

PROFESSOR COMMENTARY TO PROFESSOR WELDON'S PRESENTATION

ALEX LONG

Thank you to the organizers and also thanks to Professor Weldon. What a buffet of ethics issues for a legal ethics junkie like myself. Just really fascinating. Thank you so much for it. There's a lot of great material there. One of the complaints I sort of hear from practitioners and other folks when it comes to the Rules of Professional Conduct is that they seem like they're targeted primarily at litigators and not so much business lawyers. I wasn't a business lawyer, but I've never really fully bought into that criticism, and I think that Professor Weldon's talk here today sort of illustrates the fact that these rules apply to business lawyers as much as they do litigators. And as she mentioned at the outset, those rules about providing advice, negotiating, and investigating facts apply with equal force to business lawyers as they do litigators.

I just flagged a few bullet points from Professor Weldon's talk that I thought I'd briefly touch on. Some of them are specifically related to transactional lawyers and some not so much. One issue that I really hadn't considered was the whole wellbeing movement as applied to in-house counsel. A few years ago, there was a task force that released a report on lawyer wellbeing, entitled *The National Task Force on Lawyer Well-Being's The Path to Well-Being: Practical Recommendations for Positive Change*. And as Professor Weldon mentioned, the report specifically connected wellness with competence. I'm sort of troubled by the extent to which the report does that. There's actually language in the report that sort of suggests if you're not a healthy lawyer, then you can't be a competent lawyer. I think that maybe takes it too far, but that said, there's clearly a connection between being wellbeing and competence to some extent.

I think one issue that sort of gets overlooked in this big discussion is the responsibility of law firm partners and people in comparable situations in government and in-house counsel settings to develop policies and procedures that facilitate not just wellness, but competent practice. We typically think of this issue in terms of big law firms and what sort of policies and practices they have in place, or what sort of oversight and supervision that lawyers are getting or not getting. But the same issues come up, I think in the in-house counsel setting as well. And for folks who are interested in this, the National Task Force's Report on lawyer wellbeing includes an appendix that includes some specific suggestions for law firm partners and those in comparable situations to help develop a healthier work environment. This is good, not just because we want folks to be healthy, but also because healthy lawyers, I think, generally to be better lawyers as well. So, if you're curious about these issues, take a look at that report.

Another thing I flagged was the technology and competence issue. Tennessee is one of the majority of states that have adopted the rule that mentions understanding the risks and benefits of technology as part of a lawyer's duty of competence. It hasn't gone ahead and required lawyers to take special CLE training related to technology like I know Florida has. Tennessee hasn't done that yet, but maybe that's coming. The discussion about advice on social media, I thought, was also really interesting. I wasn't familiar with Lawyer Mike, and I just did my class on advertising and solicitation the other day, so I kind of wish I'd known about it before I did that class.

Professor Weldon mentioned the risk of basically creating a lawyer-client relationship by giving advice to people in these kinds of settings and that's obviously a real risk, but I thought it was really important that she mentioned some other risks that come along with activity on social media. She mentioned the David Traywick case from South Carolina. That lawyer was suspended for six months for making racist statements online. And what's really interesting about that case is that some states have adopted ABA Model Rule 8.4(g), which prohibits lawyers from making statements indicating bias or prejudice in connection with the practice of law. So if I've got my lawyer hat on and I say something racist, then I'm obviously subject to professional discipline. If I'm not wearing my lawyer hat and I'm just saying some racist stuff on Facebook, Rule 8.4(g) probably doesn't apply. But what's really interesting in South Carolina is South Carolina doesn't even have that rule.

South Carolina doesn't specifically have a rule addressing bias or prejudice in connection with the practice of law but the South Carolina Supreme Court nonetheless found a way to sanction Traywick. Again, there wasn't a specific rule that prohibited what he did, but the court was able to point to a rule that allows for professional discipline where a lawyer violates South Carolina's attorney's oath of office and then find a violation based on that. And so I think that's a really important lesson for lawyers to take away. There are lots of cases now where lawyers are getting sanctioned for activity on social media. We had a case in Tennessee just this past year where a criminal lawyer, more or less, suggested to a Facebook friend how she could get away with killing her boyfriend. And the Tennessee Supreme Court found that that violated the rule regarding conduct prejudicial to the administration of justice. So, there are lots of ways you can get in trouble on social media, not just business lawyers, but litigators as well.

I realize I'm probably running out of time, but I want to mention at least one other thing. Professor Weldon mentioned another issue that I hadn't really thought much about. She mentioned Rule 2.1, which involves

the duty to provide candid advice. I always tell my students in Professional Responsibility that the way that rule is written doesn't say you have a duty to provide candid, *legal* advice. It says you have a duty to provide candid *advice*, what can refer to moral, social, economic, and other factors. I always in my head just think about that rule applying when the client is doing something wrong, when the client is engaging in fraud, when the client is affirmatively engaging in some form of misconduct, and then the lawyer steps in say, "Hey, don't be a damn fool. Stop doing this." But Professor Weldon's discussion of ESG made me think about the other ways that lawyers can effectively give advice prior to the corporation or the client doing something affirmatively wrong.

I think it's a duty that is not discussed as often perhaps as it should be, but I think that in the case of in the case of business lawyers in particular, I think it's a really, really important rule.

The last thing I'll say before I leave is that Professor Weldon mentioned UPL, unauthorized practice of law, and the ethics opinions that have come out there about remote practice. Every lawyer who is working from home to some extent should read those opinions, and in particular lawyers who represent organizational clients that are scattered across the country. I think the UPL rules are rules that are probably going to change within the next five or 10 years as a result of COVID, but every business lawyer out there ought to be reading those two ethics opinions that were in the slides. So I will stop here, but once again, thanks to Professor Weldon for interesting presentation.