
**LAWYER DISCIPLINARY BOARD
INVESTIGATIVE PANEL CLOSING**

I.D. Nos.: 11-02-507
11-02-508
11-02-509
11-02-510

Date Complaints Opened: October 28, 2011

COPY

COMPLAINANT: Office of Disciplinary Counsel
City Center East, Suite 1200 C
4700 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304

RESPONDENTS: Clifford J. Zatz, Esquire
1001 Pennsylvania Avenue, NW #10
Washington, DC 20004-2595

Bar No.: N/A

William L. Anderson, Esquire
1001 Pennsylvania Avenue, NW #10
Washington, DC 20004-2595

Bar No.: N/A

Kirsten L. Nathanson, Esquire
1001 Pennsylvania Avenue, NW #10
Washington, DC 20004-2595

Bar No.: N/A

Monica M. Welt, Esquire
1001 Pennsylvania Avenue, NW #10
Washington, DC 20004-2595

Bar No.: N/A

THE INVESTIGATION OF THIS MATTER having been completed and a report having been made to the Investigative Panel of the Lawyer Disciplinary Board, the Panel orders that these complaints be closed for the following reasons:

STATEMENT OF FACTS

Pursuant to Rule 2.4(a) of the Rules of Lawyer Disciplinary Procedure, the Office of Disciplinary Counsel opened these complaints against Respondents Clifford J. Zatz, Esquire, William L. Anderson, Esquire, Kirsten L. Nathanson, Esquire, and Monica M. Welt, Esquire, members of the District of Columbia Bar, after it received a copy of advertising material that they had apparently published on the website of their law firm, Crowell & Moring LLP.¹

The material in question was a 'client alert' published at <http://www.crowell.com/NewsEvents/AlertsNewsletters/all/1360048>² on or about June 28, 2011. The article was titled "Recent Study Purports to Link Mountaintop Mining with Increased Rate of Birth Defects," and it referred to a study released by researchers from West Virginia University and Washington State University that concluded that mountaintop mining is statistically associated with an increased incidence of certain birth defects in some geographic regions of Kentucky, Tennessee, Virginia, and West Virginia. The article went on to assert that the study contained methodological flaws, including that "[t]he study failed to account for consanguinity [sic]³, one of the most prominent sources of birth defects," and

¹ According to its website, Crowell & Moring LLP has offices in Washington, DC; New York, NY; Los Angeles, CA; San Francisco, CA; Irvine, CA; Anchorage, AK; Cheyenne, WY; London, England; Brussels, Belgium; Cairo, Egypt; and Riyadh, Saudi Arabia.

² The article no longer appears on the Crowell & Moring website.

³ Consanguinity is defined in the Webster's New World Dictionary as "having the same ancestor." Consanguinity is also commonly known as 'inbred' or 'inbreeding.'

advised the reader to contact Respondents “to further discuss this study or your company’s environmental litigation defense strategy.”

The aforementioned article was subsequently discussed in articles published by the American Bar Association⁴ and the Charleston Gazette.⁵ In an ethics complaint filed against Respondents with the District of Columbia Office of Bar Counsel⁶ and provided to the Office of Disciplinary Counsel, Jason Huber, Esquire, a member of the West Virginia State Bar, asserted, “[The statement regarding consanguinity] was rightfully perceived by many as another attempt by coal industry apologists to degrade the Appalachian People in order to mask the epidemiological, social, and environmental consequences of mountaintop removal mining.” Mr. Huber further asserted, “The Advertisement perpetuates and exploits the empirically debunked notion that inbreeding is regularly practiced by the Appalachian People. Despite the firm’s frequently flaunted “ample” and “significant” experience in birth defect litigation, [Respondents] failed to recognize the lack of scientific evidence to support their attempt to mislead the reader into believing that Appalachian incest, not mountaintop removal mining, cause the observed birth defects.”

⁴ Debra Cassens Weiss, *Did Crowell & Moring Insult Appalachians with Inbreeding Suggestion?*, ABA Journal (July 12, 2011).

⁵ Ken Ward, Jr., *Mountaintop removal and birth defects: Just what are the coal industry’s lawyers talking about?* Coal Tattoo (blog) (July 11, 2011).

⁶ The District of Columbia Office of Bar Counsel docketed complaints against Respondents regarding the same allegations contained in the instant complaints on or about October 5, 2011. The complaints were dismissed without a finding of a violation of the District of Columbia Rules of Professional Conduct on or about March 16, 2012.

As the Supreme Court of Appeals of West Virginia has held that lawyers not admitted to the West Virginia State Bar but who solicit clients in West Virginia are subject to our disciplinary procedures,⁷ Respondents were asked to review Rule 7.1(a) and 8.4(c) of the West Virginia Rules of Professional Conduct and provide further explanation as to why the article was not a dishonest, false or misleading communication. In their joint response, Respondents denied misconduct.

Respondents maintained that the statement at issue was not false or misleading advertising, or dishonest, due to the following reasons: (1) the lack of a connection of consanguinity to birth defects being, at this time, a scientific debate and but one of a number of methodological critiques of the study raised in the website posting; (2) the statement that the underlying study did not consider consanguinity in its findings being truthful and not misleading; (3) the website posting not constituting advertising and thus, not falling within the scope of Rule of Professional Conduct 7.1; and (4) the discussion being a matter of scientific discourse and, thus, subject to First Amendment protection.

Respondents presented scientific literature supporting their contention that consanguinity can be a source of birth defects regardless of the location of the study population, and Respondents asserted that studies such as the underlying study are subject to criticism when all major potential confounding factors are not addressed. Respondents contended that the study “took pains” to eliminate a number of potential confounding factors,

⁷ See, Lawyer Disciplinary Board v. Coale, Allen & Van Susteren, 198 W.Va. 18, 479 S.E.2d 317 (1996).

including certain socioeconomic influences and, as Respondent explained on their website article, consanguinity. Thus, Respondents asserted that the statement contained in their 'client alert' was truthful and accurate. Respondents further asserted that based upon the current research, the issue of consanguinity and its role in birth defects is clearly the type of issue prone to be addressed in litigation by parties and experts defending or challenging their conclusions about causation.

Respondents also asserted that they do not practice law in West Virginia or otherwise perform any legal services in the State, or maintain membership in the West Virginia State Bar. Respondents denied that the 'client alert' on their website was intended to directly solicit any West Virginia clients and instead was merely an announcement of a recent development intended for those who have agreed to receive news alerts from Crowell & Moring, along with an invitation to discuss the details of the development further. Respondents further asserted that the posting was promptly removed from its website upon receiving negative feedback, and the firm issued an apology. Respondents asserted that the article was not intended to be demeaning or reflect any negative perceptions about Appalachia, but understood that some deemed it offensive.

REASON CLOSED

The Lawyer Disciplinary Board has long been of the opinion that web sites, news groups and e-mails are potential forms of attorney advertising which are governed by the prevailing ethical standards in each jurisdiction.⁸ However, Respondents did not practice in

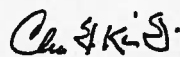
⁸ See, L.E.I. 98-03, *Attorney Advertising on the Internet*" (dated October 26, 1998).

West Virginia and it is not evident that their communication was specifically directed to West Virginia residents or corporations. The statement referenced herein is also not a statement that relates to a lawyer or a lawyer's services, as would be required to find a violation of Rule 7.1(a) of the Rules of Professional Conduct, or dishonest, as the referenced study undisputedly did not address consanguinity. The Panel finds that to find a violation of Rule 8.4(c) of the Rules of Professional Conduct in this matter there would have to be clear and convincing evidence that a statement was knowingly made by Respondents with reckless disregard for its truth or that it was knowingly false, and that burden cannot be met.

The Panel does find, however, that in its overall context, Respondents' statement did allude to offensive Appalachian stereotypes. The Panel reminds Respondents that such implications of gross stereotypes have no place in the legal system and undermine the integrity of the profession. The Panel in no way condones the conduct of Respondents but cannot proceed in the absence of clear and convincing evidence of a violation of the Rules of Professional Conduct. Accordingly, as there is no further action warranted, this matter is closed.

* * *

CLOSING ORDERED this 14th day of December, 2012, and **ENTERED** this 14 day of December, 2012.



Charles J. Kaiser, Jr.
Chairperson, Investigative Panel