinary record, extensive remedial efforts, full cooperation and lack of injury to a client. In re Member of the Bar of the Supreme Court, 985 A.2d 391 (Del. 2009).

Attorney's failure to maintain law office books and records, filing certificates of compliance with annual registration statements that indicated maintenance of such documentation, and failure to file and pay taxes violated Law. R. Prof. Conduct 1.15(d) and Law. R. Prof. Conduct 8.4(c), (d); a public reprimand was imposed. In re Witherell, 998 A.2d 852 (Del. 2010).

Attorney was suspended for 1 year, with the suspension to run retroactively to the date the attorney was transferred to disability inactive status, for violating Law. Prof. Conduct R. 8.4(c) and (d), by filing certificates of compliance that contained misrepresentations relating to attorney's maintenance of the law practice's books and records. In re Nowak, 5 A.3d 631 (Del. 2010).

Following a self-reported embezzlement by a member of the attorney's staff, the attorney failed to obtain court-ordered precertification by a licensed certified public accountant for 2 years of certificates of compliance, reporting the status of recordkeeping with regard to requirements of Law Prof. Conduct R. 1.15 and Law Prof.

Conduct R. 1.15A; because the absence of any injury to clients did not excuse the misconduct, the attorney's repeated violations of Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 8.4(d) supported an imposition of a public reprimand with conditions. In re Holfeld, 74 A.3d 605 (Del. 2013).

Attorney's admissions and the record established that the attorney violated Law. Prof. Conduct R. 1.5, 5.3, 8.4(c) and (d), resulting in 2 years' probation, by: (1) misrepresenting to the court the attorney's maintenance of records; and (2) failing to properly maintain them, to safeguard client funds, to provide for reasonable safeguards to assure accurate accounting, to supervise nonlawyer staff, and to timely file and pay taxes. In re Gray, 152 A.3d 581 (Del. 2016).

— Managing co-counsel.

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).

— Managing partner.

Where an attorney, the managing partner of a firm, admitted to violating Del. Law. R. Prof. Conduct 1.15(a) by keeping more than $1700 of the firm's funds in the client escrow account for almost a year, admitted to violating Del. Law. R. Prof. Conduct 1.15(d), by failing, for almost a year, to maintain the firm's books and records in compliance with the rule's requirements, admitted to violating Del. Law. R. Prof. Conduct 5.3 by failing to have reasonable safeguards in place to ensure an accurate accounting of the firm's financial books and records in compliance with the Rules, by failing to supervise employees' conduct in reconciling books and records and filing and paying payroll taxes, and by knowing that payroll, gross receipts, and corporate taxes were not being timely filed and paid, admitted to violating Del. Law. R. Prof. Conduct 8.4(c) by filing a Certificate of Compliance for the year 2000, which falsely stated that the law practice's books and records were maintained in compliance with Del. Law. R. Prof. Conduct 1.15 and by falsely stating on the Certificates of Compliance for 1998, 1999, and 2000 that the attorney was meeting tax filing and payment obligations, admitted to violating Del. Law. R. Prof. Conduct 8.4(d) by failing to file and pay various taxes and by filing false Certificates of Compliance for the years 1997, 1998, 1999, 2000, and 2001, and where a witness testified unequivocally that the attorney instructed the witness to transfer escrow funds to the firm's operating account, and client trust funds had to be, and were, invaded, the Office of Disciplinary Counsel's recommended public reprimand was rejected, and the attorney was suspended from the practice of law for six months and one day; a managing partner of a law firm had enhanced duties to ensure that the law firm complied with its recordkeeping and tax obligations, and the managing partner had to discharge those responsibilities faithfully and with the utmost diligence. In re Bailey, 821 A.2d 851 (Del. 2003).

— Office.

Attorney who failed to maintain a bona fide office for the practice of law in Delaware violated various disciplinary rules because the attorney's assurance to disciplinary counsel that the bona fide office requirement was satisfied was knowingly false and dishonest; merely being reachable by phone was not sufficient. In re A Member of the Bar of the Supreme Court of Delaware: Fred Bar, 99 A.3d 639 (Del. 2013).

— Taxes.

When an attorney failed to pay payroll taxes for five years and personal income taxes for six years, the attorney was suspended from the practice of law for 3 years for conduct prejudicial to the administration of justice, subject to the right to seek reinstatement after 6 months. In re Landis, 850 A.2d 291 (Del. 2004).

Attorney who was delinquent in the payment of the attorney's law practice's federal, state, and local payroll tax obligations violated Law. R. Prof. Conduct 1.15(b), 5.3, 8.4(c) and (d); due to the attorney's prior disciplinary history with delinquent taxes, a public reprimand, 18-month probation and implementation of internal accounting controls were warranted. In re Finestrauss, 32 A.3d 978 (Del. 2011).

Evidence supported the determination of an attorney's misconduct by the Board on Professional Responsibility because the attorney failed to file taxes in a timely manner for a period of years; the attorney also responded untruthfully that the taxes had in fact been filed on the annual attorney registration statement. In re Bria, 86 A.3d 1118 (Del. 2014).

Attorney's failure to file taxes in a timely manner for a period of years, and the attorney's false response on that issue on the annual attorney registration statement, warranted a suspension of 6 months and 1 day in order to avoid the automatic reinstatement of a lesser suspension period. In re Bria, 86 A.3d 1118 (Del. 2014).

Professional conduct.

— Candor toward the tribunal.

"Negligent misrepresentation" may form the basis for a charge of misconduct under the literal terms of Law R. Prof. Conduct 8.4(c). In re Wilson, 886 A.2d 1279 (Del. 2005).

Attorney's misrepresentation to a Family Court that a client was not in arrears with regard to alimony and had paid the debt in full was determined to have been an act of dishonesty, fraud, deceit, or misrepresentation in violation of Law. Prof. Conduct R. 8.4(c) and (d), a failure to provide competent representation to the client, in violation of Law. Prof. Conduct R. 1.1, and a failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions, in violation of Law. Prof. Conduct R. 1.4(b); the misrepresentation was found to have been knowingly made, but the recommended suspension of 2 years was reduced to 6 months, because mitigating circumstances were found in the nature of the attorney providing the Family Court with correspondence, which would have permitted the Family Court and the adverse party an opportunity to verify the debt. In re Chasanov, 869 A.2d 327 (Del. 2005).

Attorney violated Law. R. Prof. Conduct 8.4(c) by filing with a Family Court a petitioner's answer to a respondent's counterclaim, on which the attorney had signed the client's name and had falsely notarized the signature. In re Pankowski, 947 A.2d 1122 (Del. 2007).

Based on an attorney's false statements to a Virginia court regarding delivery of legal documents to a party-opponent, and misleading statements in a Virginia disciplinary proceeding constituting violations of Law. Prof. Conduct R. 3.3(a)(1), 4.1, and 8.4(c), a 30-day suspension was imposed; rather than imposing an "admonishment with terms," as Virginia did, a "substantially different discipline" was warranted pursuant to Bd. Prof. Resp. 18(4). In re Amberly, 996 A.2d 793 (Del. 2010).

Attorney admittedly committed disciplinary violations by failing to comply with continuing legal education (CLE) requirements, and by failing to respond to communications with the CLE Commission about that deficiency. In re Poverman, 80 A.3d 960 (Del. 2013).

Attorney admittedly committed disciplinary violations by falsely certifying in the annual registration that there were no disciplinary charges pending because the attorney knew of a continuing legal education deficiency issue and the investigation thereof. In re Poverman, 80 A.3d 960 (Del. 2013).

Deputy attorney general was suspended from the practice of law for 6 months and 1 day for 7 ethical violations because the attorney initially falsely denied making statements (corroborated by a prothonotory also present) threatening a criminal defendant by implying that the State would brand that defendant an informant; the attorney admitted only part of the substance, falsely accusing the defendant of eavesdropping, although later admitting that the attorney intended for the defendant to hear the intimidating statements about possible prison reprisals. In re Favata, 119 A.3d 1283 (Del. 2015).

Disbarment was the appropriate sanction for an attorney's intentional misconduct in a medical negligence case, which included failing to disclose altered medical records, failing to supplement discovery responses and failing to correct a client's false testimony (despite multiple opportunities for corrective action); although the attorney had no prior disciplinary record and presented evidence of good character and reputation, dishonesty and other aggravating factors outweighed the mitigating factors. In re McCarthy, 173 A.3d 536 (Del. 2017).

— Decorum of the tribunal.

Revocation of an attorney's admission pro hac vice was authorized for his failure to control his client's behavior during a deposition. State v. Mumford, 731 A.2d 831 (Del.

Super. Ct. 1999).

In an appeal taken to the trial court from a licensing board, attorney's written arguments suggesting that the trial court would not rule on the merits, an unfounded accusation, violated Law R. Prof. Conduct 3.5(d), conduct degrading to a tribunal, and Law R. Prof. Conduct 8.4(d), conduct prejudicial to the administration of justice; the trial court had to waste judicial resources striking the offending arguments sua sponte and writing an opinion explaining its actions, and warranted a public reprimand of the attorney. In re Abbott, 925 A.2d 482 (Del. 2007), cert. denied, — U.S. —, 128 S. Ct. 381, 169 L. Ed. 2d 263 (2007).

Attorney's communications sent to 4 different Deputy Attorneys Generals did not violate this rule because the evidence did not clearly show that the letters, as offensive and inappropriate as they were, had an actual impact on the administration of justice; the emails, which included crude and sexualized comments, were private and did not directly burden the trial court or affect the outcome of pending litigation. In re Memebr of the Bar of the Supreme Court: Hurley, 183 A.3d 703 (Del. 2018).

— Illegal conduct.

Attorney's conviction for felony possession of a firearm was conclusive of a violation of subsection (b). In re Funk, 742 A.2d 851 (Del. 1999).

Where an attorney was convicted of possession of child pornography and unlawful dealing in material depicting a child engaging in a prohibited sexual act, the serious crimes reflected on the attorney's fitness as a lawyer in violation of Del. Law. R. Prof. Conduct 8.4(b), and attorney's misconduct warranted disbarment without further proceedings. In re Fink, 825 A.2d 238 (Del. 2003).

State Supreme Court approved the state Professional Responsibility Board's report and found that the attorney's conduct in getting together with a friend, selling paintings to each other, making claims against a corporation that accepted payments for transactions, and then pursuing a legal action to recover not only a money back guarantee, but also treble damages and attorney fees, violated Law Prof. Conduct R. 8.4(b), 8.4(c), and 8.4(d), and warranted a public reprimand (especially in light of the attorney's lack of prior discipline and remorse). In re Gielata, 933 A.2d 1249 (Del. 2007).

In an attorney disciplinary matter, an attorney was disbarred as a result of committing various felonies (violently physically attacking that attorney's spouse in front of their children, destruction of evidence and continual violation of a protective order) in the State of Maine which violated Law. R. Prof. Conduct 3.4(a) and (c) and 8.4(b), (c), and (d); the Supreme Court of Delaware rejected the attorney's defense that the conduct was the result of 2 brain injuries, as the medical evidence did not address mental state at the time of the crimes and there was nothing in the record to suggest that the attorney raised any defense to those crimes based on the claimed infirmity. In re Enna, 971 A.2d 110 (Del. 2009).

Attorney's conduct in connection with a motor vehicle accident was a violation of Law. Prof. Conduct R. 8.4, where the attorney: (1) reported false information (i.e. that the attorney did not drink prior to the accident) to a law-enforcement officer relating to an actual offense or incident in violation of 11 Del C. § 1245; and (2) ingested alcohol after the incident with the intent to circumvent the police investigation. In re Davis, 43 A.3d 856 (Del. 2012).

Sanction of a public reprimand of attorney was the appropriate where the attorney violated Law Prof. Conduct R. 8.4(b), (c) and (d); the attorney had made a false report to the police in a 9-1-1 call that a hostage situation was taking place, in violation of 11 Del. C. § 1245, in order to obtain an expedited police response. In re Schaeffer, 45 A.3d 149 (Del. 2012).

Attorney was suspended for 2 years under Law. Prof. Conduct R. 8.4(d) where the attorney pled guilty to possession of controlled substances and drug paraphernalia (both misdemeanors) with no aggravating factors; there were, however, a number of mitigating factors including political involvement and substantial pro bono work. In re Nixon, 49 A.3d 1193 (Del. 2012).

Denial of a petition for discipline against an attorney was proper because Law Prof. Conduct R. 8.4(b) implicated only criminal conduct that reflected adversely on an attorney's fitness to practice law; there was no such case where the offensive touching was committed by the attorney in an attempt to prevent that attorney's child from running away from home. In re Michaels, 67 A.3d 1023 (Del. 2013).

Because an attorney knowingly executed Department of Housing and Urban Development settlement statements containing false information which ensured loan funding by lenders, such constituted a criminal act that reflected adversely on the attorney's honesty, trustworthiness, or fitness as a lawyer in other respects in violation of the rules of professional conduct. In re Sanclemente, 86 A.3d 1119 (Del. 2014).

Attorney who violated the Delaware Rules of Professional Conduct, as well as 18 U.S.C. § 1010, by making false certifications in Department of Housing and Urban Development settlement statements (HUD-1 statements) was disbarred; the attorney acted with the intent of facilitating 22 real estate closings that defrauded those who relied on the accuracy of the HUD-1 statements. In re Sullivan, 86 A.3d 1119 (Del. 2014).

Court accepted the findings by a panel of the Board on Professional Responsibility that an attorney's misappropriation of legal fees constituted theft under the criminal code, which was an ethical violation. In re Vanderslice, 116 A.3d 1244 (Del. 2015).

Lawyer was properly suspended for 15 months because: (1) the lawyer knowingly carried a concealed weapon, drove under the influence of alcohol and illegally possessed a controlled substance, reflecting adversely on honesty, trustworthiness, and fitness, causing potential injury to the public and actual injury due to resources expended to prosecute the lawyer; (2) the presumptive sanction was suspension; and (3) mitigating factors of lack of prior discipline or selfish motive, personal problems, effort to rectify misconduct, cooperation, inexperience, character, other sanctions and remorse outweighed aggravating factors of a pattern of misconduct and illegal conduct. In re Vavala, 207 A.3d 564 (Del. 2019).

— Obligations toward the tribunal.

Where attorney who had practiced for over 20 years and was found to be a good lawyer committed professional misconduct by failing to appear at a scheduled family court hearing and by failing to reschedule two other teleconferences in family court, which constituted violations of Del. Law. R. Prof. Conduct 3.4(c) and 8.4(d), the public probation period that attorney was already serving for prior misconduct was extended for an additional year. In re Solomon, 847 A.2d 1122 (Del. 2004).

Office of Disciplinary Counsel established by clear and convincing evidence that an attorney engaged in conduct prejudicial to the administration of justice, in violation of Law Prof. Conduct R. 8.4(d) where: (1) the attorney wasted judicial resources in continuing to request to withdraw from appointments as attorney of record; (2) asked the court to put "on the record" and disclose to clients the fact that the attorney should not be appointed, but that the court was making the appointment anyway; (3) caused clients to believe that the attorney could not represent them and that they needed other counsel; and (4) failed to obtain substitute counsel or to even contact the 2 attorneys whose names were provided by the court for just that purpose. In re Murray, 47 A.3d 972 (Del. 2012).

While it was true that an attorney's language did not amount to the inflammatory language of other cases where public reprimand was ordered, the attorney did send discourteous letters to the court in 3 different cases and violated Law Prof. Conduct R. 3.5 and 6.2 in each of those cases; because the Law Prof. Conduct R. 8.4(d) violation for the wasting of judicial resources in attempting to avoid court appointment was not de minimus, public reprimand was appropriate. In re Murray, 47 A.3d 972 (Del. 2012).

Where an attorney engaged in lateness or failure to appear at scheduled court appearances, tardy requests for postponements, failure to comply with court-imposed deadlines, "sloppy work and complete disregard to the Court's rules and procedure" and wasted judicial resources in 3 Delaware Courts, in addition to violating the duty of candor to the Supreme Court of Delaware, the attorney violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Based on the Supreme Court's interpretation of Law. Prof. Conduct R. 8.4(d) to mean that although not all crimes are "prejudicial to the administration of justice," crimes involving "violence, dishonesty, breach of trust, or serious interference with the administration of justice" are categorically Rule 8.4(d) violations; an attorney's theft constituted a violation thereof. In re Vanderslice, 55 A.3d 322 (Del. 2012).

Attorney's disclosure of a codefendant's statement to the attorney's client charged with murder and related offenses, after the attorney retrieved it from the codefendant's file, violated the codefendant's attorney-client privilege; the disclosure constituted a violation of the professional conduct rules relating to the confidentiality of information and conduct that was prejudicial to the administration of justice. In re Lyle, 74 A.3d 654 (Del. 2013).

Attorney's disclosure of a codefendant's statement to the attorney's client charged with murder and related offenses, after the attorney retrieved it from the codefendant's file, did not involve dishonesty, fraud, deceit or misrepresentation; despite the attorney's mere "knowing" conduct, the attorney was trying to zealously defend the client and had no intent to engage in dishonest behavior. In re Lyle, 74 A.3d 654 (Del. 2013).

Where an attorney, in order to benefit a client, knowingly violated the Chancery Court's seizure order enjoining persons from bringing claims relating to an insurer except in that Court, thereby causing injury to the insurer and the Insurance Commissioner and prejudice to the judicial system, the presumptive sanction of suspension was nevertheless reduced to public reprimand; mitigating factors outweighed the aggravating factors in the case. In re Brown, 103 A.3d 515 (Del. 2014).

Office of Disciplinary Counsel proved by clear and convincing evidence that an attorney committed professional conduct violations by knowingly causing images from a sexual abuse victim's cell phone to be shown to both the victim's parent and defendant in violation of a protective order. In re Koyste, 111 A.3d 581 (Del. 2015).

Thirty-day suspension of a deputy attorney general was appropriate because the attorney's conduct, cajoling a bailiff to enter a room in a courthouse brandishing a firearm as an ill-conceived prank, involved breaches of duties owed to the legal system and to the legal profession. In re Gelof, 142 A.3d 506 (Del. 2016).

Board on Professional Responsibility erred in finding that the attorney's admitted violation of the terms of private probation did not also constitute a violation of the rule of professional misconduct with respect to obligations to the tribunal; there was clear and convincing evidence that the attorney's violation thereof was prejudicial to the administration of justice. In re Woods, 143 A.3d 1223 (Del. 2016).

Sanctions.

— Disbarment.

Lawyer was disbarred for the misappropriation of client funds for the lawyer's personal use, and the failure to establish a separate account for the proceeds of the sale of a client's house, despite evidence of the lawyer's personal and emotional problems. In re Carey, 809 A.2d 563 (Del. 2002).

Attorney was disbarred for knowingly violating the terms of a prior suspension by failing to turn all files over to an active member of the bar, by failing to notify all parties of attorney's suspension, and by paying attorney's fees from estates during the suspension; that misconduct caused potential injury to the estate beneficiaries. In re McCann, 894 A.2d 1087 (Del. 2005).

Attorney was disbarred in part because of failure to: (1) maintain proper books and records relating to client funds, but falsely certified compliance for 3 years; (2) timely file and pay federal and state payroll taxes, but falsely certified compliance for 6 years; and (3) pay personal state and federal income taxes. In re McCann, 894 A.2d 1087 (Del. 2005).

Because there was evidence to support the finding that a suspended attorney knowingly practiced law multiple times over more than 1 year during a disciplinary suspension, the lawyer violated multiple disciplinary rules; the appropriate sanction in the circumstances was disbarment. In re Member of the Bar of the Supreme Court of Del. Feuerhake, 89 A.3d 1058 (Del. 2014).

Court accepted the findings by a panel of the Board on Professional Responsibility that an attorney committed multiple ethical violations by misappropriating fees received for legal services to clients while the attorney was engaged in the private practice of law and failing to disclose the fees during prior disciplinary proceedings; disbarment was warranted. In re Vanderslice, 116 A.3d 1244 (Del. 2015).

— Disciplinary proceedings.

No statute of limitation applies to a professional disciplinary proceeding and, therefore, no basis exists in such proceedings to assert the affirmative defense of laches. In re Tenenbaum, 918 A.2d 1109 (Del. 2007).

— Dismissal of claim.

Because the integrity of the proceedings and the court's truth-finding function involving company management disputes between the parties was threatened by plaintiffs' actions, based on their payments to witnesses in exchange for certain testimony, threats against witnesses and threats of civil litigation on baseless claims, their conspiracy claims were dismissed against all defendants; certain adverse inferences were also drawn as to other claims. OptimisCorp v. Waite, — A.3d —, 2015 Del. Ch. LEXIS 222 (Del. Ch. Aug. 26, 2015).

— Reprimand.

When an attorney handling 2 estates violated Law. R. Prof. Conduct 8.4(d), because the attorney had aggravating factors of a prior private admonition, multiple counts, and substantial legal experience, and mitigating factors of remorse and lack of dishonest motive, the attorney was publicly reprimanded, prevented from representing a personal representative or serving as 1, and required to cooperate and pay costs. In re Wilson, 886 A.2d 1279 (Del. 2005).

The appropriate sanction was a public reprimand and 1 year probation period where: (1) an attorney violated the conditions of a previously imposed private admonition by failing to provide a required precertification and not promptly paying various payroll taxes; (2) the attorney admitted to violating Law. Disc. P. R. 7(c) and Law Prof. Conduct R. 1.15(b), 1.15(d), 5.3, 8.4(c), and 8.4(d); (3) the attorney's violations were not isolated incidents but were repeat violations; (4) the attorney failed to adequately supervise a nonlawyer assistant to assure an accurate accounting of the firm's books and records;

and (5) the attorney disregarded the conditions imposed on the private admonition. In re Martin, 35 A.3d 419 (Del. 2011).

Attorney who committed various disciplinary violations with respect to the failure to complete continuing legal education requirements and reporting obligations relating thereto was publicly reprimanded with conditions, because: (1) the attorney acted knowingly and had no remorse; (2) the attorney did not cause injury to a client; and (3) the aggravating factors outweighed the mitigating ones. In re Poverman, 80 A.3d 960 (Del. 2013).

Attorney who had knowingly violated a protective order was properly sanctioned to public reprimand because the misconduct was serious, caused potential injury to the vulnerable teenage victim and caused actual injury to the legal system. In re Koyste, 111 A.3d 581 (Del. 2015).

Attorney committed professional misconduct by failing to comply with the conditions of private probation, by failing to maintain the firm's books and records properly, and by filing false certifications with respect to compliance with that obligation; public reprimand and probation for 3 years with conditions were imposed upon the attorney's immediate reinstatement to the practice of law. In re Woods, 143 A.3d 1223 (Del. 2016).

When respondent violated Law. Prof. Conduct R. 1.5(f), 1.15(a) and (d), 8.4(c) and (d) by failing to properly maintain law firm's books and records for 3 consecutive years, filing inaccurate certificates of compliance for 3 consecutive years, and failing to give flat fee clients proper notice that the fee was refundable if not earned, a public reprimand with a 2-year period of probation was appropriate; this was true, even considering the mitigating factors, given a lawyer's obligation to maintain orderly books and records. In re Castro, 160 A.3d 1134 (Del. 2017).

The Delaware Supreme Court accepted the Board on Professional Responsibility's findings and recommendation for discipline, publicly reprimanding and placing the attorney on a 2-year period of probation with the imposition of specific conditions, because the attorney failed to provide the client with a fee agreement and/or statement of earned fees withdrawn from the trust account, to identify and safeguard client fund, to maintain financial books and records or to supervise nonlawyer assistants; the attorney had engaged in conduct involving misrepresentation, prejudicial to the administration of justice. In re Malik, 167 A.3d 1189 (Del. 2017).

Attorney was publicly reprimanded with a 2-year probation, subject to conditions; the attorney acted with "wilfulness" and did not comply with 3 conditions of a prior disciplinary sanction by failing to inform the firm's supervising attorney of the conditions of the attorney's reinstatement, including the need for a practice monitor. In re Grandell, 189 A.3d 1288 (Del. 2018).

— Suspension.

Where a lawyer engaged in a pattern of knowing misconduct over a period of several years by commingling client funds, failing to maintain the lawyer's law practice accounts, failing to pay taxes, falsely representing on certificates of compliance that the lawyer complied with the record-keeping requirements and paid taxes, the lawyer violated Del. Law. R. Prof. Conduct 1.5(f), 1.15(a), (b), (d), 8.4(b), (c), (d); as a result, the lawyer was suspended for 3 years. In re Garrett, 835 A.2d 514 (Del. 2003).

Attorney, who was on probation for previous violations of the Rules of Professional Conduct and who violated Law. Prof. Conduct R. 1.1, 1.2(a), 1.4(a), 1.15(a), 8.1, 8.1(b), 8.4(c), and 8.4(d), and Law. Disc. P. R. 7(c), was suspended from the practice of law in Delaware for 3 years after the Board on Professional Responsibility found that the attorney's problems appeared to be getting worse and included: co-mingling client trust funds; inadequate bookkeeping and safeguarding of client funds; inadequate maintenance of books and records; knowingly making false statements of material fact to the ODC; false representations in Certificates of Compliance for 3 years; and failure to file corporate tax returns for 3 years. In re Becker, 947 A.2d 1120 (Del. 2008).

Attorney whose misconduct involved false notarizations, failure to safeguard fiduciary funds, failure to pay taxes on real estate transactions, and other misrepresentations committed violations Law. R. Prof. Conduct 1.15(a), (b), and 8.4(a), (c), and (d); based on knowing, rather than negligent, conduct in committing the violations, a 1-year suspension as well as a public reprimand and permanent practice restrictions were deemed appropriate sanctions to impose. In re Member of the Bar of the Supreme Court, 974 A.2d 170 (Del. 2009).

Attorney whose multiple federal actions for assorted clients were dismissed due to failure to respond to dismissal or summary judgment motions violated Law. R. Prof. Conduct 1.1, 1.3, 1.4, 1.5, and 8.4, warranting a 2-year suspension from the practice of law, with conditions where: (1) the attorney had an unblemished record; (2) the attorney had undergone 2 eye surgeries; (3) the attorney had suffered the loss of a half-sibling; but (4) the conduct was deemed "knowing" and evidenced engagement in a pattern of misconduct. In re Feuerhake, 998 A.2d 850 (Del. 2010).

Suspension for 6 months and 1 day was warranted where an attorney: (1) violated Law Prof. Conduct R. 1.1, 1.3, 3.3, 3.4 and 8.4; (2) had a record of 2 prior private admonitions; (3) engaged in a pattern of misconduct consisting of multiple offenses; (4) suffered from personal or emotional problems; (5) cooperated with the Office of Disciplinary Counsel in connection with the hearing; (6) was generally of good character, as evidenced by willingness to represent those who might not otherwise have had representation; and (7) exhibited remorse. In re: Poliquin, 49 A.3d 1115 (Del. 2012).

Based on an experienced attorney's misappropriation on multiple occasions of clients' funds and the attorney's use of a deficient retainer agreement, which constituted a violation of Law. Prof. Conduct R. 8.4(b) and (d) as well as violations of other disciplinary rules, a suspension of 1 year was deemed appropriate; in the circumstances, a public reprimand was too lenient. In re Vanderslice, 55 A.3d 322 (Del. 2012).

Lawyer was suspended for 21 months, retroactive to the date of the attorney's transfer to disability inactive status, for violating this rule after the attorney injured another driver as a result of DUI; the attorney demonstrated aggressive and consistent rehabilitation since the accident, implementing the appropriate and necessary life changes and counseling to maintain sobriety for over 1 year. In re Cairns, 132 A.3d 1160 (Del. 2016).

Attorney who committed numerous ethical violations, including neglecting multiple client matters, making misrepresentations to the court and failing to properly safeguard clients' funds, was suspended for 18 months, based on a determination that the mitigating factors significantly outweighed the aggravating factors. In re Carucci, 132 A.3d 1161 (Del. 2016).

Attorney was suspended for an additional 6 months where: (1) the attorney filed 2 complaints in Superior Court without maintaining a Delaware office, conduct prejudicial to the administration of justice; (2) the attorney created a false impression by testifying in a prior disciplinary matter that the attorney did not currently have any suits pending in Delaware; (3) the violations were knowing and caused potential harm to the legal system; (4) suspension was the presumptive sanction; and (5) the aggravating factors did not sufficiently outweigh the mitigating factors to warrant disbarment. In re Lankenau, 158 A.3d 451 (Del. 2017).

Rule 8.5. Disciplinary authority; choice of law.

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

COMMENT

[1] *Disciplinary Authority.* — It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this

jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

[2] *Choice of Law.* — A lawyer may be potentially subject to more than one set of rules of professional conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonably specifies a particular jurisdiction is within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

NOTES TO DECISIONS

In-state practice.

Attorney's regular representation of Delaware clients constituted the practice of law "in Delaware" under Law. R. Prof. Conduct 8.5 as, for several years, the attorney: (1) accepted new clients who were Delaware residents, involved in Delaware car accidents, and seeking recovery under Delaware insurance policies; (2) did everything short of appearing in Delaware courts; (3) engaged Delaware attorneys as co-counsel only if the attorney could not resolve the matter without litigation; and (4) was physically present in Delaware, representing the attorney's Delaware clients, on 3 occasions. In re Tonwe, 929 A.2d 774 (Del. 2007).

Safe harbor provision.

Where attorney's regular representation of Delaware clients constituted the practice of law "in Delaware," the safe harbor provision of Law. R. Prof. Conduct 8.5(b) was unavailable as even if the attorney harbored a belief that the representation was in Pennsylvania, the attorney knowingly violated a cease and consent order prohibiting such conduct; the attorney was disbarred. In re Tonwe, 929 A.2d 774 (Del. 2007).

FORMS

For court forms associated with this rule set, see: http://courts.delaware.gov/forms/.

INDEX TO THE DELAWARE LAWYERS' RULES OF PROFESSIONAL CONDUCT

A

B

C

E

F

G

I

K

L

M

N

O

P

R

S

T

U

W