

# ACI's Advanced Forum on LPL/Legal Malpractice

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## The Interplay Between Ethics and LPL Claims: *Protecting Against Damage from Companion Ethics Cases*

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Tweeting about this conference?  
#ACIMalpractice



# First Civil Suit

- Homeowner A sues Attorney
  - Attorney represented Lender at closing, which was part of a mortgage foreclosure rescue fraud
  - Homeowner A's civil complaint asserts claims for legal malpractice, breach of fiduciary duty, breach of contract, fraud and aiding and abetting fraud
- *Ethics Issue*: Does defense counsel move to dismiss the weakest claims, with the possibility of leaving Attorney with no insurance coverage for the fraud claim?



# NY Rule 1.7(a)

- Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
  - (1) the representation will involve the lawyer in representing differing interests; or
  - (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.



# First Complaint to Ethics Committee

- Homeowner A also files an ethics complaint with the Grievance Committee in State A
  - Grievance Committee requests (a) Attorney's complete file from closing of Homeowner A's transaction and (b) information about Attorney's defense strategy in litigation
  - Ethics Issue: Is Grievance Committee entitled to Attorney's file and documents describing defense strategy in the civil suit?



# Model Rule 8.1

- 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 admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.



# New York Rule 8.1(a): Candor in the Bar Admission Process

- A lawyer shall be subject to discipline if, in connection with the lawyer's own application for admission to the bar previously filed in this state or in any other jurisdiction, or in connection with the application of another person for admission to the bar, the lawyer knowingly:
  - (1) has made or failed to correct a false statement of material fact;  
or
  - (2) has failed to disclose a material fact requested in connection with a lawful demand for information from an admissions authority.



# Second Civil Suit

- Homeowner B sues Attorney in State B, raising substantially similar claims to those that Homeowner A has raised
- Ethics Issues:
  - Is Homeowner B entitled to discover Homeowner A's ethics complaint?
  - Does Attorney (through counsel) notify Grievance Committee in State A regarding lawsuit?



# Second Complaint to Ethics Committee

- Homeowner B files a complaint against Attorney with Grievance Committee in State B.
- Ethics Issues:
  - Is Grievance Committee B entitled to request the Grievance Committee A file from defense counsel? Or vice versa?
  - Is Homeowner (Plaintiff) A entitled to request the Grievance Committee B file from defense counsel?
    - Is Homeowner (Plaintiff) B entitled to the Grievance Committee A file?





# Direct Inquiry By Ethics Committee

- Grievance Committees from State A requests copies of Attorney's files from all closings on behalf of bank which involve the same buyer/group of buyers.
  - Grievance Committee mentions possibility of referring matter for criminal indictment if appropriate
- Ethics Issue:
  - How should Attorney respond?
  - Would the response be different if the Attorney has a duty to cooperate?



# Model Rule 1.6

- (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:
  - (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;
  - (6) to comply with other law or a court order; or



# Three More Civil Suits Are Filed

- Homeowners C and D sue Attorney in additional States C and D for same type of alleged misconduct
- Ethics Issue: What is the impact of the pending Grievance Committee complaints in all civil suits?
  - Discovery
  - Settlement
    - Possible admission of wrongdoing
    - Potential of favorable result in lawsuit(s) influencing Grievance Committee
      - Prohibition from making withdrawal of grievance complaint a term of settlement
    - Res judicata effect of grievance committee hearing?



# Continued Inquiry By Ethics Committee

- Grievance Committee continues to request files and seek assistance
  - Grievance Committee also continues to discussion of potential criminal indictments against wrongdoers
- Ethics Issues:
  - What do you advise your client Attorney to do?
  - What do you do if Attorney appears to or does disregard your advice?



# Civil Suits – Motions to Dismiss

- In each civil suit, all causes of action are dismissed except aiding and abetting fraud
- Fraud claims are sufficiently plead against straw buyers and foreclosure rescue defendants
- Ethics Issue: What is defense counsel's role in the tripartite relationship when a coverage dispute arises between the insured Attorney and the insurance carrier?



# Criminal Indictments

- All parties to the civil suits (including Attorney) are indicted on criminal charges of felony larceny
- Ethics Issue: What is the interplay between:
  - 1) Civil defense counsel and criminal defense counsel?
  - 2) The Grievance Committee and civil defense counsel?
  - 3) The Prosecuting Attorney and civil defense counsel?



# Thank You

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