IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN HAYMOND HAYMOND NAPOLI DIAMOND	: CIVIL ACTION
v.	
MARVIN LUNDY	
v.	
JOHN HAYMOND, SCOTT DIAMOND, ROBERT HOCHBERG, HAYMOND, NAPOLI, DIAMOND, P.C.	: No. 99-5048

ORDER

AND NOW, this 21st day of December, 2000, upon consideration of a request from defense counsel to which plaintiff has no objection, it is **ORDERED** that:

1. The Memorandum Opinion of December 12, 2000 (# 155) is hereby **AMENDED**. Footnote five on page twelve shall read as follows: "Although the Rule 11 signatory on the Motion for Reconsideration was Deborah H. Bjornstad, Esq., any monetary sanction would be imposed upon the law firm of Mann, Unger, Spector & Labovitz because Ms. Bjornstand is an associate who works under the supervision and direction of the partners of the firm." The footnote shall also be moved from after the word "attorneys" to the end of the sentence.

2. A complete copy of the amended Memorandum Opinion and Order is attached and should be filed as of December 12, 2000 in lieu of the previously filed document, *nunc pro tunc*.

Norma L. Shapiro, S.J.

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MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **December 12, 2000**

In October, 1999, the law firm of Haymond and Lundy, LLP was dissolved and the named partners, John Haymond ("Haymond") and Marvin Lundy ("Lundy"), brought civil actions against each other.[1] The cases were consolidated in an order dated October 25, 1999. Each party filed an amended complaint[2] and moved to

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[1] In his complaint, Haymond asserted claims on behalf of himself and his new law firm, Haymond Napoli Diamond, P.C. Lundy initially asserted claims against Haymond, Robert Hochberg, and John Haymond, P.C. t/a Haymond & Lundy, LLP.

[2] In his amended complaint, Lundy asserted additional claims against Scott Diamond and Haymond Napoli Diamond, P.C.; after a realignment of the parties, Lundy's claims were reasserted as counterclaims.

dismiss. The motions to dismiss were granted, in part, and denied, in part, in an Opinion and Order filed June 22, 2000. See Haymond v. Lundy, No. 99-5015 & 99-5048, 2000 U.S. Dist. LEXIS 8585, at *44 (E.D. Pa. June 22, 2000). Two counts of the Lundy Complaint, (1) unauthorized practice of law; and (2) breach of contract, remained for trial.

Lundy dismissed the two remaining Counts of his first amended complaint on June 26, 2000 and filed a Notice of Appeal on June 27, 2000. Because the cases had been consolidated, this court determined that Lundy had prematurely appealed from a non-final order and the court retained jurisdiction to proceed on Haymond's counterclaims. The parties were realigned with Haymond as plaintiff. In his answer, Lundy asserted three counterclaims: (1) unauthorized practice of law; (2) breach of contract; and (3) civil conspiracy.

Discussion

I. Motion to Strike and Dismiss Counterclaims:

Haymond moves to dismiss Count I of Lundy's Counterclaim for failure to state a claim under 12(b)(6) and for lack of subject matter jurisdiction under Rule 12(b)(1), and to strike portions

of Lundy's Counterclaims for alleging matters previously dismissed by this court.

A. Count I of Lundy's Counterclaims:

Haymond moves to dismiss Count I of Lundy's Counterclaims alleging defendant Hochberg illegally practices law without a license and defendants Haymond, Diamond, and the law firm of Haymond Napoli Diamond, P.C. aid, abet, and conspire to facilitate Hochberg's illegal practice. Pennsylvania law creates a private right of action to enjoin the unauthorized practice of law by a non-lawyer. See 42 Pa. Cons. Stat. Ann. § 2524(c); see also Haymond v. Lundy, 2000 U.S. Dist. LEXIS 8585, at *26. The statute also permits a plaintiff to seek injunctive relief against a person who is aiding and abetting the unauthorized practice of law by a non-lawyer. See id. Haymond now claims that it would violate the Pennsylvania Constitution, Article V, Section 10(c), to permit a claim of aiding, abetting or conspiracy to facilitate unauthorized practice against a member of the Pennsylvania Bar.

The Pennsylvania Constitution provides, "the Supreme Court shall have the power to prescribe general rules governing. . . admission to the bar and to practice law." P.A. Const. art. V, §

10. Article V, Section 10 vests the exclusive power to enact rules governing the conduct of attorneys and adjudicate claims of behavior violative of those rules in the Supreme Court of Pennsylvania. See Commonwealth v. Stern, 701 A.2d 568, 572 (Pa. 1997)(holding that a statute criminalizing payment of a referral fee by a lawyer to a non-lawyer violates Article V, Section 10 of the Pennsylvania Constitution because the Supreme Court had addressed the misconduct prohibited in the Rules of Professional Conduct.) The legislature impermissibly interferes with the Pennsylvania Supreme Court's exclusive jurisdiction when it attempts to regulate the conduct of Pennsylvania attorneys related to their practice of law. See Gmerek v. State Ethics Comm'n, 751 A.2d 1241, 1254-1255 (Pa. Commw. Ct. 2000)(declaring the Lobbying Disclosure Act void upon a finding that the law regulated conduct constituting the practice of law already regulated by the Rules of Professional Conduct).

The practice of law encompasses not only the presentation of arguments before a court, but also preparation of legal papers and management of actions. See id, at 1255. A lawyer who aids, abets or conspires to enable a non-lawyer to practice law within

an attorney's firm is acting in relation to that attorney's practice of law.

The Pennsylvania Supreme Court has exercised its jurisdiction over attorneys and promulgated a rule to address this exact misconduct. Pennsylvania Rule of Professional Conduct 5.5 states "[a] lawyer shall not: (a) aid a non-lawyer in the unauthorized practice of law." The Supreme Court having addressed the specific conduct precludes a private action to sanction violative behavior by members of the Pennsylvania bar. See Stern, 701 A.2d at 572.

To the extent § 2524(c) permits a claim against members of the Pennsylvania bar for aiding and abetting the unauthorized practice of law, the statute transgresses the Pennsylvania Supreme Court's exclusive jurisdiction and is unconstitutional. Count I of Lundy's counterclaims will be dismissed against Scott Diamond and John Haymond, both members of the Pennsylvania bar.[3]

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[3] Lundy asserts that this court has already determined that the claim for aiding and abetting or conspiracy to facilitate unauthorized practice of law may proceed. See Order dated June 22, 2000; Haymond v. Lundy, No. 99-5015 & 99-5048, 2000 U.S. Dist. LEXIS 8585, at *26 (E.D. Pa. June 22, 2000). Neither party raised the constitutionality of the claim at that time, and the court failed to raise it sua sponte. The court acknowledges that the dismissal of the count now may constitute a reconsideration and reversal of a previous decision in this action, but on a

Haymond asserts that if the court dismisses Count I as to Diamond and Haymond, it must also dismiss Count I as to Hochberg, a non-lawyer, for lack of subject matter jurisdiction. This assertion is incorrect; the court has supplemental jurisdiction over the claim against Hochberg.

A district court exercises jurisdiction supplemental to federal question jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367. This court has original jurisdiction over the federal claims in this action and supplemental jurisdiction over all other claims asserted. See Haymond v. Lundy, 2000 U.S. Dist. LEXIS 8585, at *44. Dismissal of the claim against Diamond and Haymond for facilitating Hochberg's unauthorized practice does not alter the court's jurisdiction. The remaining claim against Hochberg arises out of a common nucleus of operative facts, and one would generally expect all the claims to be decided in the same judicial proceeding. See Lyon v. Whisman, 45 F.3d 758, 760 (3d

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Pennsylvania claim, the exclusive jurisdiction of the Pennsylvania Supreme Court, established by the Pennsylvania Constitution, cannot be waived by a party in these circumstances.

Cir. 1995). This court retains subject matter jurisdiction, and clearly has personal jurisdiction over Hochberg. Count I of Lundy's Counterclaims for unauthorized practice of law will not be dismissed against Hochberg.

B. Motion to Strike portions of Lundy's Counterclaims

Haymond moves to strike paragraphs 45-50, 52, 64-66, 69, 71, 72, 74-79, 84-89, 103 and 117 of Lundy's Counterclaims because they include extensive allegations regarding claims already dismissed. A court may strike "redundant, immaterial, impertinent, or scandalous" allegations from a pleading, Fed. R. Civ. P. 12(f), but generally will not do so unless the allegations will cause prejudice to one of the parties. See, e.g., Lake Lucerne Civic Ass'n, Inc. v. Dolphin Stadium Corp, 801 F. Supp. 684, 694 (S.D. Fla. 1992).

Many of the paragraphs cited by Haymond concern Hochberg's alleged unauthorized practice of law, a claim that will not be dismissed. See e.g., Lundy Answer & Countercl., ¶¶ 52 & 64. A few allege that Lundy justifiably relied on Hochberg's and Haymond's assertions that Hochberg could practice, see id. ¶ 75, although the court has previously ruled to the contrary. See Haymond v. Lundy, 2000 Lexis 8585, at *21. Most of the

paragraphs at issue contain a number of assertions, only some of which may contradict a previous ruling of the court.

Haymond alleges that if the paragraphs are not stricken, Lundy will use these allegations to justify abusive discovery. Fact discovery in this action has concluded, and any additional discovery requires leave of court. The paragraphs are not evidence; they will not be admitted at trial. The court does not find it appropriate to parse the language of each paragraph of the Answer to strike questionably offending portions, and no prejudice will result to Haymond from permitting the allegations to remain. If allegations are contradictory to the court's previous rulings on justifiable reliance, they will be ignored. The motion to strike will be denied.

II. Motions arising from Plaintiff's submission of a Motion for Reconsideration of Order Respecting Subpoenas Targeting Unclean Hands

While Haymond's Motion to Strike and Dismiss was pending, his counsel issued third party subpoenas seeking evidence of possible unrelated ethical violations by Lundy. According to counsel, the subpoenas sought evidence to support an unclean

hands defense to Lundy's counterclaim for unauthorized practice of law and conspiracy to commit unauthorized practice. Haymond Mot. for Recons., at 2. Magistrate Judge Angell quashed the subpoenas, and Haymond's counsel filed a Motion for Reconsideration of Order Respecting Subpoenas Targeting Unclean Hands ("Motion for Reconsideration") to which documentation was appended supporting the alleged violations of the Professional Code of Conduct by Lundy.

A. The Sealing of the Motion for Reconsideration

By Order dated September 14, 2000, Magistrate Judge Angell placed the Motion for Reconsideration under seal. This court immediately supplemented her Order by Order dated September 15, 2000, holding the Motion for Reconsideration under seal pending a hearing to determine whether it should be under seal. Haymond then filed a Motion to Vacate the court's September 15, 2000 Order.

The Motion to Vacate the court's Order of September 15, 2000 alleges that the court was in error to place the Motion for Reconsideration under seal without notice and an opportunity to be heard. When a party moves to close a civil court proceeding

to the public, a court may hold argument in camera on whether the proceeding should be closed to avoid disclosures that would effectively nullify the party's claim for closure. See Publicker Industries v. Cohen, 733 F.2d 1059, 1071-72 (3d Cir. 1984). Likewise, a court is permitted to place a document under seal pending a hearing to determine whether the document should be under seal. Otherwise, public access to the material would moot any claim for sealing the document. The court's hearing on October 13, 2000,[4] to determine whether the Motion for Reconsideration should remain under seal was the correct procedure.

The Motion to Vacate also alleges that the Motion for Reconsideration should not remain under seal under the common law right of access and the First Amendment. The public's common law right of access to judicial records entitles the public to inspect judicial records and documents. See Bank of America v. Hotel Rittenhouse Assoc., 800 F.2d 339, 343 (3d Cir. 1986). But the right of public access is not absolute. See id. at 344. Under the common law right of access, a court must weigh factors

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[4] October 13, 2000 was the earliest practicable date for a hearing of this length.

favoring restriction against the interest of the public in access. See id.; Republic of the Philippines v. Westinghouse Electric Corp., 949 F.2d 653, 662-63 (3d Cir. 1991).

The public may also have a First Amendment right of access to motions filed with the court. See Publicker, 733 F.2d at 1073. Even under the stricter First Amendment standard, the court may place a court filing under seal if the party requesting it demonstrates an overriding interest, and the court finds that placing the document under seal is narrowly tailored to serve that interest. See id. at 1073.

Discovery motions are not subject to the same presumptive right of access. See Leucadia v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 165 (3d Cir. 1993). The Motion for Reconsideration is, in effect, a discovery motion, as it seeks reconsideration of a magistrate judge's decision to quash subpoenas.

Lundy argues that the Motion for Reconsideration should remain under seal because it is designed to prejudice, embarrass and humiliate Mr. Lundy. Haymond responds that the documents attached to the Motion for Reconsideration were not obtained in discovery, the court's September 15, 2000 Order was overbroad,

and, based upon the minimal amount of publicity this case has engendered to date, there was very little danger that unsealing the document would result in harm either to Lundy or the administration of justice.

The oral argument on October 13, 2000 suggested that the Motion for Reconsideration was irrelevant to the proceedings before the court, so the court issued a Rule to Show Cause why the document should not be stricken as frivolous and scurrilous under Rule 11. Finding that the Motion for Reconsideration was a discovery motion, even if the appended materials were not obtained in discovery, the court reserved final judgment on whether the Order of September 15, 2000, should be vacated, and continued to hold the document under seal pending the outcome of the Rule to Show Cause.

B. The Rule to Show Cause

Under Federal Rule of Civil Procedure 11(c), a court may, after notice and reasonable opportunity to respond, impose an "appropriate sanction" upon attorneys, law firms, or parties if the court finds they have violated subdivision (b) of that Rule.[5]

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[5] Although the Rule 11 signatory on the Motion for Reconsideration was Deborah H. Bjornstad, Esq., any monetary sanction would be imposed upon the law firm of Mann, Unger,

Fed. R. Civ. P. 11(c). Rule 11(b) provides that by presenting a motion to the court, the attorney is certifying that the document (1) "is not being presented for any improper purpose, such as to harass;" and (2) the legal claims made are nonfrivolous. Fed. R. Civ. P. 11(b). An attorney's conduct is evaluated objectively when it is challenged under Rule 11: the applicable standard is that of the reasonable attorney admitted to practice before this court. See Adamson v. Bowen, 855 F.2d 668, 673 (10th Cir. 1988).

As required by Rule 11(c), the court gave Haymond's counsel a reasonable opportunity to respond and justify having filed the Motion for Reconsideration. Following submission of a Memorandum in Response to the Rule to Show Cause, a hearing was held November 8, 2000.

A motion is frivolous under Rule 11 if it is "baseless and made without a reasonable and competent inquiry." Townsend v. Holman Consulting Corp., 914 F.2d 1136, 1140 (9th Cir. 1990). Haymond's counsel claims that the third-party subpoenas sought in the Motion for Reconsideration were to help them obtain evidence to assert an unclean hands defense to Lundy's allegations that

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Spector & Labovitz because Ms. Bjornstand is an associate who works under the supervision and direction of the partners of the firm.

Diamond and Haymond conspired to aid Hochberg in his unauthorized practice of law. Mot. to Vacate Order of Sept. 15, 2000, at 2.

Haymond's counsel argues that seeking the subpoenas was reasonable because Lundy's counterclaim for unauthorized practice seeks equitable relief, so the equitable defense of unclean hands is applicable. Unclean hands is an equitable defense, but it does not permit an opposing party to bring in any and all evidence of a party's past bad acts merely because equitable relief is sought.

The defense of unclean hands makes admissible only the bad actions of the claimant related to the transaction of the equitable claim.

> Courts of equity do not make the quality of the suitors the test. They apply the maxim requiring clean hands only where some unconscionably act of one coming for relief has immediate and necessary relation to the equity that [the party] seeks in respect to the matter in litigation. They do not close their doors because of plaintiff's misconduct, whatever its character, that has no relation to [the equitable claim] involved in this suit, but only for such violations of conscience as in some measure effect the equitable relations between the parties.

Keystone Driller Co. v. General Escavating Co., 290 U.S. 240, 245 (1933). This rule was reaffirmed recently by both the Third Circuit Court of Appeals and the Pennsylvania

Supreme Court. See New Valley Corp. v. Corporate Prop. Assoc., 181 F.3d 517, 525-26 (3d Cir. 1999) (requiring an immediate and necessary relationship between the challenged conduct and the claim for relief); see also, Lucey v. Workmen's Comp. Appeals Bd., 732 A.2d 1201, 1204 (Pa. 1998) ([The doctrine of Unclean hands] closes the doors of a court of equity to one tainted with iniquity or bad faith relative to the matter in which he seeks relief.)

The evidence Haymond sought, ostensibly in pursuit of an unclean hands defense, was not sufficiently related to Lundy's requested equitable relief. The ethical violations alleged did not include involvement by Lundy in the alleged conspiracy to facilitate Hochberg's practice of law without a license and have no immediate relationship to the matters before the court for resolution.

The theory on which the Motion for Reconsideration was filed was not legally reasonable; the motion was frivolous and subject to sanction. Moreover, the frivolity of the motion and the scurrilousness of the material appended thereto gives rise to an inference that the motion was filed solely to embarrass Lundy. See Katzman v. Victoria's Secret

Catalogue, 167 F.R.D. 649, 661 (S.D.N.Y. 1996), aff'd mem., 113 F.3d 1229 (2d. Cir. 1997). A motion filed for an improper purpose is also subject to sanction under Rule 11. See Fed. R. Civ. P. 11(b). Plaintiff's counsel is in violation of Rule 11(b), and subject to sanctions under Rule 11(c).

Courts have significant discretion under Rule 11(c) to fashion an appropriate remedy for behavior violating Rule 11(b). Although Rule 11 no longer specifically mentions striking the offending document as a sanction,[6] courts continue to order nonmonetary sanctions under Rule 11. See 5A Wright & Miller, Federal Practice and Procedure:

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[6] A former version of Rule 11 read as follows:

> If a pleading is not signed or is signed with intent to defeat the purpose of the rule, it may be stricken as sham and false and the action may proceed as if the pleading had not been served.

Rule 11 was amended in 1983 to make explicit the scope of the rule, its certification requirement, who may be sanctioned, and the breadth of sanctions available. Nothing in the court's research suggests that it was meant to curb the striking of a document as a sanction if the court finds the sanction appropriate.

Civil 2d, § 1136 (1996). The appropriate remedy here is to strike the Motion for Reconsideration.[7]

Striking the material from the record is an appropriate remedy here, but not for the improper allegations in Lundy's Answer and Counterclaims, because the subject matter of the allegations in the Answer is properly before this court. Some of the allegations in Lundy's Answer and Counterclaims are improper because the court has already ruled against Lundy on certain matters, but they are not irrelevant or scurrilous. None of the allegations in the Motion for Reconsideration are properly before this court, and there is prejudice to the opposing party not present with regard to the Lundy allegations.

The Motion for Reconsideration will be stricken as in violation of Rule 11. This action will proceed as if it had never been filed. The following documents, filed solely as a

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[7] The court acknowledges that the Motion for Reconsideration was filed with leave from Magistrate Judge Angell, who granted the initial Motion to Quash under Rule 45 for lack of foundation and suggested that if plaintiff had a foundation for the evidence sought by the subpoenas they should have submitted it. Magistrate Judge Angell recognized that it was not her role to determine the applicability of the unclean hands defense and told the parties that the propriety of the defense was a matter for this court. Her grant of leave to file evidence supporting the need for subpoenas does not excuse the impropriety of the motion, but has been considered in determining the appropriate sanction.

result of the filing of the Motion for Reconsideration, will similarly be stricken: the defendant's Response to the Motion to Vacate the Court's Order of September 15, 2000, the Memorandum of Plaintiffs and Counterclaim Defendants in Response to the Rule to Show Cause, and the Reply of Marvin Lundy in Support of this court's Rule to Show Cause. The court's Order of September 15, 2000 will be vacated as moot.

Conclusion

Plaintiffs' Motion to Strike and Dismiss will be granted, in part, and denied, in part. Count I of defendant's counterclaims will be dismissed as to Haymond and Diamond. To permit the claims against them would violate Article V, Section 10 of the Pennsylvania Constitution. Count I will proceed against Hochberg; the court has supplemental jurisdiction over this claim under 29 U.S.C. § 1367. No allegations of the defendant's Answer and Counterclaims will be stricken; allegations as to dismissed claims will be ignored.

The Motion for Reconsideration will be stricken as filed in violation of Rule 11 of the Federal Rules of Civil Procedure. Certain other related documents will also be stricken as placing

irrelevant materials before the court. The court's Order dated September 15, 2000 will be vacated.

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v.	:	
MARVIN LUNDY	:	
v.	:	
JOHN HAYMOND, SCOTT DIAMOND, ROBERT HOCHBERG, HAYMOND, NAPOLI, DIAMOND, P.C.	:	No. 99-5048

ORDER

AND NOW, this 12th day of December, 2000, in consideration of the Motion of Plaintiff/Counterclaim Defendant to Strike and Dismiss (# 79), the Response thereto (# 98), the Motion to Vacate Order of September 15, 2000 (# 124), the Answer thereto (# 126), the Rule to Show Cause (# 130), the Memorandum of Plaintiffs and Counterclaim Defendants in Response to the Rule to Show Cause (# 135), and the Reply of Marvin Lundy thereto (# 137) and after a hearing at which all parties were heard on November 8, 2000,

It is **ORDERED** that:

1. Plaintiff's Motion to Strike and Dismiss (# 79) is **GRANTED, IN PART,** and **DENIED, IN PART.**

a. Dismissal of Count I of Lundy's Counterclaims as against Haymond and Diamond is **granted**; the claim against Diamond and Haymond for aiding and abetting, and conspiracy to commit unauthorized practice is dismissed.

b. Dismissal of Count I of Lundy's Counterclaims as against Hochberg is **denied**; the claim against Hochberg for unauthorized practice of law will proceed. The court has supplemental jurisdiction over this claim.

c. Striking certain paragraphs of Lundy's Counterclaims is **denied** as unnecessary.

2. The Motion for Reconsideration of Order Respecting Subpoenas Targeting Unclean Hands (# 108) is **STRICKEN** as frivolous in violation of Federal Rule of Civil Procedure 11(b).

a. Defendant's Response to the Motion to Vacate the Court's Order of September 15, 2000 (# 126), the Memorandum of Plaintiffs and Counterclaim Defendants in Response to the Rule to Show Cause (# 135), and the Reply of Marvin Lundy in Support of this court's Rule to Show Cause (# 137) are also **STRICKEN**. These documents were filed in response to the Motion for Reconsideration and discuss the Motion at length.

b. The Rule to Show Cause why the Motion for Reconsideration of Order Respecting Subpoenas Targeting Unclean Hands should not be stricken as frivolous (# 130) is **DISCHARGED**.

3. Plaintiffs' Motion to Vacate the court's Order of September 15, 2000 (# 124) is **GRANTED**. The court's Order of September 15, 2000 is **VACATED** as **MOOT**.

Norma L. Shapiro, S.J.