

**DSBA Seminar – May 12, 2011**

**Recent Developments in Delaware  
Corporate and Alternative Entity Law**

**Rules of Professional Conduct and Related  
Ethical Considerations Applicable to  
Class Action Settlements**



Francis G.X. Pileggi  
Jill Agro

Eckert Seamans Cherin & Mellott, LLC

# Ethical Considerations in Class Action Settlements

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# Rules of Professional Conduct

## ◆ Preamble [1]\*

- Defines lawyers' responsibilities as
  - A member of the legal profession
  - A representative of clients
  - An officer of the Courts
  - A public citizen

*\*Recognition that a lawyer wears many hats.*

# Rules of Professional Conduct

## ◆ Preamble [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.

*cited in Scully v. Nighthawk Radiology Holdings, Inc., C.A. No. 5890-VCL (Mar. 11, 2011) (Report of Special Counsel)*

# *Scully v. Nighthawk*

## ◆ Delaware Principles of Professionalism

- A(4) (“A lawyer should represent a client with vigor, dedication and commitment.”),
  - B(1) (“Before choosing a forum, a lawyer should review with the client all alternatives, including alternate methods of dispute resolution.”).
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# Rules of Professional Conduct

## ◆ Preamble [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.

# Rules of Professional Conduct

## ◆ **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.

# Rules of Professional Conduct

## ◆ **Rule 1.8. Conflict of interest: Current clients**

- (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;

# Rules of Professional Conduct

## ◆ **Rule 1.8. Conflict of interest: Current clients**

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - (1) the client gives informed consent; [and]
  - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;

# Rules of Professional Conduct

## ◆ Rule 1.8. Conflict of interest: Current clients

- (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 . . . 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.
- (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:
  - (2) contract with a client for a reasonable contingent fee in a civil case.

# Rules of Professional Conduct

## ◆ 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;

# Rules of Professional Conduct

## ◆ Rule 3.3. Candor toward the tribunal

- (a) A lawyer shall not knowingly:
  - (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.

# Rules of Professional Conduct

## ◆ 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 in the matter.\*

*\*In a bench trial, would a newspaper article or similar publication have a **substantial likelihood** of triggering this part of the rule? I doubt it.*

# Rules of Professional Conduct

## ◆ 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.

## *In re Revlon, Inc. S'holders Litig.*

### ◆ *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940 (Del. Ch. 2010)

- Vice Chancellor Laster's colorful explanation of counsel's questionable candor with the Court
  - "Then, when forced to defend their conduct and leadership role, . . . counsel approached the concept of candor to the tribunal as if attempting to sell me a used car."

# Principles of Professionalism

## ◆ Preamble

- The Delaware State Bar Association and the Delaware Supreme Court have jointly adopted the Principles of Professionalism for Delaware Lawyers for the guidance of Delaware lawyers, effective November 1, 2003. These Principles replace and supercede the Statement of Principles of Lawyer Conduct adopted by the Delaware State Bar Association on November 15, 1991. They are not intended, nor should they be construed, as establishing any minimum standards of professional care or competence, or as altering a lawyer's responsibilities under the Delaware Lawyers' Rules of Professional Conduct. These Principles shall not be used as a basis for litigation, lawyer discipline or sanctions. The purpose of adopting the Principles is to promote and foster the ideals of professional courtesy, conduct and cooperation. These Principles are fundamental to the functioning of our system of justice and public confidence in that system.

# Chancery Court Rules

## ◆ Chancery Court Rule 170. Attorneys

- (b) Attorneys who are not members of the Delaware Bar may be admitted *pro hac vice* in the discretion of the Court and such admission shall be made only upon written motion by a member of the Delaware Bar who maintains an office in this State for the practice of law (“Delaware Counsel”). The admission of an attorney *pro hac vice* shall not relieve the moving attorney from responsibility to comply with any Rule or order of the Court.

# Chancery Court Rules

## ◆ Chancery Court Rule 170. Attorneys

- (c) Any attorney seeking admission *pro hac vice* shall certify the following in a statement attached to the motion:
  - (i) That the attorney is a member in good standing of the Bar of another state;
  - (ii) That the attorney shall be bound by the Delaware Lawyers' Rules of Professional Conduct and has reviewed the Statement of Principles of Lawyer Conduct;<sup>\*</sup>
  - (iii) That the attorney and all attorneys of the attorney's firm who directly or indirectly provide services to the party or cause at issue shall be bound by all Rules of the Court;

*\*Rule not updated to reflect new name adopted in 2003 for the Principles*

# Chancery Court Rules

## ◆ Chancery Court Rule 170. Attorneys

- (d) Delaware counsel for any party shall appear in the action in which the motion for admission *pro hac vice* is filed and shall sign or receive service of all notices, orders, pleadings or other papers filed in the action, and shall attend all proceedings before the Court, Clerk of the Court, or other officers of the Court, unless excused by the Court. Attendance of Delaware Counsel at depositions shall not be required unless ordered by the Court.\*

*\*This rule prohibits attorneys who are only admitted pro hac vice, from contacting the Court directly by letter or by phone.*

# Chancery Court Rules

## ◆ Chancery Court Rule 170. Attorneys

- (h) The Delaware Counsel filing a motion *pro hac vice* for the admission of an attorney not a member of the Delaware Bar shall certify that the Delaware attorney finds the applicant to be a reputable and competent attorney, and is in a position to recommend the applicant's admission.

# Chancery Court Rules

## ◆ Guidelines for Preservation of Electronically Stored Information

- The purpose of these guidelines is to remind all counsel (including Delaware counsel) appearing in any case before this Court of their common law duty to their clients and the Court with respect to the preservation of electronically stored information ("ESI") in litigation. A party to litigation must take reasonable steps to preserve information, including ESI, that is potentially relevant to the litigation and that is within the party's possession, custody or control. ESI takes many forms and may be lost or deleted absent affirmative steps to preserve it. As set forth below, at the very minimum that means that parties and their counsel must develop and oversee a preservation process. Such a process should include the dissemination of a litigation hold notice to custodians of potentially relevant ESI.

# *Pro Hac Vice* Considerations

## ◆ **Compilation of Case Law and O.D.C. Proceedings concerning *Pro Hac Vice* Motions and Serving as Delaware Counsel**

- By: The Honorable Andrea L. Rocanelli
  - Delaware Court of Common Pleas
  - Former Chief Disciplinary Counsel for the Office of Disciplinary Counsel of the Supreme Court of Delaware
  
- Available at:
  - <http://www.delawarelitigation.com/int86.PDF>

# Thank You !

Francis G.X. Pileggi  
Eckert Seamans Cherin & Mellott, LLC  
300 Delaware Avenue  
Suite 1210  
Wilmington, DE 19801  
(302) 655-3667  
fpileggi@eckertseamans.com  
blog: [www.delawarelitigation.com](http://www.delawarelitigation.com)