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ONEONONE

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A Message from the Chair

The closer we get to an Election Day, some people tend to become more heated and short-tempered. Every quadrennial, families and workmates grow divided by political ideology, and we retreat into the websites, publications and radio that reinforce what we already believe. Last year, even though New York State was largely spared ads for the Presidential campaign by the candidates and the outside groups supporting them, there were still plenty of negative ads for other races from Niagara to Suffolk counties, as well as a bombardment of ads from neighboring states. We always think that the election season we're in at the time is the nastiest and most corrosive ever, and with a seemingly endless supply of rancor, divisiveness and anger on all sides, 2012 certainly felt that way. But just when it got to the point where you couldn't even talk to your neighbor who had the temerity to put up a lawn sign for the other guy, the rancor stopped. A little over a week before the election, none of that seemed to matter very much.

It may sound like a cliché, but when Superstorm Sandy hit on October 29th, it did seem as though all our political differences momentarily evaporated. Sandy's powerful winds and attendant overwhelming waves were of a breadth that defied adjectives, destroying property and upending lives across the Downstate region and beyond. The inconvenience of lost electricity paled in comparison to the tragedy suffered by those who lost their homes or, in some cases, their lives. Within days, the New York State Bar Association mobilized to launch a program to train attorneys to assist Sandy's victims. The NYSBA Lawyer Referral and Information Service set up a dedicated phone number for victims to call and receive consultation from NYSBA volunteers. It was not surprising that NYSBA acted so quickly. The Association is really a tremendous representative for the profession, and it reaction to Sandy was but one example.

Every member of the General Practice Section I spoke with in the wake of the storm had a story to tell. One member of our Executive Committee told me that his Brooklyn home had become inhabitable. One of my predecessors as Chair, who works at a large firm in Lower Manhattan, told me that their building had been flooded, and that some employees were working out of offices in Midtown, but because of damage to the phone system near Wall Street, all their calls were

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being routed through Los Angeles. One of our members sought advice on our invaluable listserve about what to do after learning that their storage locker had been flooded, destroying many files (consensus: get them freeze-dried). Before the storm hit, Manhattan-based Joyce Goldstein posted the following prescient note on the listserve: "My office is on Battery Place right opposite the Harbor. If the storm is as bad as they say it will be there will likely be tremendous flooding." A week after the storm, I e-mailed her privately to ask how she had made out. Her experiences are no doubt not unique to our members, and I'm sure there are dozens of you who had to make similar, if not far worse, accommodations last year. But her experiences do serve as a reminder of how our members persevere in their practice against adverse conditions.

On the Sunday before the storm, Joyce had the foresight to head to her office to pick up some files she might need, and left her work computer on so she could work remotely if need be. The next evening, the storm surge dramatically poured water onto the streets, into the tunnels of Lower Manhattan, half of Manhattan was plunged into darkness, and her office at the lower tip of the island was without power and otherwise inaccessible.

Lacking a scanner or fax machine at home, she was somehow able to do her work by turning her dining room table into an office, and having her legal assistant walk or bike the two miles to her home. During this unsettled period, Joyce was able to form a corporation for a client, arrange for signature on a contract for clients who were buying a condominium and even drafted a shareholder agreement, with a template she received over the listserve from a fellow member of the General Practice Section. Over a week after Sandy hit, the floodwaters had receded, and Joyce finally made it back to the eerie quiet of her office. Even though most all of Manhattan had power restored, her office was located in a rare corner of the Island bereft of electricity. There was obviously no heat or hot water either, and she had been informed that the phone company wouldn't be coming by to restore phone and Internet service for over a month. Joyce showed up at her office equipped with a flashlight and five large duffel bags and suitcases, taking office supplies, active files, and the data storage system that would enable her to access electronic files from home (one lesson she believes we can all learn from this experience is to invest in off-site electronic data storage). By essentially taking her office home and improvising (she used her personal webmail account to send new contact information to all current clients), and the generosity of colleagues who let her use their conference room space, she was able to be up and running. It was essential to her that she keep her law practice going despite the difficulty, which involved keeping all her clients aware of her temporary circumstances. "Without that," she told me, "my practice would just shrivel up. Luckily, I am up for the challenge." But weren't we all.

Joyce's story was probably not unique under the trying circumstances faced by many in the General Practice Section last fall (of course, months later, difficulties still persist). But they remind us how resourceful we lawyers can be to remain accountable and accessible to our clients. Like the Postal Service, neither snow nor rain nor heat nor gloom of night stays us from being responsible and responsive to our clients and to our profession. In one respect or another, Sandy tested all of us. It is heartening to know that our Section rose to the challenge, not only through charitable efforts to assist those hardest hit, but also by persevering professionally, keeping our practices functioning as smoothly as possible.

Zachary J. Abella

From the Co-Editors

Richard Klass

Martin Minkowitz

As the Co-Editors of *One on One*, we endeavor to provide our members and readers with a great selection of topical articles on issues affecting the varying and diverse areas of law in which our General Practice Section members practice. This issue, we are pleased to offer you the following articles, which we hope will be found very helpful and informative:

***Workers' Compensation Law*:** From co-editor Martin Minkowitz, Esq., there is analysis of when workers' compensation benefits may offset against a recovery by the claimant in a separate action. Recent case law provides the insurance carrier with both a lien on any recovery and offset against any benefits to be paid.

***Attorney's Charging Lien*:** Attorneys have it hard enough! Richard A. Klass, Esq., discusses a recent action involving the attorney's charging lien granted under Judiciary Law §475. An attorney's charging lien comes into existence when the attorney appears of record for a party in an action.

***Privacy and Smartphone Technology*:** The author, Christy Foley, Esq., questions whether current smartphone technology has created the situation where "Big Brother" is watching the user's every step. At this point, almost all attorneys have a "smartphone" with expanded capabilities and applications, including posting photographs, searching social networking websites, obtaining directions and locating local businesses. Behind many of these applications, the smartphone is also collecting tracking data on the user. Two large smartphone technology providers, Apple and Google, have location tracking data systems that may leave the user's data unencrypted, despite required privacy notices. Several lawsuits have been brought under consumer protection laws to address these privacy concerns.

***Property Condition Disclosure Act*:** Believe it or not, the Property Condition Disclosure Act [PCDA] has now turned 10 years old! In an article by Andrew D. Brodnick, Esq., he discusses the implications of the PCDA on real estate transactions. There is a discrepancy in practice among New York State attorneys, where downstate attorneys rarely provide the seller's disclosure form (thus, giving the buyer a $500 credit against the purchase price) and upstate attorneys generally do. Mr. Brodnick reviews the remedies available to a buyer under the PCDA.

***Social Media and Civil Litigation*:** In an article by Emina Poricanin, Esq., she discusses the Internet fad of social networking, including Facebook and other websites, and the impact on civil litigation. Specifically, the article reviews the status of New York law concerning disclosure of documents, postings and photographs from social networking websites to other parties in the context of litigation. Acknowledging that content on these sites is discoverable, the author analyzes the case law as to when and how such content may be produced.

The General Practice Section encourages its Section members to participate on its committees and to share their knowledge with others, especially by contributing articles to an upcoming issue of *One on One*. Your contributions benefit the entire membership.

Articles should be submitted in a Word document. Please feel free to contact either Martin Minkowitz at mminkowitz@stroock.com (212-806-5600), or Richard Klass at richklass@courtstreetlaw.com (718-643-6063) to discuss ideas for articles.

Sincerely,
Martin Minkowitz
Richard Klass
Co-Editors

Workers' Compensation Offset Against Federal Recovery

By Martin Minkowitz

It is well settled by statute and case law that an injured worker who is receiving workers' compensation benefits for an injury which arose out of and in the course of employment can bring suit in a civil action against the one causing the injury.[1] The employer and co-employees are generally immune from such suits by the exclusive remedy doctrine of the Workers' Compensation Law. That doctrine provides that if an employer has made provision for workers' compensation coverage for its employees,[2] that employer's exclusive liability to its employees for the injury is to secure that coverage. Therefore, except for very limited circumstances, an employer, and co-employees, cannot be sued by an injured employee who is entitled to workers' compensation benefits.

If the injured worker recovers money for the same injury, for which workers' compensation benefits were paid, in a separate civil action, the carrier has a lien against that recovery. Since the exclusive remedy doctrine usually prevents suit against the employer, or co-employees, a recovery in a civil suit is usually against a third party who caused the injury or contributed to it. As between a tortfeasor and the employer, the one who should bear the ultimate burden for the loss is the one who caused the harm. The carrier's lien would attach to any settlement, award or judgment in the civil action to repay it for money it had paid to the claimant. It would also have an offset, or credit, against any balance of money paid to the claimant from the civil action. It could, therefore, offset money given to the claimant from the civil action against workers' compensation benefit payments it would have made after the conclusion of the civil action.

In a recent case which the Appellate Division had before it, the Court held that the recovery in a civil action for the same injury that the claimant was receiving workers' compensation benefits, even if the action was against the employer or a co-employee, the carrier still has a right to a lien and an offset. In that case, claimant was a youth division aide at a juvenile detention center. She was kidnapped and raped. She sustained a permanent partial disability caused by post traumatic stress disorder. After the workers' compensation award, she commenced a Federal Court action against her employer, the New York State Office of Children and Family Services, for a deprivation of her civil rights. The issue was clear. Did the carrier have a right to a lien or an offset against a recovery for a violation of claimant's civil and constitutional rights?

When rendering its decision, the Court looked beyond the nature of the federal cause of action to the injury itself. It concluded that if the injuries, or damages, which were alleged in the federal action were the same as those alleged in the workers' compensation case, and for which the Board awarded benefits, then the carrier has a right to a credit against the settlement recovery which it sought.[3] It seems that the effect of the employer paying the settlement in the civil action is to enable it to reimburse itself for the payment of workers' compensation benefits. The result is less of a benefit to the claimant if most or all of the settlement is used in the offset. It leaves open the question as to why the Federal Court should permit the cause of action against the employer when the employee-plaintiff was receiving workers' compensation benefits.

Endnotes

1. Sec. § 29 WCL.
2. Sec. § 11 WCL.
3. *Beth V. v. New York State Office of Children & Family Services et al.*, __ AD3d __ (2012).

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The Crane Collapse and the Charging Lien

By Richard A. Klass

On March 15, 2008, there was tragic collapse of a crane from the top of a high-rise building being constructed at 303 East 51st Street in Manhattan. The tower crane snapped off and fell, in what was referred to as the worst construction accident in recent New York history. Sadly, several people died and many people were injured. Additionally, many of the surrounding buildings sustained damage from the crane collapse.

In *Cabukyuksel v. Ascot Properties LLC,* 2011 WL 3898067 [Sup. Ct., NY Co. Index No. 108356/08], the Supreme Court Justice decided one of the issues which arose from the approximately 60 lawsuits filed over the crane collapse. The issue which she decided involved an attorney's charging lien.

The alleged pertinent facts recited in the court's decision were as follows: A couple were two of the victims of the crane collapse, with the wife sustaining personal injuries as a result of falling down some stairs and injuring her ankle, and both spouses sustaining damages due to the landlord's failure to restore them to their apartment in the building next door. The wife retained Attorney "A" to represent her and her husband concerning the personal injury claim. The retainer agreement stated that she was retaining Attorney "A" for her personal injury claim and for her husband's loss of services claim.

Unbeknownst to the wife, one week later, the husband retained Attorney "B" to pursue the non-personal injury damages claim. In the retainer agreement with Attorney "B,"it stated, "This office will not handle [the wife's] claim for personal injury with regards to her being present in the building at the time of the accident as I have been informed she has retained separate counsel." Attorney "B" then filed an action against the landlord, claiming that "Landlord" failed to repair the building and to restore the couple to their tenancy.

Shortly before settling the action against Landlord, Attorney "B" amended the complaint to include causes of action for negligence and intentional infliction of emotional distress. Then, the claims of the couple were settled for $700,000. The General Release signed by both of them recited, among other things, that "tenants began to experience physical and emotional injuries" including loss of sleep, anxiety, shock, etc." The wife executed the Release while in Greece.

Concerning the wife's claim, Attorney "A" commenced an action against the City of New York, contractors and crane operators [but not against Landlord] for personal injuries, including physical and emotional pain and suffering and loss of services. At the deposition in the personal injury action, the wife testified that she signed the Release but never saw the whole ten-page document before. The wife then informed Attorney "A" that, although she read English, it was not her first language and she did not completely understand the Release prepared by Verzani. She claimed that no one read the Release to her or advised her of its meaning and significance. The husband admitted that he collected the $700,000, and then turned to his wife and said, "Surprise." Attorney "A" then explained that the defendants would argue that any recovery awarded to the wife for her personal injury claim should be reduced by the $700,000 settlement.

Attorney "A" then took the position that she was entitled to compensation from the $700,000 recovery in the action prosecuted by Attorney "B" against Landlord, since she had been retained to pursue the claims for physical and/or emotional injuries arising from the crane collapse accident. Attorney "B" disputed the claim.

Accordingly, Attorney "A" brought a petition in the Landlord action, claiming an entitlement of one-third of the settlement amount by virtue of an attorney's charging lien under Judiciary Law §475. Verzani brought a cross-motion to dismiss the petition of Attorney "A," indicating that she failed to allege that she was the attorney of record in the Landlord case or that she performed any legal services which contributed to the $700,000 settlement.

In deciding the petition and cross-motion, the Supreme Court Justice noted that Attorney "B"'s retainer agreement proved that he knew the wife was pursuing her personal injury claim through Attorney "A" and acknowledged that he would not pursue that claim in the Landlord action. The court, therefore, found that Attorney "B" committed fraud by amending the complaint to include a cause of action for emotional and physical injuries in light of his knowledge that Attorney "A" was retained for this purpose.

First, the Supreme Court decision discussed the nature of an attorney's charging lien, affirming the principle that the "enforcement of a charging lien is

founded under the equitable notion that the proceeds of a settlement are ultimately 'under the control of the court, and the parties within its jurisdiction, [and the court] will see that no injustice is done its own officers'." Citing to T*unick v. Shaw*, 45 AD3d 145, 148,842 NYS2d 395 [1 Dept. 2007].

The Supreme Court then went on to analyze the situation at hand under Judiciary Law §475, which provides as follows:

> From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, or the initiation of any means of alternative dispute resolution including, but not limited to, mediation or arbitration, or the provision of services in a settlement negotiation at any stage of the dispute, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, award, settlement, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.[1]

Finding that Attorney "A" maintained a charging lien in the one-third legal fee portion of the $700,000 settlement [namely $233,333.33], the Supreme Court specifically held that, "Based on [Attorney "A"'s] Retainer Agreement, the Notice of Claim filed by [Attorney "A"], and [Attorney "B"'s] own letter agreement, Attorney "B" is precluded from disputing that Attorney "A" was the attorney of record for any claim involving physical and emotional injuries."

On appeal, the First Department unanimously reversed the decision of the Supreme Court. In *Cabukyuksel v. Ascot Properties LLC,* 99 AD3d 405, 952 NYS2d 3 [1 Dept. 2012], the court held that Attorney "A" could not have a charging lien on the settlement proceeds in the action against the City and other contractors.

In reversing the decision, the First Department emphasized the language of the above statute which states, "from the commencement of an action…the attorney who appears for a party…" Attorney "A" could not have had a charging lien on the settlement proceeds under Judiciary Law §475 where she never commenced an action against Landlord and was, thus, never the attorney of record. Rather, the remedy available to Attorney "A" is a plenary action. *See, e.g., Rodriguez v. City of New York,* 66 NY2d 825, 498 NYS2d 351, 489 NE2d 238 [1985] [where the attorney's name "never appeared on any of the pleadings, motion papers, affidavits, briefs or record in plaintiff's action," "it is clear that [he] is not entitled to seek an attorney's lien under Judiciary Law §475 and must enforce such rights as he may have in a plenary action"]; *see also Weg and Myers v. Banesto Banking Corp.*, 175 AD2d 65, 66, 572 NYS2d 321 [1 Dept. 1991] [Judiciary Law §475 grants a charging lien to an attorney only when there has been an appearance by the attorney in the action]; *Max E. Greenberg, Cantor & Reiss v. State of New York,* 128 AD2d 939, 512 NYS2d 587 [3 Dept. 1987], *lv. denied* 70 NY2d 605, 519 NYS2d 1028, 513 NE2d 1308 [1987] (while the firm was the attorney of record in the state court action and provided legal services to a client for which it may be entitled to compensation, the firm was not entitled to a lien under Judiciary Law §475 for proceeds of a settlement in a federal court action, where it was not the attorney of record and not the firm which produced the settlement).

In this case, Attorney "A" is now free to commence a plenary action against the wife, husband, Attorney "B," and any other parties she believes may be liable to pay legal fees to her.

The important points to get from the *Cabukyuksel* case are, perhaps, three-fold: (1) explicit, detailed retainer agreements with clients about the nature and scope of legal services to be performed by the attorney should be used, envisioning situations that may seem murky; (2) attempting to keep informed of the client's overall strategy concerning a particular event or litigation (realizing that not everything can be known); and (3) understanding the extent to which an attorney's charging lien may or may not protect the attorney, depending on the claims asserted.

Endnote

1. Section 475 was recently amended to include alternative dispute resolution fora, including mediation and arbitration, as one of the proceedings to which an attorney's charging lien may apply.

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Suing Ourselves: How Our Need for Smartphones Allows Apple and Google to Act Like Big Brother

By Christy Foley

Introduction

It is rare to find someone without a smartphone these days (and even rarer to find a lawyer without such a phone). On occasion, we use smartphones to call and text each other. More often, we use smartphones to check our email, update our social networking websites, get directions, locate nearby businesses, and take photos. Our smartphones help us stay constantly connected to the world. What most of us do not realize, though, is how visible our private information is to the world because of these phones…and just who might be collecting that private information.

Background

In April 2011, two researchers began publicizing the fact that Apple's iPhone and iPad devices secretly record the locations of their users. The researchers, Alasdair Allan and Pete Warden, discovered that Apple devices include a system for collecting users' locations, time-stamping those locations, and then storing that information in hidden files for up to a year.[1] Research indicated that location data may be transferred up to 100 times a day.[2] The information is even being "restored across backups [and] device migrations," indicating that Apple intentionally keeps track of its users.[3]

Warden, who once worked as an Apple software engineer, and Allan say that the file containing all of a user's location tracking data is not encrypted and can be accessed via any machine synched to the user's iOS 4 device.[4] Apple released iOS 4 in June 2010 for its 3G devices.[5] It is said that even when a smartphone user tries to circumvent the location tracking by disabling one's device's GPS function, the tracking system continues to operate.[6] Therefore, consumers have no way to stop this tracking or to stop Apple from keeping track of them like Big Brother.[7]

Apple devices ask users for permission to use location data one time (for purposes such as mapping) by displaying a pop-up window.[8] In that window, a message appears and explains that granting Apple permission to use your location to create data will also allow apps "access to location information in photos and videos."[9] Consequently, apps can access—and copy—people's photo libraries without notifying users at all.[10] In that way, David E. Chen (a co-founder of the Curio app development company) says it is possible for apps to "put together a history of where the user has been based on photo location."[11]

Additionally, researchers found that Google's Android operating system does the same thing that Apple's iOS 4 devices do.[12] As a result, the discovery of this location tracking practice by both Apple and Google potentially impacts nearly 60 million American smartphone users, many of whom may have synched their phones to computers that have unsecured connections to the Internet.[13]

In their defense, Apple and Google argue that the location tracking data was implemented to make services easily accessible to customers.[14] Apple and Android representatives have said that the "location information regarding nearby Wi-Fi access points and cell towers is kept…to help the user continue to enjoy the service when no service connection is available and to improve speed."[15] For smartphone users, it is certainly helpful to have a cell phone identify the nearest restaurants, ATMs, and stores. It can also be nice to have a streamlined system for telling Facebook where pictures were taken. Yet do those benefits warrant the loss of privacy many iPhone and Android customers are now feeling? Or is there a way to eliminate Big Brother's constant observations while still providing consumers with helpful services on their smartphones?

Terms of Service

Part of the problem is that smartphone users are given vague terms of service and privacy policies to sign when they purchase their phones. Even Apple admitted that "[u]sers are confused…because the creators of this new technology (including Apple) have not provided enough education about these issues to date."[16] If the smartphone creators did not properly "educate" consumers about the sensitive data that would be collected about users when they activate the phone, then the wireless providers should have given customers that information. However, the Terms of Service for AT&T iPhone customers' states:

> Your Device may be location-enabled meaning that the Device is capable of using optional Goods, Content, and Services…using location technology such as Global Positioning Satellite ('GPS'), wireless network location, **or other location technology**. Please review the terms and conditions and the associated privacy policy for **each** Location-Based Service to learn how

> the location information will be used and protected. We may also use location information to create aggregate data…[17]

Here, AT&T reserves the right to use any kind of location tracking the company desires. The company also puts a burden on its customers to review the privacy policy, as well as the terms and conditions, for each service used to determine whether the company is tracking consumers. Yet reviewing each individual policy can be extremely time consuming. It can also be difficult to use on a small smartphone screen. Although lawyers (in theory) know never to click "I Accept" when downloading a new app on a smartphone without reading the accompanying policies, most people accept the terms and conditions of apps every single day without ever reading them. This is a problem acknowledged by the Federal Trade Commission (FTC) in its May 2011 Staff Report, where it was suggested that, in the future, "companies should also obtain affirmative express consent before collecting or sharing sensitive information such as precise geolocation data."[18] That way, consumers would know exactly when their devices were being tracked and would have the opportunity to refrain from using services that enabled tracking mechanisms.

To seek clarity on AT&T's use of location-based services, customers can also examine the company's privacy policy. However, there is a problem with that policy as well. According to John Casasanta (owner of the app development business Tap Tap Tap), "The message the user is being presented with [in the privacy policy] is very, very unclear."[19] Casasanta said that AT&T's privacy policy does not describe why a smartphone would need to hide a user's location tracking data or store it for up to a year. As a matter of fact, the policy offers no explanation for such a detailed location tracking system. It simply says:

> We monitor, collect and use your wireless location information, as well as other information obtained from our network and your device, to provide you with wireless voice and data services, and to maintain and improve our network.[20]

This does not imply that iPhones are tracking anyone in particular (or, for that matter, tracking people's precise locations). Rather, it implies that smartphone providers simply want to collect data about local hotspots and cell towers…which does not explain why Big Brother is keeping track of customers' precise locations.

The AT&T iPhone privacy policy also states, "We collect some information on an anonymous basis. We also **may** anonymize the personal information we collect about you."[21] Obviously, the word "may" is of concern to many customers, since it means that the company does not have to anonymize the information it is collecting about smartphone users. The idea to anonymize the data is completely self-imposed, since there are no laws requiring smartphone providers to do that. As a result, Apple and Android employees (or affiliate companies' employees) could have access to data about smartphone users that is not necessarily anonymous or encrypted.

We would, of course, be remiss if it was not acknowledged that this tracking information could serve beneficial purposes when put in the right hands (law enforcement, for example). However it seems that the potential negative consequences of this tracking information far outweigh the positive. Since this location tracking system cannot be turned off (though Apple has pledged to allow opt-outs in future iOS systems),[22] users have no control over smartphones storing unencrypted data about their every movement. Therefore, anyone who studies a smartphone user's movements can easily find patterns of behavior to help predict where the person might be going next, or what sensitive trips a person might be taking (such as to doctors' offices or political rallies). Whether it be a robber waiting for one to leave a house or an abusive spouse trying to track another's location, this is information that could be exceedingly dangerous if placed in the wrong hands.[23] Law enforcement, on the other hand, could use this information, even if it was protected in an encrypted format and not stored for an entire year. So why is Big Brother continuing to gather so much information about people's locations in ways that large numbers of police officers would not even be able to do? Nobody seems to know…but many of us keep using smartphones and letting our every move be tracked.

As smartphones have become so prevalent in our society, New York's Senator Schumer has expressed concern about Apple's practices and privacy policies. The Senator issued a statement explaining that Apple's recording of users' locations "go[es] well beyond what a reasonable user understands himself to be consenting to when he allows an app to access data on the phone for purposes of the app's functionality."[24] In March, Schumer asked the FTC to investigate the cell phone companies' use of location tracking data in order to determine if "copying or distributing personal information from smartphones, without a user's consent, constitutes an unfair or deceptive trade practice."[25] Senator Schumer asked for the investigation by the FTC because it had been granted power under the FTC Act to prohibit companies from engaging in unfair or deceptive marketing tactics that would materially change a consumer's decision to purchase a product or that would injure a consumer.[26] However, the FTC Act is not the only potential grounds for a lawsuit of this nature.

Potentially Applicable Statutes

Since Senator Schumer's call for an investigation, at least three lawsuits have been filed (two of which were filed in Florida; one against Apple and one against Google).[27] Although consumers typically think that the lawsuits against smartphone providers should be based on privacy concerns, the filings have not stated claims for disclosure of private facts. They have not alleged invasion of privacy claims because when consumers are in public, they do not have a right to privacy.[28] Since the geolocation tracking does not disclose anything except a consumer's location—which the consumer arrives at by going in public—the invasion of privacy claims would fail. Additionally, some state statutes are so narrowly drawn that they would not allow for an invasion of privacy claim. As an example, New York Civil Rights Law §50 defines an invasion of privacy only as the unauthorized use of one's name or image for advertisement or trade purposes.[29] Obviously, such a statute would not help smartphone customers bring claims against companies such as Apple and Google for tracking smartphones' locations. Therefore, in the complaints that have been filed, consumers allege that the location tracking practice results in misrepresentation and violates "federal computer fraud laws [as well as] consumer fraud and deceptive trade practice laws in many states."[30]

The Computer Fraud and Abuse Act (CFAA) has been at the center of these lawsuits. The CFAA, which was originally enacted in the 1980s, "criminalizes, in relevant part, one who—intentionally accesses a computer without authorization or exceeds authorized access…from any protected computer."[31] It can certainly be argued that smartphones are mobile mini-computers and that Apple and Android might be exceeding their authorized access to the devices' information. A lawsuit filed in Florida did just that, arguing that "[b]y secretly installing software that records users' every move[] Apple has accessed Plaintiffs' computer…in excess of the authorization provided by Plaintiffs."[32] Specifically, the lawsuit alleged that "Apple further violated the Fraud Act by causing the transmission of a program, information, code or command" in violation of the CFAA.[33]

However, making that argument requires one to stretch what the CFAA was intended to accomplish. Initially, the CFAA was "designed to combat egregious computer crimes and [therefore] cannot, and should not, be a primary tool in protecting consumers' mobile privacy from data sharing," according to Justin Brookman, the Director of the Consumer Privacy Center for Democracy and Technology.[34] The statute simply was not drafted in a way that would easily apply to geolocation tracking practices on smartphone devices. As such, the CFAA is not helpful for consumers of today's technology who want to argue that smartphone providers are impinging on people's autonomy by tracking the location of phones.

The second argument advanced in the complaints filed against Apple and Google is that the smartphone companies have violated the FTC Act (as well as multiple state unfair and deceptive trade practices acts). Although "the FTC is generally limited under current law to bringing enforcement actions against companies that make affirmative misstatements about their own privacy practices,"[35] the FTC Act does allow claims to be brought for "unfair" or "deceptive" trade practices. The Act explains that business practices are "unfair" when they "cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[36] Thus, in order to establish a cognizable claim under the FTC Act, plaintiffs must demonstrate: (1) that they have incurred a substantial injury; and (2) that injury (or, in some cases, product) was not reasonably avoidable.

This is where most plaintiffs encounter a problem.[37] Although consumers feel that their privacy has been invaded because their location has been tracked, so far there is no evidence showing that this data has been used for illegal purposes or has in any way resulted in "substantial injury" to a single consumer, as would be required by the FTC Act (and by Article III of the Constitution to establish standing for the lawsuit).[38] Additionally, plaintiffs would have to illustrate why their use of a smartphone (or iPad) "was not reasonably avoidable," which can be very difficult. Although millions of people use these devices, there are alternative types of cell phones available and most consumers have access to a computer every day in case they need to view information only available online or on a hard drive.

Another argument consumers have made in their lawsuits against Big Brother is the violation of state statutes because "[e]ach state has enacted laws comparable to the Federal Trade Commission Act, known as 'little FTC' acts,"[39] which can be used to argue that smartphone providers' privacy policies were unfair and/or deceptive.[40] Under the FTC Act—and the comparable state statutes—a deceptive business practice is one that "is likely to mislead a consumer acting reasonably under the circumstances."[41] According to the complaints filed against Apple and Google, the lack of disclosure in the companies' privacy policies regarding geolocation tracking practices was material because it would have "affect[ed] a consumer's decision regarding the product" and whether the product should be purchased.[42] While this is a valid point, plaintiffs would still encounter trouble bringing claims under

these statutes because the disclosures are so broad that there is no distinct act of deception being committed.

Some experts have argued that plaintiffs should not bring claims under the FTC Act, but instead should consider whether the Electronic Communications Privacy Act would apply to consumers' claims against Apple and Google.[43] However, that Act (which was originally enacted in 1986) applies mostly to electronic communication services. Electronic communication services (or "ECSs") are those services that transmit communications electronically, as the name implies. The creators of this Act, though, did not envision the types of electronic communications utilized by smartphones—and particularly did not envision geolocation tracking communications. As a result, most apps are not considered ECSs, or at least fall into a "grey area" regarding their status as an ECS.[44] Consequently, it would require a "highly fact-dependent analysis on the ECS question" to determine whether the ECPA would apply to each app that utilizes geolocation technology.[45] The simple impracticality of trying to determine whether each app that engages geolocation technology is considered an ECS would be too cumbersome to produce results for those concerned about their privacy, especially since experts say "mobile operating systems… likely do not qualify" as ECSs in the first place.[46]

Finally, some commentators have looked to the recently proposed Consumer Privacy Bill of Rights for guidance.[47] The Bill was created by the Obama Administration to give consumers power against companies that want to collect and use their private information. In particular, the Bill states that it will:

> Require each covered entity (1) to provide clear, **concise, and timely notice** to individuals of (A) the practices of the covered entity regarding the collection, use, transfer, and storage of covered information; and (B) **the specific purposes of those practices;** (2) to provide clear, concise, and timely notice to individuals before implementing a material change in such practices; and (3) to **maintain the notice required by paragraph (1) in a form that individuals can readily access.**[48]

This Bill could provide smartphone users with much better disclosures—in a way that can actually be read on a small screen. However, it may not necessarily eliminate the tracking practices Google and Apple are conducting. Another section of the proposed Bill, section 301, states that smartphone providers could still collect data regarding Wi-Fi access points and cell tower accessibility for users because "covered entit[ies] shall" be allowed to:

> (1) collect only as much covered information relating to an individual as is reasonably necessary…(G) for research and development conducted for the improvement of carrying out a transaction or delivering a service or (H) for internal operations, including…conducting customer research to improve customer service.[49]

The original Bill also included a subsection within 301 that would allow information to be retained by the companies for however long they determined was necessary "for research and development" purposes.[50] Thus, the Bill would still give smartphone providers the ability to retain tracking information about consumers. Although parts of this Bill seem to protect consumers well, the final Bill will need to include an additional provision limiting smartphone providers' actions and ability to retain location tracking information, even for "research and development" purposes, if consumers are truly to be protected from Big Brother's watchful eye.

Additional Difficulty with Lawsuits

In April 2011, two consumers who felt their rights were not being protected by Apple banded together to sue the corporation in the Middle District of Florida (one was an iPhone user and the other was an iPad user). The Apple customers, Vikram Ajjampur and William Devito, sought damages and an injunction to prohibit Apple from tracking customers through cell-tower triangulation and GPS data.[51] In the complaint, Apple's tracking practices were compared to court-ordered tracking devices that law enforcement would usually have to obtain warrants to use.[52] Similarly, the Southern District of Florida received a lawsuit against Google for its "tracking and recording of plaintiffs' movements and locations…without their knowledge or consent" on an Android phone.[53]

Although at least three such lawsuits have been filed, they have failed to be heard in court because the plaintiffs have a difficult time demonstrating standing. In fact, a consolidated lawsuit filed against Apple in California has been dismissed due to lack of standing.[54] In particular, plaintiffs have trouble proving that they suffered an injury as a result of these location-tracking practices. In the complaints that were filed, the alleged "irreparable injury" that resulted from the location tracking was consumers' "shock[] and alarm[] to learn of Apple's practices" because Apple (and other smartphone providers) did not "obtain[] specific, particularized informed consent" for the location tracking software.[55] Courts have rejected this as a basis for standing, though, stating that it does not demonstrate "a con-

crete harm from the alleged collection and tracking of [consumers'] personal information sufficient to create injury in fact," especially since there has been no evidence showing that this data has in any way resulted in injury to a single consumer.[56]

The complaints have also described consumers' injuries as being a deprivation "of money they would have spent elsewhere."[57] However, this is not a cognizable injury demonstrating consumers have suffered irreparable harm. The court responsible for dismissing the lawsuit against Apple stated that "the tracking or disclosure of personal information does not establish an 'economic loss' sufficient to find an injury in fact," even considering that plaintiffs spent money in purchasing the smartphones.[58] The court based its decision on the *Specific Media* case, which held that when plaintiffs only offer "'abstract concepts, such as 'opportunity costs,' 'value-for-value exchanges,' 'consumer choice,' and 'diminished performance,'" no particularized economic injury or harm is presented to establish Article III standing.[59]

Finally, the complaints have argued that the smartphone companies' practices cause an injury to the marketplace because they inhibit competition and cause "honest companies…to lose market share" while Apple and Google are "rewarded for [their] deceit with billions of dollars in revenues."[60] Again, however, the plaintiffs have lacked proof of this so-called injury to the marketplace and how that injury impacts them, despite their claims that these practices have created a "'race to the bottom,' wherein additional companies feel economic pressure to similarly track users'[] whereabouts to…avoid losing further market share."[61] Courts, naturally, have been hesitant to agree with these arguments without any proof of the market engaging in a 'race to the bottom,' making it difficult for consumers to establish their standing in court. All they can show is that their apparent need for the latest smartphone or iPad has forced them to buy a device that tracks their every movement.

Conclusion

Though Apple and Google spokesmen have promised that future software releases would require users to explicitly agree to the use of location services and would no longer back up the tracking logs,[62] the issue still remains a concern for users who want to keep their locations private.

Whether we like it or not, ultimately, we are to blame for allowing some of the nation's biggest corporations to track our movements. We have invited Big Brother into our lives because of our smartphone addiction. We are the ones regularly using GPS services to help us locate the nearest coffee shop, movie theater, or grocery store. We are also the ones who willingly sign up for FourSquare and other social media websites so that we can share our photos or interests with others. In the end, it is our own responsibility to police what information we release about ourselves…and what technology we use to do it.

Endnotes

1. Karen Gullo, *Apple Accused in Suit of Tracking IPad, IPhone User Location,* Bloomberg News, April 25, 2011, ¶6, *at* http://www.bloomberg.com/news/2011-04-25/apple-accused-in-suit-of-tracking-ipad-iphone-user-location-1-.html (Some other reports attribute credit for this discovery to Alex Levinson of the Rochester Institute of Technology. However, Levinson's work did not set off the firestorm of media coverage that Allan & Warden's discovery did, and it is the firestorm of media coverage that produced the inspiration for this article. As a result, Allan & Warden are listed as the discovering party in this article.).
2. *Protecting Mobile Privacy: Your Smartphones, Tablets, Cell Phones and Your Privacy*, 112th Cong. ¶18 (2011) (statement of Sen. Al Franken, Chairman, S. Subcomm. On Privacy, Technology and the Law).
3. Alasdair Allan & Pete Warden, *Got an iPhone or 3G iPad? Apple is recording your moves,* O'Reilly Radar, ¶1 (2011), *at* http://radar.oreilly.com/2011/04/apple-location-tracking.html.
4. *Id*. at ¶3.
5. Complaint at ¶8, Ajjampur & Devito v. Apple, Inc., No. 11-00895 (M.D. Fla. April 22, 2011).
6. Gullo, *supra* note 1, at ¶9.
7. *Protecting Mobile Privacy, supra* note 2, at ¶19.
8. Nick Bilton, *Apple Loophole Gives Developers Access to Photos*, N.Y. Times, Feb. 28, 2012, at ¶5, *available at* http://bits.blogs.nytimes.com/2012/02/28/tk-ios-gives-developers-access-tophotos-videos-location/.
9. *Id*. at ¶6.
10. *Id*. at ¶3.
11. *Id*. at ¶7.
12. *Protecting Mobile Privacy, supra* note 2, at ¶19.
13. Gullo, *supra* note 1, at ¶7.
14. Bilton, *supra* note 8, at ¶8.
15. *Protecting Mobile Privacy, supra* note 2 at ¶4. *See also supra* note 2 at ¶6(statement of Dr. Guy "Bud" Tribble, VP of Software Technology for Apple, Inc.).
16. Apple, Inc., *Q&A on Location*, www.apple.com.
17. AT&T, *Terms of Service*, www.att.com (emphasis added).
18. *Protecting Mobile Privacy, supra* note 2 at ¶11 (statement of Jessica Rich, Dep. Dir. of Consumer Protect at Fed. Trade Comm.).
19. Bilton, *supra* note 8, at ¶9.
20. AT&T, *Privacy Policy*, www.att.com.
21. *Id.* (emphasis added).
22. The Legal Talk Network, *Podcast: Digital Privacy and Your Smartphone* (May 4, 2011), *at* (http://legaltalknetwork.com/podcasts/).
23. According to 2006 census data, more than 26,000 people are stalked each year…and that was when one-third the number of people had smartphones as they do today. *Protecting Mobile*

Privacy, *supra* note 2 at ¶21 (statement of Sen. Al Franken, Chairman, S. Subcomm. On Privacy, Technology and the Law).

24. *Senator asks for FTC probe on Apple and Android*, RT-TV, March 7, 2012, ¶6, *at* http://rt.com/usa/news/senator-android-schumer-iphone-995/.
25. *Id*. at ¶9.
26. 15 U.S.C. §§ 41-58 (2012).
27. Ajjampur & Devito v. Apple, Inc., No. 11-00895 (M.D. Fla. April 22, 2011). *See also* Jeffreys v. Google, Inc. No. 11-80676 (S.D. Fla. June 9, 2011). *See also* Brown & Molaski v. Apple, Inc., No. 11-11867 (E.D. Mich. April 27, 2011).
28. The Legal Talk Network, *supra* note 22.
29. NY Civil Rights Law §50 (2000).
30. Gullo, *supra* note 1, at ¶8.
31. *Protecting Mobile Privacy, supra* note 2 at ¶8 (statement of Justin Brookman, Dir. of Consumer Privacy Center for Democracy & Technology).
32. Complaint, *supra* note 5 at ¶45.
33. *Id*. at ¶48.
34. *Protecting Mobile Privacy, supra* note 2 at ¶8 (statement of Justin Brookman, Dir. of Consumer Privacy Center for Democracy & Technology).
35. *Id*.
36. 15 U.S.C. §45(n) (2012).
37. Steven Sande, *iPhone privacy class action case thrown out*, Unofficial Apple Weblog, Sept. 26, 2011, *at* http://www.tuaw.com/2011/09/26/iphone-privacy-class-action-case-thrown-out/.
38. Article III requires a plaintiff to demonstrate that "(1) it suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Evtl. Sys, Inc., 528 U.S. 167, 180-181 (2000).
39. Complaint, *supra* note 5 at ¶23(b).
40. *Id*. at ¶57.
41. *Id*. at ¶56.
42. *Id*. at ¶62.
43. *Digital Privacy and Your Smartphone*, *supra* note 22.
44. *Protecting Mobile Privacy, supra* note 2 at ¶5 (2011) (statement of Justin Brookman, Dir. of Consumer Privacy Center for Democracy & Technology).
45. *Id*.
46. *Id*. at 6.
47. Leila A. Amineddoleh, *Apple and Android Applications Access Private Data,* March 9, 2012, nysbar.com/blogs/EASL.
48. Commercial Privacy Bill of Rights, S. 799 112th Cong. §201 (2011) (emphasis added).
49. *Id*. at §301.
50. *Id*.
51. Complaint, *supra* note 5 at ¶8.
52. *Id*. at ¶16.
53. Hunton & Williams LLP, *Class Action Lawsuit Filed Against Google for Tracking Android Users' Location Data,* June 13, 2011, ¶1, *at* http://www.huntonprivacyblog.com/2011/06/articles/class-action-lawsuit-filed-against-google-for-tracking-android-users-location-data/.
54. *In re* iPhone Litig. No. 11-02250, ¶1 (N.D. Cal. Filed Sept. 20, 2011) (dismissal of *In re* iPhone Litig.).
55. Complaint, *supra* note 5 at ¶39.
56. *In re* iPhone Litig. *supra* note 54, at ¶16.
57. Complaint, *supra* note 5 at ¶65.
58. *In re* iPhone Litig. *supra* note 54, at ¶13.
59. *Id*. at ¶16.
60. Complaint, *supra* note 5 at ¶66.
61. *Id*.
62. Gerry Shih, *Apple Tweaks Apps Policy Under Lawmaker Pressure,* Reuters, Feb. 16, 20121, ¶3, *at* http://www.reuters.com/assets/print?aid-USTRE81E1W520120216.

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The Property Condition Disclosure Act Celebrates Its Tenth Birthday

By Andrew D. Brodnick

Article 14 of the Real Property Law requires that the seller of a residential home either provide a Property Condition Disclosure Statement or provide a $500 credit at closing ("PCDA").[1] The PCDA, which became effective March 1, 2002, now celebrates its tenth birthday.

The PCDA was enacted to provide a better basis for the negotiation of the sale of a home.[2] In addition, its practical effect was to poke at least a dent in the mighty armor of caveat emptor, which provides that a seller with no fiduciary or confidential relationship to the buyer has no duty to disclose the existence of defects unless the defects are actively concealed or where the seller makes a misrepresentation or partially discloses the existence of a defect.[3] The PCDA, at least for those sellers who provide a disclosure statement rather than a credit at closing, changed caveat emptor. The seller was now required to come forward and provide information regarding the property which could assist the buyer in ascertaining defects. But the PCDA's intent was only to put a small dent in caveat emptor; the buyer was warned that the seller's statements were not "a warranty" and were not a substitute "for any inspections or tests."[4] The PCDA also "encouraged" buyers to obtain an independent professional inspection and to check public records.[5]

Surveys indicated that most downstate sellers opt out of the PCDA by providing a $500 credit at closing, while upstate attorneys reported that the disclosure statement was generally being provided.[6] A few of the sellers who chose to provide a disclosure statement were sued under section 465(2), which provides that the seller will be liable for the buyer's actual damages if the seller willfully fails to perform the requirements of the PCDA.

Not surprisingly, the effort to establish just how much of a dent the PCDA put into caveat emptor has befuddled the courts. The PCDA is not, as noted by at least one court, a model of clarity with respect to exactly how the PCDA was meant to change caveat emptor.[7] Karl Holtzschue suggested that the remedy provisions of the PCDA could be modified to address the confusion.[8]

This article will examine how the PCDA has fared towards changing judicial attitudes towards caveat emptor for the first ten years of its existence. It concludes with a suggestion as to how the PCDA should be applied so that it fulfills its function of modestly limiting caveat emptor.

I. Caveat Emptor

Caveat emptor provides that in an arm's length transaction involving real property, a seller (who does not make a misrepresentation and does not make partial disclosure) is not obligated to disclose defects unless: i) the seller actively concealed critical information at the time the contract was entered into,[9] or ii) there is a confidential or fiduciary relationship between the buyer and seller.[10] Some courts have recognized an exception where the seller has "superior knowledge" that the purchaser could not uncover through a reasonable inspection.[11]

II. The Property Condition Disclosure Act

The PCDA provides that every seller shall complete and deliver a property condition disclosure statement prior to the buyer signing a contract.[12] The Act applies to the sale of one-to-four family homes and excludes condominiums and cooperatives.[13] In all cases, the disclosure statement should be annexed to the contract of sale.[14]

The disclosure statement asks the seller a wide range of questions regarding the title and ownership of the home, and a series of questions regarding any environmental, structural or mechanical problems with the home. The seller responds to most questions by responding "yes, no, unkn [unknown], or n/a [not applicable]."[15] The seller concludes the disclosure by certifying that it is "true and complete to the seller's actual knowledge."[16]

The seller is put on notice that "a knowingly false statement or incomplete statement by the seller on this form may subject the seller to claims by the buyer prior to or after the transfer of title."[17]

In the event that the seller "fails to perform the duty prescribed in this article" the buyer receives a credit at closing of $500 against the purchase price.[18] The credit is not negotiated *into* the sales price; it is taken *out* of the sales price. If a seller provides a disclosure statement, the seller may be liable "only for a willful failure to perform the requirements of this article" which in turn entitles the buyer to "actual damages suffered… in addition to any other existing equitable or statutory remedy."[19]

The buyer is still required to perform due diligence, and cannot blindly follow the seller's representations. The seller's statements are not "a warranty" nor "a substitute for any home, pest, radon or other inspections

or testing of the property or inspection of the public records"[20] The PCDA "encourages" buyers to have the home professionally inspected.[21]

III. Judicial Application of the PCDA

A. No Remedy

Malach v. Chuang was the first case to apply the PCDA and, in dicta, attempted to blunt its impact.[22] The seller stated in the disclosure statement that it was "unknown" whether there was any rot or water damage. Although the buyer knew that repairs to the deck around the swimming pool were required, the buyer discovered after closing that the base of the pool was so rotted that it needed to be replaced.[23]

The court found that the seller did not make misrepresentations in the disclosure statement because the seller told the truth when representing that it was "unknown" whether there was rotting.[24] As a result, even though the buyer did not state a claim under the PCDA, the court opined that the PCDA does not provide a cause of action because "it is not clear…what… 'a willful failure to perform the requirements of'" the PCDA means.[25] The court therefore concluded that the PCDA did not provide a remedy and actually "obfuscate[d] the issue of a purchaser's available remedies."[26]

Similarly, in *Middleton v. Calhoun*, the court (reviewing a small claims action) found no evidence that the seller actually knew that the septic system was defective.[27] The buyer did not test the septic system even though the buyer's contract was contingent on such a test. As with *Malach*, the court correctly found there was no claim under the PCDA, but "threw out the baby with the bathwater" by holding that the PCDA "did not create a cause of action for an alleged willful misrepresentation…."[28]

Renkas v. Sweers went even further than *Malach*.[29] The court denied a claim by the buyer even though it found that the seller *made* misrepresentations. The court found no remedy because the condition complained of was a latent defect and asserted that the PCDA "supports and reinforces…caveat emptor."[30]

As has been noted by Karl Holtzschue,[31] while *Malach* correctly declined to award relief under the PCDA due to the facts of that case, it erred in declaring that there was no remedy under the PCDA.[32] *Renkas* and *Middleton* followed in *Malach*'s footsteps by finding that the PCDA reinforced—not mitigated—caveat emptor.

B. Remedy—But Not Under the Facts

In *Fleischer v. Morreale*, the seller provided a disclosure statement which represented that there were no material defects to the roof and no flooding or drainage problems.[33] The buyer discovered within days that the roof was defective, which in turn led to basement flooding. The court recognized that the PCDA created a new statutory remedy which entitled a buyer to actual damages suffered if the seller willfully fails to disclose a known defect.[34] Similarly, the court in *Gabberty v. Pisarz* held that while the PCDA provided a remedy, the buyer was not entitled to invoke the remedy because the seller's failure to answer questions in the disclosure statement put the buyer on notice that certain defects needed further investigation.[35]

C. Remedy Awarded

Other cases have forthrightly applied a remedy. In *Calventi v. Levy*, the court found that it would "nullify" the statutory remedy if a buyer were not awarded damages after a seller failed to disclose knowledge of previous water basement leakage.[36] Furthermore, in *Ayers v. Pressman*, the court upheld a buyer's small claims action for title search expenses and mortgage application fees after the seller knew but did not disclose that the septic system encroached on the neighbor's property.[37]

In *McMullen v. Properter*, the court upheld a claim under the PCDA, where the seller failed to disclose known defects involving the septic system and covered up the "tell-tale" smell of a failing system.[38] The court reasoned that the misrepresentation in the disclosure statement might constitute active concealment which permits a claim to proceed notwithstanding caveat emptor.[39] In addition, the court in *Pettis v. Haag* found that concealment by the seller of electrical problems and flooding problems warranted a remedy.[40]

The Second Department held that a misrepresentation in the disclosure statement may constitute proof of active concealment which removes the defense of caveat emptor.[41] Similarly, the Third Department held that a misrepresentation "constitute[s] active concealment."[42] Finally, in *Meyers v. Rosen*, the Third Department found that a cause of action under the PCDA was stated when a seller was charged with failing to disclose knowledge of rodent infestation.[43]

IV. Conclusion

The legislature intended to create a remedy when it enacted the PCDA. (Section 465 of Article 14 is entitled "Remedy.")[44] A seller's failure to disclose a known defect constitutes a misrepresentation (which is an exception to caveat emptor because the seller did not remain silent) or—as the Second Department held in *Simone*—constitutes "active concealment."[45]

However, even if the seller loses the benefit of a caveat emptor defense, a buyer must still establish that he or she reasonably relied on the alleged misrepresentation.[46] The PCDA expressly maintained the requirement that a buyer conduct due diligence and it strongly recommended that a buyer obtain a professional home inspection. A seller may fail to disclose a known defect, but if the buyer could have discovered the defect with a modicum of due diligence, then the buyer did not rea-

sonably rely on the seller's failure to disclose a known defect. The adequacy of the buyer's due diligence reflects the adequacy of the buyer's reliance.

A willful failure to disclose under the PCDA constitutes an exception to caveat emptor, but the buyer must still prove reliance. Highlighting that distinction would go a long way towards recognizing the small dent which the PCDA put into caveat emptor while respecting that reliance must always be established under both a fraud claim *and* under a PCDA claim.

Endnotes

1. *See* N.Y. Real Prop. Law §§ 460-467 (McKinney 2012).
2. *See* Karl B. Holtzschue, *Property Condition Disclosure Act Enacted*, N.Y. Real Prop. L.J., Winter 2002, at 15.
3. *See generally* Holtzschue, *infra* note 6, at 7-8 (providing an overview of caveat emptor case law, and then detailing how the PCDA "changed the ground rules").
4. N.Y. Real Prop. Law § 462(2).
5. *See id*.
6. *See* Karl B. Holtzschue, *The Purchaser Hasn't a Ghost of a Chance: Update on PCDA Cases and PCDA Revision*, N.Y. Real Prop. L.J., Winter 2007, at 8.
7. *See generally* Malach v. Chuang, 194 Misc. 2d 651, 665, 754 N.Y.S.2d 835, 846 (N.Y. Civ. Ct. Richmond Cnty. 2002) (stating in conclusion that certain remedies "contained in RPL § 462 are void for vagueness and unenforceable in a legal or equitable proceeding. The legislature needs to redraft those sections to either create a new right of action, or eliminate them so as to avoid confusion.").
8. *See* Holtzschue, *supra* note 6, at 15 (discussing the hard questions that have arisen since the PCDA's passage, as well as some proposed revisions and clarifications).
9. *See* Devine v. Meili, 89 A.D.3d 1255, 932 N.Y.S.2d 581 (3d Dep't 2011).
10. *See* Moser v. Spizzirro, 31 A.D.2d 537, 295 N.Y.S.2d 188 (2d Dep't 1968), *aff'd*, 25 N.Y.2d 941, 305 N.Y.S.2d 153 (1969).
11. *See* Karl B. Holtzschue, Holtzschue on Real Est. Cont. and Closing § 2:2.11[A] (2006) (citing Young v. Keith, 112 A.D.2d 625, 492 N.Y.S.2d 489 (3d Dep't 1985); 344 E. 72 Ltd. P'ship v. Dragatt, 188 A.D.2d 324, 591 N.Y.S.2d 28 (1st Dep't 1992) and McMillen v. Marzacano, 277 A.D. 977, 100 N.Y.S.2d 240 (1st Dep't 1950)); *see also* Stambovsky v. Ackley, 169 A.D.2d 254, 259, 572 N.Y.S.2d 672, 676 (1st Dep't 1991) (holding that caveat emptor will not apply where the seller had publicized the fact that the property was haunted and the buyer's reasonable inspection of the property could not have revealed "the property's ghoulish reputation").
12. *See* N.Y. Real Prop. Law § 462(1).
13. *See id*. § 461(5).
14. *See id*. § 462(1).
15. *Id*. § 462(2).
16. *Id.*
17. *Id.*
18. *See* N.Y. Real Prop. Law § 465(1).
19. *Id*. § 465(2).
20. *Id*. § 462(2).
21. *See id*.
22. *See generally* Malach v. Chuang, 194 Misc. 2d 651, 754 N.Y.S.2d 835 (N.Y. Civ. Ct. Richmond Cnty. 2002).
23. *See id*. at 652-53, 754 N.Y.S.2d at 837.
24. *See id*. at 653, 662-63, 754 N.Y.S.2d at 837, 844.
25. *See id*. at 656, 754 N.Y.S.2d at 839-40.
26. *Id*. at 657, 754 N.Y.S.2d at 840.
27. *See* 13 Misc. 3d 949, 956-58, 821 N.Y.S.2d 444, 450-51 (Rensselaer Cnty. Ct. 2006).
28. *Id.* at 956, 821 N.Y.S.2d at 450.
29. 10 Misc. 3d 1076(A), 814 N.Y.S.2d 892 (Sup. Ct. Monroe Cnty. 2005).
30. *Id.* at 5.
31. Karl B. Holtzschue, *First Court Case to Interpret Property Disclosure Act Holds Sellers Not Liable*, N.Y. St. B. J. March/April 2003, at 31.
32. The court also erred by misattributing the "sound and fury" soliloquy from Shakespeare's Macbeth to Lady Macbeth, rather than her husband. Malach v. Chuang, 194 Misc. 2d 651, 666, 754 N.Y.S.2d 835, 846 (N.Y. Civ. Ct. Richmond Cnty. 2002).
33. *See* 11 Misc. 3d 1004, 1005, 810 N.Y.S.2d 624, 625 (Dist. Ct. Suffolk Cnty. 2006).
34. *See id.* at 1008, 810 N.Y.S.2d at 627.
35. *See* 10 Misc. 3d 1010, 1016-17, 810 N.Y.S.2d 799, 804 (Sup. Ct. Nassau Cnty. 2005).
36. *See* 12 Misc. 3d 38, 40-41, 816 N.Y.S.2d 828, 829-30 (Sup. Ct. App. T. 2d Dep't 2006).
37. *See* 14 Misc. 3d 145(A), 836 N.Y.S.2d 496 (Sup. Ct. App. T. 9th & 10th Districts 2007).
38. *See* 13 Misc. 3d 1232(A), 831 N.Y.S.2d 354 (Sup. Ct. Yates County 2006).
39. *See id.*
40. *See* 84 A.D.3d 1553, 1554-55, 923 N.Y.S.2d 745, 747 (3d Dep't 2011).
41. *See* Simone v. Homecheck Real Estate Servs., Inc., 42 A.D.3d 518, 520-21, 840 N.Y.S.2d 398, 400 (2d Dep't 2007).
42. Anderson v. Meador, 56 A.D.3d 1030, 1035, 869 N.Y.S.2d 233, 238 (3d Dep't 2008) (citing *Simone*, 42 A.D.3d at 520-21, 840 N.Y.S.2d at 400).
43. *See* 69 A.D.3d 1095, 1099, 893 N.Y.S.2d 354, 358 (3d Dep't 2010).
44. *See* N.Y. Real Prop. § 465.
45. *See Simone*, 42 A.D.3d at 521, 840 N.Y.S.2d at 400.
46. *See* Eurycleia Partners LP v. Seward & Kissel, LLP, 12 N.Y.3d 553, 559, 883 N.Y.S.2d 147, 150 (2009) (explaining "The elements of a cause of action for fraud are a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.").

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The State of Social Media in Civil Litigation—Where Do the Courts Stand Now?

By Emina Poricanin

The law is slowly but surely catching up to the latest Internet fad—social networking websites, also known collectively as social media. Facebook, undoubtedly the largest and most popular of them all, currently has 500 million users and one study has found that Americans spend 22.7 percent of their free time on social networking sites.[1] In the legal realm, social media have most often been utilized to investigate claims of pain and suffering or loss of enjoyment of life in civil suits. For example, a plaintiff who claims catastrophic injuries from a motor vehicle accident posts a video to her Facebook page showing her doing cartwheels after the accident occurred. The state of mind of the social media user can also be examined by viewing the user's "wall posts," messages, and "status updates." The foregoing information may be used to impeach testimony, dismiss the complaint, or negotiate lower damages. These are some of the most basic ways that information discovered on social media may be utilized and some recent cases show the "unconventional" roles that social media may play in litigation. For example, information on social media may be utilized to establish the domicile of a decedent at the time of her death in a wrongful death suit arising from an airplane crash.[2] In a divorce case, statements by the wife on her blog were found to be relevant with respect to her demand for non-durational maintenance.[3] Social media may also reveal the work and hours spent by a plaintiff's attorney on a case in an attorneys' fee dispute.[4] Given the prevalence of social media and their ever-expanding role in litigation, familiarity with cases that have addressed this issue is necessary for any practitioner.

In New York, the courts that have addressed discoverability of social networking sites have applied traditional principles of discovery: All non-privileged matter which is material and necessary to the defense or prosecution of an action is discoverable.[5] Since the content on social networking sites is, in some cases, practically per se relevant, or by its very nature likely to lead to discovery of relevant information, discovering social media content should be easier than discovering some other materials. Perhaps because of the potential for abuse, some of the higher courts in New York State have denied liberal disclosure of content on social networking sites and have demanded a strong evidentiary showing before granting orders to compel discovery. Conversely, the lower courts appear to be more inclined to find relevance based on the motion papers and grant discovery.

The first New York case on this topic was *Romano v. Steelcase*,[6] a personal injury action, in which plaintiff sought damages for loss of enjoyment of life. Defendant moved the court for an order granting access to the plaintiff's current and historical Facebook and MySpace pages and accounts, including all deleted pages. Defendant asserted that plaintiff's claims of permanent injuries were belied by the public portions of her Facebook and MySpace profiles, which revealed that she had an active lifestyle and participated in many activities. A picture portrayed plaintiff smiling happily outside her home, despite the plaintiff's claim that she was largely confined to her house and bed as a result of her injuries. Plaintiff objected to the motion of defendant on the ground that its assertions were speculation and conjecture and that ordering the release of all private messages would permit defendant to obtain wholly irrelevant content and private information. After laying out the relevant discovery rules, namely those codified in CPLR 3101, the court held that defendant would be at a distinct disadvantage in defending the action without the requested information and granted defendant's motion.

Patterson v. Turner Construction Company,[7] yet another personal injury action, was an appeal from an order granting defendants' motion to compel an authorization for "all of plaintiff's Facebook records compiled after the incident alleged in the complaint, including any records previously deleted or archived." The motion court had determined that "at least some of the discovery sought" would disclose relevant evidence or lead to the same. The Second Department, however, held that it was "possible" that not all plaintiff's Facebook communications would be related to the events that gave rise to the plaintiff's claim. Consequently, the Second Department remanded the case for a "more specific identification of plaintiff's Facebook information" that was "relevant, contradicted or conflicted with plaintiff's alleged restrictions, disabilities, and losses, and other claims." Most importantly, however, the Second Department noted that plaintiff's utilization of privacy settings on Facebook did not shield his posts from discovery—private posts on Facebook are discoverable, just like relevant matter from a personal diary is discoverable.

In *McCann v. Harleysville Ins. Co. of New York*,[8] defendant sought disclosure of "an authorization for plaintiff's Facebook account," which allegedly contained information about the plaintiff's motor vehicle injury. The Appellate Division, Fourth Department, affirmed

the trial court's denial of defendant's motion, noting that defendant had failed to establish a factual predicate to justify its discovery demand and was on a fishing expedition. The Appellate Division, however, lifted the protective order that was granted to the plaintiff by the trial court and held that defendant should be permitted to seek disclosure of plaintiff's Facebook account at a future date, presumably after defendant establishes the necessary factual predicate.

In *Caraballo v. City of New York*,[9] defendant general contractor sought to compel plaintiff to provide it with authorizations to access the plaintiff's "current and historical Facebook, MySpace and Twitter pages and accounts, including all deleted pages and related information." Defendant asserted that the websites contained photographs, status reports, and videos that belied the plaintiff's claims of injury. Plaintiff refused defendant's demand on the ground that it was overboard, intrusive, and that the information sought was irrelevant. Citing *McCann*, the court held that defendant's discovery demand was overly broad and that defendant had failed to establish a factual predicate for the relevancy of the information that the websites might contain. Notably, in its decision, the court referred to another Richmond County Supreme Court decision, *Fernandez v. Metropolitan Tr. Auth*, Index No. 102662/09, where the movant's request for plaintiff's MySpace account information was granted. In *Fernandez*, however, the plaintiff had testified at a deposition about the type of information she posted on her social networking website, thus enabling defendant to establish the relevancy of the information sought in its discovery demand.

Abrams v. Pecile[10] is the most recent New York decision on discoverability of information from social media sites. In *Abrams*, the plaintiff's complaint alleged intentional infliction of emotional distress. In reversing the order of the trial court and denying defendant's demand for access to plaintiff's social networking accounts, the First Department held that defendant had failed to make a showing that "the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims." The court cited *McCann*.

The federal courts have granted parties access to their opponents' social networking sites more liberally than New York State courts. For example, in *Ledbetter v. Wal-Mart Stores, Inc.*,[11] the court denied the plaintiff's motion for a protective order and granted defendant's motion to compel production of content on plaintiff's social media site, finding that it was reasonably calculated to lead to discovery of relevant and admissible evidence. Similarly, in *Beye v. Horizon Blue Cross Blue Shield of New Jersey*,[12] the court ordered plaintiffs to produce their beneficiaries' Facebook and MySpace writings and entries that the beneficiaries shared with others. The court also ordered plaintiffs to preserve writings that were not shared with others, in case defendants' experts needed such writings at a later time.

In *Bass v. Miss Porter's School*,[13] the plaintiff filed an action against her school, alleging, among other things, intentional and negligent infliction of emotional distress. Defendants sought production of "all documents representing or relating to communications between plaintiff and anyone else" regarding the plaintiff's allegations. Pursuant to plaintiff's request, Facebook provided plaintiff with over 750 pages of wall postings, messages, and pictures that had been made on her Facebook site. Plaintiff gave only 100 of those pages to defendant. The court reviewed all of the pages in camera and found that "production should not be limited to Plaintiff's own determination of what may be 'reasonably calculated to lead to the discovery of admissible evidence,'" noting that some of the unproduced documents contained information that was "clearly relevant" to the action. The court ordered plaintiff to provide defendant with all of the pages it had received from Facebook.

In *E.E.O.C. v. Simply Storage Mgmt., LLC*,[14] a sexual harassment case, defendant employer sought the claimants' social networking website "profiles." The court interpreted "profile" to mean any postings, pictures, blogs, messages, personal information, and lists of friends that the user had placed or created. The EEOC objected to the demand on the grounds that the requests were overbroad, not relevant, unduly burdensome because they infringed on the claimants' privacy, and were meant to harass and embarrass the claimants. The court rejected the notion that all content on the claimants' social media sites was relevant with respect to the claimants' emotional distress claims. Instead, the court determined that any postings within a certain period of time, which related to any emotion, feeling or mental state, or which related to "events that could reasonably be expected to produce a significant emotion, feeling, or mental state," would be relevant.

Conversely, in another sexual harassment case,[15] the court denied defendant's motion to compel production of plaintiff's private messages sent via MySpace. While the court recognized that defendants were entitled to discover information relevant to plaintiff's alleged emotional distress, which she had placed at issue in the case, it nevertheless found that defendants had merely speculated that the plaintiff's MySpace account contained relevant information. The court, however, indicated that it would grant defendants' request if they demanded "relevant email communications" from plaintiff.

Some federal courts have even gone as far as injecting themselves into social media in order to resolve

discovery disputes. In *Barnes v. CUS Nashville, LLC*,[16] a magistrate judge offered to create a Facebook account and "friend" witnesses for the sole purpose of reviewing, *in camera*, potentially relevant comments and photographs that were posted on those witnesses' Facebook sites.

Several conclusions may be distilled from the foregoing cases. First and foremost, content on social networking sites is indeed discoverable. Presently, the courts are applying traditional rules of discovery to evaluate orders to produce or compel discovery. It remains to be seen whether the Legislature, or courts at the local levels, will craft rules specifically designed for discovery of social media.

Secondly, and more practically speaking, in order to obtain content from social media websites, the movant can either seek discovery of specific content or account access information, such as username and passwords. Another option is for the account holder to execute a release, which the other litigants may submit to the social media company to obtain the necessary content. The first option is the safest for the social media account holder because it allows the account holder to be the gatekeeper of the information on the site. The other options expose the account holder to having another party obtain more information than is necessary. As such, discovery demands for username and passwords should be opposed on the basis of being overly broad. The account holder should demand that the party seeking the information specifically tailor the discovery request, perhaps even limiting it to a specific time period.

Third, the party seeking disclosure will have to establish a factual predicate for the discovery demand. A request for "all information" from the litigants' social media site will most likely be denied as vague and overly broad. The most prudent practice would be to submit to the court, with the motion papers, some evidence that the social networking sites contain relevant information. Conclusory assertions will not suffice and will be interpreted as a request for a fishing expedition into the social media user's account. A movant may submit, for example, evidence that the movant has already obtained from the claimant's social networking site, such as the claimant's profile picture or postings containing relevant information. The logical inference is that if the public portions of the claimant's account show relevant information, then the private portions of those sites may contain relevant information as well. Alternatively, if the claimant subscribes to several social networking sites, such as Twitter, Facebook, MySpace, or LinkedIn, and some of the settings on those sites are set to private, while others are viewable to anyone, information obtained from the public portions of one site may be used to seek disclosure of the private contents on another site. For example, one may try to use public information obtained from Twitter to obtain discovery of private content on Facebook.

Another way to establish relevancy is to elicit testimony at depositions regarding the type of information the claimant posts on the websites, focusing specifically on status updates, pictures, videos, and communications. Questions about the frequency of usage of these sites would also be useful, since habitual users are more likely to post detailed information about their lives than occasional users. Also, while potentially futile, litigants should seek the identity of the claimants' "friends," who also may have discoverable information.

In sum, social media have the potential to break or make a case. As such, litigants should arm themselves with strong motions to compel or preclude discovery because that battle is one that they cannot afford to lose.

Endnotes

1. http://blog.nielsen.com/nielsenwire/online_mobile/what-americans-do-online-social-media-and-games-dominate-activity/.
2. See memorandum and affidavit filed of defendants in support of their motion to compel production of documents and answer interrogatories, Matter of Aircrash Near Clarence Center, New York, on February 12, 2009, 2011 WL 1555615 (W.D.N.Y. 2011).
3. *B.M. v. D.M.*, 31 Misc. 3d 1211, 2011 WL 1420917 (Sup. Ct., Richmond Co. 2011).
4. *Muniz v. United Parcel Service, Inc.*, 2011 WL 311374 (N.D. Cal. 2011).
5. See CPLR 3101.
6. 30 Misc. 3d 426, 907 N.Y.S.2d 650 (Sup. Ct., Suffolk Co. 2010).
7. 88 A.D.3d 716, 931 N.Y.S.2d 311 (1st Dep't 2011).
8. 78 A.D.3d 1524, 910 N.Y.S.2d 614 (4th Dep't 2010).
9. 2011 NY Slip Op. 30606 (U), 2011 WL 972547 (Sup. Ct., Richmond Co. 2011).
10. 83 A.D.3d, 927, 922 N.Y.S.2d 16 (1st Dep't 2011).
11. 2009 WL 1067018 (D. Colo. 2009).
12. 2007 WL 7393489 (D. N.J. 2007).
13. 2009 WL 3724968 (D. Conn. 2009).
14. 2010 WL 3446105 (S.D. Ind. 2010).
15. *Mackelprang v. Fidelity Nat'l Title Agency*, 2007 WL 119149 (D. Nev. 2007).
16. 2010 WL 2265668 (M.D. Tenn. 2010).

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Ethics Opinion 931

Committee on Professional Ethics of the New York State Bar Association (9/7/12)

Topic: Law firm names.

Digest: Law firm of solo practitioner cannot include "and Associates" based on employment of paralegal.

Rules: 7.5(b), 7.5(c), 8.4(c).

Facts

1. A solo practitioner employs a paralegal. He would like to name his firm "Smith [assumed name] and Associates" because he feels it would give a more positive impression of his firm's capabilities, but seeks assurance that such name complies with professional ethics.

Question

2. Would the law firm name "Smith and Associates" comply with the Rules of Professional Conduct where "Smith" is a solo practitioner, and Smith's law firm also employs a paralegal?

Opinion

3. Rule 7.5(b) provides that "a lawyer in private practice shall not practice under a trade name" or "a name that is misleading as to the identity of the lawyer or lawyers practicing under such name…"
4. Rule 7.5(b) also provides that "A lawyer or law firm may not include the name of a nonlawyer in its firm name."
5. Rule 7.5 (c) provides that "Lawyers shall not hold themselves out as having a partnership with one or more other lawyers unless they are in fact partners."
6. Comment 1 to Rule 7.5 states that "to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status."
7. Rule 8.4(c) provides that "A lawyer or law firm shall not…(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation."
8. The inquirer asks whether he ethically can use the name "Smith and Associates" as the name of his law firm name where he does not have any partners and employs no other lawyers, and the "and Associates" aspect of the proposed name is based on the presence of a paralegal employed by the firm. Thus he asks whether the term "Associates" properly can refer to a paralegal.
9. N.Y. State 869 (2011), which dealt in part with whether a solo practitioner could practice under a name containing the word "Firm," notes that law firm names are subject to more stringent requirements than general lawyer advertising, and that a law firm may not practice under a trade name or any other name that is misleading. The opinion explains that this requirement "serves to protect the public from being deceived as to the identity, responsibility or status of those who use the firm name."
10. Use of the words "and Associates" does not comply with Rule 7.5(b) where the firm only has one lawyer. In that context, the term "and Associates" could only refer to a paralegal or other nonlawyer, since Smith is the only lawyer and Smith's firm employs a paralegal. The firm name "Smith and Associates" would give the false impression to the public, including potential clients, that Smith is practicing with other lawyer colleagues. This is particularly true where "associate" has a long-established meaning in the context of lawyers in private practice, as a lawyer admitted to practice and employed by the law firm, but is not a partner.
11. On the present facts, the term "and Associates" is misleading, and violates Rule 8.4(c). Based on its literal meaning, it can deceive the public because it suggests that the firm includes at least three lawyers: Smith and two others.
12. N.Y. State 732 (2000) authorizes the use of the word "group" in a law firm name using the name of a particular lawyer where that lawyer practices with other associates (presumably lawyers). Its reasoning assumes that a name suggesting that the firm's practice includes other associates is not misleading. By negative inference, using "and associates" in a law firm name where the firm consists of only one lawyer would be misleading.
13. N.Y. State 286 (1973) similarly allows the use of the firm name "and associates" in a situation where "the associates" unquestionably refers to lawyers.
14. Rule 7.5(c) also supports the negative answer to the inquiry because of its blanket prohibition against lawyers creating the impression that they are partners where that is not correct.

Conclusion

15. A solo practitioner whose law firm employs no other lawyers, but does employ a paralegal, may not ethically use the name "Smith and Associates" because that would risk misleading the public as to the number of lawyers at the firm.

(9-12)

Ethics Opinion 932

Committee on Professional Ethics of the New York State Bar Association (9/7/12)

Topic: Lawyers' business cards; recommendation of services.

Digest: A lawyer's photograph may be on the lawyer's business card. A lawyer may recommend other service providers provided that there is an appropriate disclaimer.

Rules: 7.5(a)(i); 5.4; 7.2; 7.1(c) (3)).

Question

1. We have been asked if an attorney's business card may include a photograph of the attorney and whether the attorney may include on the back of the card, or on a separate sheet of paper, lists of other service providers such as a plumber, realtor, mortgage loan officer, or accountant, which may be useful to the attorney's clients during a real estate transaction and which are recommended by the attorney based on past personal experience with the provider.

Opinion

2. Rule 7.5(a)(i) provides a non-exclusive list of the content of a lawyer's professional or business card. It provides that the card may contain the following:

   - The lawyer's name
   - Identification that the person is a lawyer such as "J.D.," "Esq.," "Attorney-at-law" or "lawyer"
   - Address or addresses
   - Telephone numbers
   - The name of the lawyer's firm
   - Any information permitted under Rule 7.4 relating to area of practice
   - Name of members and associates of the firm

3. Nothing contained in the Rules prohibits the use of a photograph or "headshot" of a lawyer. However, a lawyer may not use an actor to portray a lawyer in the photograph without disclosing that fact. (Rule 7.1(c) (3). A lawyer may not include anything in the business card which would be false, misleading or deceptive. Rules 7.5(a) and 7.1(a).

4. The rules clearly contemplate that lawyers may refer their clients to other service providers and that others may refer clients to lawyers. *See, e.g.*, Rules 5.4 and 7.2. The lawyer must be mindful that referrals are managed in such a way that the lawyer must always maintain professional independence in order that the client always receives the lawyer's best professional judgment free of any undue or inappropriate influence. Thus, exclusive reciprocal referral arrangements are prohibited. *See* Rule 7.2, Cmt.4. Furthermore, the lawyer must not have such an interest in a steady stream of referrals that it undermines the lawyer's professional judgment for the client. Rule 7.2, Cmt.4. and N.Y. State 765 (2003). Non-exclusive agreements are permissible provided that the client is informed of the agreement. To this end, the list of referrals, whether on the back of a business card or separate, should contain a disclaimer making it clear that the lawyer does not have an agreement with those on the list. While many formulations are possible, the following would be sufficient: *"Note: These professionals are not affiliated with the Law Offices of _____ and may not be appropriate choices in every matter."*

5. We do not opine on the constitutionality of the advertising rules.

Conclusion

6. A lawyer's photograph may be on the lawyer's business card. A lawyer may recommend other service providers provided that there is an appropriate disclaimer.

7-12

Ethics Opinion 933

Committee on Professional Ethics of the New York State Bar Association (9/7/12)

Topic: Dual practice; real estate broker; law office.

Digest: A lawyer may conduct a law practice and a real estate brokerage business in the same office, and may advertise them together provided that the advertising is neither false nor misleading, but may not act as lawyer and broker in the same transaction.

Code: Rules 1.6 (a) and (c) 5.7, 5.8, 7.1, 1.7(a).

Questions

1. May a lawyer ethically practice law and conduct a real estate brokerage business in the same premises?

2. May a lawyer who is also engaged in a real estate brokerage business conduct a joint mailing of greeting cards, business cards, refrigerator magnets and the like to a combined list of law clients, brokerage clients, general business contacts and other names without differentiation of the source?

Facts

3. Inquirer is an attorney practicing alone in his residence, from which he also conducts a real estate brokerage business in the form of a limited liability company of which inquirer is the sole member but not the sole employee. The brokerage entity does not pay any rent to the inquirer.

Opinion

4. In a departure from prior opinions and due to the decision of the United States Supreme Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this committee opined in N.Y. State 493 (1978) (i.e., under the Code of Professional Responsibility) that "a lawyer may conduct his law practice and a real estate brokerage business from the same office.…" In *Bates*, the Supreme Court held that lawyer advertising enjoys a First Amendment protection, thereby effectively eliminating many traditional prohibitions of lawyer advertising. Prior opinions of this Committee that a lawyer could not ethically conduct a law practice from the same office in which the lawyer or the lawyer's spouse conducted a real estate brokerage had been premised on the perceived impropriety of lawyer advertising. *Id.* In the light of *Bates*, this Committee overruled those prior opinions to the extent that they held to the contrary.

5. Nothing in Rule 5.7 of the Rules of Professional Conduct, which governs the provision of nonlegal services by a lawyer or law firm directly or through an entity that the lawyer or law firm owns or controls or with which the lawyer or law firm is otherwise affiliated, and which, therefore, governs the inquirer's situation, suggests a different conclusion.

6. On the same basis, we see no ethical objection to inclusion in the same mailing envelope a greeting card, business card, refrigerator magnet or other token of that sort that indicates that the sender is both a lawyer and a licensed real estate broker, or two of whatever the lawyer may send, one from the lawyer as lawyer and one as proprietor of the brokerage, provided that the information is truthful and is neither deceptive nor misleading. *See* Rule 7.1; N.Y. State 493, *supra*; New York State 487 (1978). *See also, Ibanez v. Florida Dep't of Business and Professional Regulation*, 512 U.S. 136 (1994).

7. Three cautionary reminders are in order. First, while a lawyer may conduct a legal practice and a brokerage business from the same premises, a lawyer may not ethically serve both as lawyer for a party to a real estate transaction and also as broker in the same real estate transaction. Rule 1.7(a) states in pertinent part that "a lawyer shall not represent a client if a reasonable lawyer would conclude that… (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." In many circumstances, fully informed client consent may enable a lawyer to proceed with a representation, notwithstanding a personal conflict. This Committee has opined repeatedly, however, most recently in N.Y. State 919 (2012) and in N.Y. State 752 (2002) following the adoption of the rules addressing the responsibilities of lawyers and law firms providing non-legal services to clients or other persons (then DR 1-106 and now Rule 5.7), that the personal interest of a lawyer-real estate broker in the brokerage fee that will be generated by a closing of a real estate transaction so conflicts with the lawyer's responsibility

to provide independent legal judgment with respect to that transaction as to preclude the dual roles and to make the conflict non-consentable by the client.

8. Second, we note the provisions of Rule 5.7, which are applicable to brokerage services provided by a lawyer. If the brokerage services provided to a particular brokerage client are not distinct from legal services provided to that same client, albeit in different matters, or could be perceived by that client to be the subject of a client-lawyer relationship, those brokerage services will be subject to the Rules of Professional Conduct. Moreover, "it will be presumed that the person receiving the brokerage services believes" them to be the subject of a client-lawyer relationship "unless the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services…" *Id.*

9. Finally, paragraph b of Rule 5.7 enjoins a lawyer not to allow any non-lawyer with whom the lawyer is associated in a brokerage business to "direct or regulate" the lawyer's professional judgment "in rendering legal services" or to cause the lawyer "to compromise the lawyer's duty under Rule 1.6(a) and (c) with respect to the confidential information of a client receiving legal services."

Conclusion

10. For the reasons stated, and subject to the cautions hereinabove set forth, the questions posed are answered in the affirmative.

(47-10)

Ethics Opinion 934

Committee on Professional Ethics of the New York State Bar Association (9/7/12)

Topic: Compensation of lawyer by law firm; third-party payments.

Digest: A law firm may compensate a partner, associate or counsel by making a payment directly to the lawyer or to a professional services corporation as described in Article 15 of the New York General Business Law. A professional services corporation for the practice of law may not have non-lawyer shareholders. Consequently, a law firm may not pay a lawyer's compensation to a subchapter S corporation with non-lawyer shareholders. A law firm may make payments to a third party at the direction of the lawyer, as long as it does not treat such payment as payment for legal services. Thus, the firm may make payments to a subchapter S corporation with non-lawyer shareholders, but neither the law firm nor the subchapter S corporation may mischaracterize the payments as compensation for legal services.

Rules: Rules 1.0(h), 1.5(g), 5.4(a) and (d), 8.4(c).

Question

1. May a lawyer who has withdrawn as a partner in a firm, and who remains of counsel to the firm, receive compensation for the lawyer's legal services by check from the firm to a subchapter S corporation[1] in which the lawyer's spouse is a shareholder?

Discussion

2. Under Article 15 of the N.Y. Business Corporation Law, N.Y. Bus. Corp. Law § 1503, a New York lawyer, whether practicing as a sole practitioner or in a law firm, may practice law as a professional services corporation.[2] *See also* Rule 1.0(h) (defining "firm" or "law firm" to include a professional corporation).

3. Under § 1503 of the Business Corporation Law, however, a non-lawyer may not own any interest in a professional services corporation authorized to practice law. Thus the subchapter S corporation in this inquiry is not a professional services corporation authorized to practice law. *See also* Rule 5.4(d) (lawyer shall not practice with or in the form of an entity authorized to practice law for profit, if a non-lawyer owns any interest therein.)

4. The law firm in this case may have occasion to pay the "of counsel" lawyer either as compensation for legal services rendered or as a return of the lawyer's capital contribution. If the law firm is willing to make payments to a third party at the direction of an employee— for example, to a creditor of the employee or, in this case, to the subchapter S corporation— such a payment would not be prohibited by the Rules. The Rules do not prohibit a law firm from making payments to third parties, as long as they are accounted for properly, and as long as the payment does not constitute an impermissible sharing of a legal fee.[3] Third party payments effectively are the same as payments by the firm to the lawyer with a second payment from the lawyer to the subchapter S corporation.

5. The law firm's books and records may not mischaracterize the nature of the payments made— that is, as compensation to the lawyer (not the subchapter S corporation) for services rendered or return of the lawyer's capital contribution. Similarly, the lawyer, as a shareholder of the subchapter S corporation, may not mischaracterize the nature of the payments to the subchapter S corporation as compensation for legal services. *See* Rule 8.4(c) (a lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation). A payment for legal services would need to be made to the lawyer or a professional services corporation authorized to practice law in which the lawyer practices.

Conclusion

6. A law firm may compensate a lawyer who is a partner, associate or counsel to the firm by making a payment directly to the lawyer or to a professional services corporation as described in Article 15 of the New York Business Corporation Law. Because a professional services corporation authorized to practice law may not have non-lawyer shareholders, the law firm may not treat as compensation a payment that it makes to a subchapter S corporation in which a non-lawyer is a shareholder. The lawyer may direct the law firm to pay over the lawyer's compensation to a third party, including a subchapter S corporation with non-lawyer shareholders, but neither the law firm nor the third party may mischaracterize such payment as a fee for legal services.

Endnotes

1. A subchapter S corporation is a creature of the Internal Revenue Code. In general, S corporations do not pay any federal income taxes. Rather, the corporation's income or losses are divided among and passed through to its shareholders. The shareholders must then report the income or loss on their own individual income tax returns.

2. BCL § 1503 provides, in pertinent part, as follows:

   > (a) Notwithstanding any other provision of law, one or more individuals duly authorized by law to render the same professional service within the state may organize, or cause to be organized, a professional service corporation for pecuniary profit under this article for the purpose of rendering the same professional service…
   >
   > (b) The certificate of incorporation of a professional service corporation…(ii) shall have attached thereto a certificate or certificates issued by the licensing authority certifying that each of the proposed shareholders, directors and officers is authorized by law to practice a profession which the corporation is being organized to practice….
   >
   > Similarly, BCL § 1507 limits the issuance of shares by a professional services corporation to those individuals who are authorized by law to practice the profession that the corporation is authorized to practice.

3. The opinions of this committee have long recognized that a law firm may employ outside service providers. *See, e.g.*, N.Y. State 95 (accounting service/data processor). However, the subchapter S corporation cannot provide legal services because of its non-lawyer ownership. And a lawyer may not share legal fees with a nonlawyer, with certain exceptions not relevant here. *See* Rule 5.4(a) ("A lawyer or law firm shall not share legal fees with a nonlawyer…"). Moreover, a lawyer may not share legal fees with a lawyer outside the lawyer's own law firm, unless the relationship complies with Rule 1.5(g).

(1-12)

Ethics Opinion 935

Committee on Professional Ethics of the New York State Bar Association (9/18/12)

Topic: Public Defender; private practice.

Digest: A Public Defender or Assistant Public Defender can represent private clients as part of a separate private practice in the same Criminal Court in which he or she appears in a public defender capacity.

Rules: 1.11.

Facts

1. An appointed county Public Defender has a staff that includes part-time and full-time assistants. He has created a practice policy for both the part-time and full-time attorneys, including himself, that permits them to practice law privately in criminal or civil cases within and outside the county as long as no conflict of interest is involved. The full-time attorneys must do their private case work outside of normal business hours.

2. The Public Defender seeks guidance on whether his attorneys can represent private clients in the same Criminal Court in which they appear in their public defender capacity.

Question

3. May a Public Defender or Assistant Public Defender represent private clients as part of a separate private practice in the same Criminal Court in which he or she appears as a member of the Public Defender's Office?

Opinion

4. No rule expressly prohibits a Public Defender or Assistant Public Defender from separately representing private clients. Indeed, in the past this Committee has issued opinions, under both the current Rules and the prior Code of Professional Responsibility, addressing specific questions involving scenarios where a public defender undertakes to represent a private client, and in none of those opinions did we suggest that there is any per se prohibition against a public defender separately representing private clients. *See, e.g.*, N.Y. State 862 (2011) (imputing conflict of interest in Public Defender Office to Assistant Public Defender acting in private practice capacity); N.Y. State 587 (1987) (concluding that it is proper for part-time Public Defender to represent, privately, individual found ineligible for Public Defender's assistance where individual unable to find other retained counsel and stating that "a part-time Public Defender may engage in private criminal defense work, at least when 'the client had never requested the services of the public defender's office'"); N.Y. State 518 (1980) (concluding that part-time Public Defender can represent private clients in litigation against county by which he is employed).

5. Other than Rule 3.8, which addresses the conduct of prosecutors and other government lawyers acting in a prosecutorial capacity, only Rule 1.11 establishes special obligations for former and current government officers and employees. The title of this rule refers to special conflicts of interest for former and current government officers and employees. Parts of the rule address how traditional kinds of conflicts can arise for such lawyers. *See* Rule 1.11 (a)(1), (b), (c). This aspect of Rule 1.11 has no bearing on the inquirer's question because the inquirer has acknowledged that his attorneys will abide by conflict-of-interest rules in determining whether to accept a retained case.

6. Rule 1.11 also limits a former government lawyer's ability to represent a private client in a matter in which the lawyer participated substantially as a public officer or employee. *See* Rule 1.11(a)(2). This rule, although it literally applies to "former" government lawyers, would limit a Public Defender's ability to successively represent a client on a single matter first as a public employee and subsequently—for example, because of a change in financial circumstances of the client—as a private lawyer. Under the prior Code of Professional Responsibility, this Committee expressed the concern that "the office of Public Defender not be perceived as a feeder in building a private law practice," N.Y. State 587, and closely circumscribed the situations in which an individual who contacts a Public Defender Office for representation can end up represented privately by a lawyer in that office. Compare N.Y. State 165 (1970) (prohibiting private retainer of part-time Public Defender whose office had previously been contacted by client for assigned representation) with N.Y. State 587 (modifying N.Y. State 165 to allow for limited exceptions). But there is no suggestion here that the inquirer permits his lawyers to

direct potential public defender clients to their private practice, or that any of those lawyers would otherwise represent clients in violation of Rule 1.11(a)(2). Accordingly, Rule 1.11(a)(2) does not control this inquiry.

7. Finally, Rule 1.11 also prohibits lawyers who hold public office from improperly using the influence that their office carries. Rule 1.11(f)(2) specifically prohibits lawyers who hold public office from using their public office "to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client." It is this rule that comes closest to bearing on Public Defenders' appearances in a private capacity in the same tribunal where they appear in a public capacity. It is difficult, however, to discern how Public Defenders acting in a private capacity would use their public position to influence a tribunal. In both private and public capacities, the lawyer who is also a Public Defender is typically seeking to accomplish the same legitimate purpose—effective client representation. There is nothing attendant to the Office of Public Defender that carries with it the power to exert influence over a tribunal in which the Public Defender appears other than by means of appropriate and effective advocacy. Accordingly, Rule 1.11(f) does not prohibit the inquirer's practice model.

8. Our position with respect to Public Defenders contrasts with our opinions on part-time prosecutors. We have long held that the rules against representation of differing interests prevent a part-time prosecutor from representing criminal defendants in New York State courts or in suing the governmental entity that employs them and that these conflicts are not waivable. N.Y. State 788 (2005); N.Y. State 657 (1993); N.Y. State 544 (1982); N.Y. State 218 (1971). In N.Y. State 544, we held that a part-time municipal attorney should not permit himself to represent an interest adverse to that of the locality. He should, therefore, not undertake a matter that would require him to appear before a judicial official of the locality or with respect to a violation of one of its ordinances. In that opinion, we explained that

> "A part-time local attorney may undertake a criminal defense without conflict of interest…if (1) his statutory or other responsibility to prosecute criminal proceedings on behalf of the locality does not require him, in any case, to prosecute any crimes or offenses designated as such by the Penal Law or any other law enacted by the Legislature of the State of New York, (2) the defense does not require him to appear before a judicial or other official of the locality he publicly represents, (3) the local government unit by which he is employed, or a violation or a construction of one of its ordinances, is not involved, (4) the offense charged is unlike any of those which he prosecutes, and (5) the investigating officers and law enforcement personnel involved are not those with whom he associates as prosecutor."

Notably, we have treated Public Defenders differently than prosecutors and other municipal attorneys, reasoning that a Public Defenders' true clients are "indigents accused of crime rather than the county" for which they work. N.Y. State 518.

9. Of course, in carrying out the inquirer's practice model, the lawyers must, as noted above, comply with all relevant ethical considerations such as conflict-of-interest rules. Because shouldering a full-time Public Defender position and a separate private practice may be burdensome, special attention must be paid to Rule 1.3's requirement that a lawyer act with diligence and promptness in representing a client. *See* Rule 1.3(a). Such lawyer must give diligent and equal priority to both private and public clients. *See* N.Y. State 260 (1987) (Public Defender must "exercise great care not to permit his personal or professional interests to appear to influence his judgment with respect to the priority to be assigned as between his public defender and private matters.").

Conclusion

10. A Public Defender or Assistant Public Defender can represent private clients as part of a separate private practice in the same Criminal Court in which he or she appears in a public defender capacity.

(45-11)

Ethics Opinion 936

Committee on Professional Ethics of the New York State Bar Association (9/21/12)

Topic: Designation of departing former name partner, who is taking an in-house counsel position, as "Special Counsel" on letterhead.

Digest: Whether a law firm may designate a departing name partner as "Special Counsel" after removing his name from the firm name depends on the level of his continuing involvement with the firm and its clients.

Rules: 1.10(a) & (e), 7.1(a), 7.5(a).

Facts

1. One of the founding name members of the inquiring lawyer's firm recently left to take a position as in-house counsel to a regional hospital center. The firm has changed its name by eliminating the name of the departing attorney. The firm would, however, like to list the departing attorney's name on the firm's letterhead. The inquirer states that the departing attorney's relationship to the firm remains "sufficiently robust and close to justify including him on the letterhead with an appropriate footnote."

2. Specifically, the inquirer states that the departing attorney will continue to do meaningful, substantive work through the firm, but only for certain firm clients with whom he had developed a close relationship during his tenure as a member of the firm, and only at their request for his involvement. The departing attorney will not provide legal services through the firm in any other cases. Thus, he will not provide legal services through the firm to clients with whom he did not develop a close relationship, and will not provide legal services to a firm client with whom he did develop a close relationship unless that client has requested his involvement.

3. When the departing attorney provides legal services through the firm, he will consult directly with the client and bill for his services through the firm. The firm will retain 10% of the amount billed for the departing attorney's time, and the remainder will be paid to the departing attorney. The departing attorney (1) will not have access to firm files for any clients other than those with whom he had a prior close relationship and who request his further involvement, (2) will not have an office at the firm, and (3) will not participate in firm management decisions.

4. The inquiry claims that an "Of Counsel" relationship "is a close, regular, personal relationship implying broader access to general firm files, general availability of the attorney to firm clients, and more involvement in day-to-day affairs of the firm than will be present here." Thus the firm will not designate the departing partner as being "Of Counsel," but instead proposes to designate him as "Special Counsel" with a further explanation.

Question

5. May the inquirer's firm designate the departing partner as "Special Counsel" on its letterhead and include one of the following two explanations in a footnote:

> Alternative 1: [John Doe], Special Counsel (with a footnote stating, "Mr. [Doe] consults through the firm with certain clients with whom he worked closely while a member of the firm.")
>
> Alternative 2: [John Doe], Special Counsel (with a footnote stating, "Mr. [Doe] consults through the firm with certain clients with whom he worked closely while a member of the firm. He is currently General Counsel for [Name of Institution] Hospital Health Center.")

Opinion

6. The New York Rules of Professional Conduct (Rules) do not explicitly address use of the term "Special Counsel," but do address use of the term "Of Counsel." Rule 7.5(a) provides in pertinent part:

> "A lawyer or law firm may use… letterheads…provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:…
>
> "(4)…A lawyer or law firm may be designated 'Of Counsel' on a letterhead if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate."

7. While Rule 7.5(a)(4) on its face broadly includes any "continuing relationship," this term has been interpreted to require a certain threshold level of involvement. "An of counsel relationship is one in which the of counsel lawyer is available to the firm for consultation and advice on a regular and continuing basis." N.Y. State 853 (2011) (citation and internal quotes omitted); N.Y. State 793 (2006); N.Y. City 1995-8 (noting that term "continuing relationship" has been characterized for purposes of this provision as a "close, regular, personal relationship" other than that of partner or associate).

8. Several variations of the term "Of Counsel," including "Special Counsel," have come into use by law firms.[1] The meanings of these various terms are similar and for practical purposes may be indistinguishable. One ethics committee has opined that while there may be "connotative differences evoked by these variants of the title 'counsel,' they all share the central, and defining, characteristic of the relationship that is denoted by the term 'of counsel,'" which is

> "a close, regular, personal relationship" which is neither that of a partner nor that of an associate. ABA 90-357. One treatise indicates that 'counsel' and 'of counsel' are terms that 'should be considered synonymous,' and 'special counsel' may also mean about the same thing, though sometimes it refers to a lawyer who is associated with the firm only for a particular type of matter." *Simon's New York Rules of Professional Conduct Annotated 1205 (2012 ed.).*

9. "Of Counsel" and other designations of professional status must not be used in misleading ways. Rule 7.5(a) explicitly provides that use of such designations is subject to Rule 7.1. A provision in the latter rule prohibits a lawyer or law firm from disseminating advertising that contains statements or claims that are false, deceptive or misleading. Rule 7.1(a)(1).

10. Rule 7.1 would apply to this inquiry only when letterhead is used in a communication that constitutes an "advertisement" as defined by Rule 1.0(a). But there are also more general rules governing use of misleading statements.[2] Although Rule 7.5(a) is written in the permissive terms of a safe harbor, we do not believe it serves to allow professional designations that would otherwise violate these more general rules just because the designations are not used in advertising. Ethics committees have set forth criteria for use of particular designations such as "of counsel" so as to avoid the risk of misleading the public.[3] There is no apparent reason to limit that purpose and those criteria to the context of advertising. *See* Rule 7.5, Cmt.1 ("In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status").

11. The inquiry before us posits that the departing lawyer's ongoing new relationship to the firm "is sufficiently robust and close" to justify including him on the letterhead as a "Special Counsel," but not so extensive as to allow his designation as "Of Counsel." More particularly, the inquiry points to three factors claimed to be essential to an Of Counsel relationship. The inquiry argues that this terminology implies "(1) broader access to general firm files, (2) general availability of the attorney to firm clients, and (3) more involvement in day-to-day affairs of the firm than will be present here." We do not adopt this analysis, as it does not completely follow the established principles set forth above.[4]

12. What is essential is that the Of Counsel lawyer be available to the firm for consultation and advice on a regular and continuing basis. This standard is necessarily a matter of degree. *See* N.Y. State 853 ¶¶ 8-9 (2011) (opining that lawyer who "minimizes" his participation in a firm would not qualify as Of Counsel if he works "full time" as in-house lawyer at a corporation). As applied to the current inquiry, the standard will turn in part on how many clients use the services of the departing lawyer, and to what extent.

13. If the departing lawyer is expected to, and ultimately does, represent a number of former clients in multiple matters on an ongoing basis, that might well justify designating him, on letterhead and otherwise, as Of Counsel (or if the firm wishes, Special Counsel, with or without an explanatory footnote). On the other hand, if the departing lawyer is expected to, and ultimately does, represent only a few former clients in a small number of matters or in very limited ways, then designation as Special Counsel could well be impermissibly misleading. *See* N.Y. State 853 (2011); N.Y. State 262 (1972) (if relationship only existed for one particular case, "Of Counsel" designation on letterhead would be misleading "even though the case might be of great importance and over an extended period of time"). To give an extreme example, it would be

misleading for the departing lawyer to maintain a "counsel" designation if, during the first year of the arrangement, no clients at all used his services and his relationship with the firm were purely theoretical.[5]

14. Accordingly, the term "Special Counsel" is permissible only if the departing lawyer's actual practice includes the regular and continuing level of consultation and advice for the firm and its clients that is necessary to justify a "counsel" designation. This conclusion does not depend on compensation arrangements, *see* ABA 90-357, or on whether the firm explains the departing lawyer's relationship to the firm in a footnote. If the departing lawyer meets "counsel" standards, then the firm may use the "Special Counsel" designation and may explain his relationship in an accurate footnote if it wishes, but if he does not meet those standards, an explanatory footnote will not make such a designation permissible.

15. Finally, although the inquiry does not raise the question of imputed conflicts, we believe the issue merits discussion. When a lawyer would be prohibited from representing a client by virtue of certain kinds of conflicts, the prohibition also applies to other lawyers who are "associated in a firm" with the lawyer subject to the conflict.[6] The term "associated" is not defined in the Rules, and it does not apply to all lawyers who are in any way connected or related to the firm. N.Y. State 853 (2011). However, a lawyer with close enough connections to be Of Counsel to a firm is "associated" with that firm for purposes of the imputation rule. *See* N.Y. State 853 (2011); N.Y. State 793 (2006); N.Y. State 773 (1993); ABA 90-357; N.Y. City 1995-8; Restatement (Third), The Law Governing Lawyers § 123 cmt. c(ii).

16. Moreover, a lawyer who is held out to the public with the term "counsel" or one of its variants—whatever the level of the lawyer's actual involvement—is "associated" with the firm for purposes of the imputation rule. *See* N.Y. State 793 (2006) (recognizing imputation when lawyer holds self out as having Of Counsel relationship and thus "conveys to the public that the lawyer has a continuing relationship with a firm that is close and regular"); *cf.* N.Y. State 807 (2007) ("A law firm may not denominate a lawyer as an associate and then take the position that the lawyer is not an associate for the purpose of imputation of conflicts of interest"). Because variants of the "counsel" formulation are essentially synonymous for ethical purposes, calling the attorney "Special Counsel" as opposed to "Of Counsel" does not change the effect of the designation in imputing conflicts.

17. When two law firms are associated with the same lawyer, they are considered the same firm for conflicts purposes. The legal department of a corporation is considered a law firm, *see* Rule 1.0(h), and is therefore subject to this rule like any other firm. Accordingly, "the conflicts of the Firm and the legal department will generally be shared and must become part of both of their conflict-checking systems under Rule 1.10(e)." N.Y. State 853 (2011).

18. In some circumstances, conflicts that would personally disqualify an "Of Counsel" lawyer from undertaking or continuing a particular representation would not necessarily result in disqualification of the entire law firm from litigation. *See Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127 (2d Cir. 2005). In that opinion, after noting ethics opinions suggesting a per se rule imputing conflicts between law firms and their Of Counsel attorneys, the Second Circuit rejected such a per se rule for disqualification purposes. For those purposes it adopted a more flexible standard that had been applied in a different context by N.Y. State 715 (imputation of conflicts for contract lawyers "depends on the facts and circumstances of the employment"). This approach to disqualification has been followed in other cases as well.[7]

19. Judicial reluctance to disqualify an entire firm based on imputation of an Of Counsel lawyer's conflict of interest, however, is not inconsistent with our view that such a lawyer's conflicts are always imputed to an entire firm under Rule 1.10(a). Courts considering disqualification motions may have reason to consider whether a conflict violates the Rules, but they may also have reason to consider other factors such as delay, public confidence, increased expense, fairness to the parties, entitlement to choose counsel and the prospect of abusive disqualification motions. Given the availability of procedures for professional discipline, courts have found no need to deal with all ethical violations "in the very litigation in which they surface." *Board of Education v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979). Under this approach, while decisions on disqualification motions may benefit from "general guidance" offered by state disciplinary rules, "not every violation of a disciplinary rule will necessarily lead to disqualification" unless it "tends to taint the underlying trial." *Hempstead Video*, 590 F.2d at 132 (quoting Nyquist). Accordingly, under this approach, a con-

flict that does not warrant disqualification may nonetheless constitute a violation of the Rules.

20. Thus, an Of Counsel (or Special Counsel) relationship between a lawyer with a conflict and a firm may not always justify the firm's disqualification by imputation in litigation, but as a matter of legal ethics, imputation is required when the lawyer's conflict is one of the kinds specified in Rule 1.10(a). As a corollary, pursuant to Rule 1.10(e), a law firm that maintains a "counsel" relationship with a lawyer must check for conflicts with that lawyer and that lawyer's firm, and vice versa.

Conclusion

21. If the departing lawyer's continuing work for the firm rises to the level that the lawyer is available to the firm for consultation and advice on a regular and continuing basis, then the lawyer may be designated as Special Counsel on letterhead. In that case, the lawyer would be "associated" with the firm for purposes of imputation of conflicts of interest.

Endnotes

1. "[A]lthough 'of counsel' appears to be the most frequently used among the various titles employing the term 'counsel,' it is by no means the only use of that term to indicate a relationship between a lawyer and a law firm. Other such titles include the single word 'counsel,' and the terms 'special counsel,' 'tax [or other specialty] counsel,' and 'senior counsel.'" ABA 90-357.
2. See Rule 4.1 (in course of representing a client, lawyer shall not make a false statement of fact to a third person) and Cmt. [1] (a misleading statement or omission can constitute a misrepresentation); Rule 8.4(c) (lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").
3. Such criteria protect against misleading marketing. "Otherwise, law firms could raise the price of their stock (so to speak) by listing a famous lawyer or retired judge or public official as 'of counsel' even though the 'of counsel' lawyer had little or nothing to do with the firm." *Simon's New York Rules of Professional Conduct Annotated* 1204 (2012 ed.).
4. The inquirer's analysis purports to distinguish between terms that are extremely close, if not identical, in meaning. We believe that a relationship close enough to justify a "Special Counsel" designation would generally also justify a designation that the lawyer is "Of Counsel." Moreover, we doubt that any fixed set of a few factors will answer the question whether a relationship is sufficiently close, regular and personal as to justify any form of "counsel" designation.
5. We understand that the number of matters handled may vary over time, and we are not suggesting that a firm is required to reevaluate a "counsel" designation every week or month. The firm may rely on its long-term expectations, but may not indefinitely maintain a designation based on expectations not borne out in actual practice.
6. Rule 1.10(a) states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."
7. *See Calandriello v. Calandriello*, 32 A.D.3d 450, 819 N.Y.S.2d 569 (2d Dep't 2006) (previous representation of defendant-husband by a matrimonial attorney now serving as "of counsel" to plaintiff-wife's firm would not justify disqualification of plaintiff-wife's firm where, as "of counsel" to the plaintiff-wife's firm, the defendant-husband's prior attorney "did not perform any legal work for the firm or its clients, but merely had office space available to him in its New York office"); *Ciao-Di Restaurant Corporation v. Paxton 350, LLC*, 2008 WL 5582720 (Sup. Ct. N.Y. Co. 2008) (denying disqualification and adopting *Hempstead Video* rule).

(18-12)

Ethics Opinion 937

Committee on Professional Ethics of the New York State Bar Association (10/3/12)

Topic: Promotional gifts branded with a law firm's logo.

Digest: A law firm may cooperate with a local hospital to include promotional gifts branded with the law firm's logo in a welcome package distributed to all patients.

Rules: 7.1, 7.3(a).

Facts

1. The inquirer wants to cooperate with a local hospital to provide a promotional gift (i.e., calendar, pen, etc.), branded with the law firm logo, in a welcoming informational package given to all hospital patients.

Question

2. May a law firm provide a promotional gift with its logo in a welcoming informational package provided to all patients at a local hospital?

Opinion

3. In our view, nothing in the New York Rules of Professional Conduct prevents the proposed distribution of branded promotional gifts to hospital patients. Such items are not "advertising" within the meaning of the Rules, so that many of the restrictions on advertising and solicitation (a form of advertising) do not apply. An "advertisement" is defined as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is the retention of the lawyer or law firm," other than communications to existing clients or other lawyers.[1]

4. As the State Bar's Comments to the Rules make clear, there are many communications that have the general aim of increasing a lawyer's business and yet are not deemed advertising. For example, topical newsletters intended to educate recipients about new developments in the law are generally not considered advertising. Rule 7.1 Cmt. [7]. Of particular significance here, the same is true of certain communications intended to raise brand awareness:

> "Some communications by a law firm that may constitute marketing or branding are not necessarily advertisements. For example, pencils, legal pads, greeting cards, coffee mugs, T-shirts or the like with the law firm name, logo and contact information printed on them do not constitute 'advertisements' within the definition of this Rule if their primary purpose is general brand awareness and branding, rather than the retention of the law firm for a particular matter."

Rule 7.1, Cmt. [8]. In other words, when the intent of a communication is to educate recipients about legal developments or to raise general brand awareness, that intent will be considered its primary purpose. Thus, even if such communications are more fundamentally motivated by the aim of increasing a lawyer's business, they are not advertising within the meaning of the Rules.

5. With that understanding, it seems clear that the primary purpose of giving incoming hospital patients a calendar or pen marked only with the inquirer's name and contact information is to raise general awareness of the inquirer's firm. As a consequence, numerous rules that apply to advertising, such as the requirement that all advertisements include the principal law office address and telephone number of the lawyer or law firm being advertised, Rule 7.1(h), do not apply to the distribution of the promotional gifts at issue here. We note, however, that if the pen or calendar were marked with more than the firm logo—if, for example, they included slogans or more information about the firm—then the conclusion we reach here might change.

6. We recognize that the distribution of law-firm-branded materials to hospital patients might seem in tension with the policy expressed in Rule 7.3(a)(2)(iv), which provides that solicitation is barred when "the lawyer knows or reasonably should know that the age or the physical, emotional or mental state of the recipient makes it unlikely that the recipient will be able to exercise reasonable judgment in retaining a lawyer." But we think it unlikely that a mere branded pen or calendar would overwhelm the judgment of even a frail hospital patient or his or her family.

7. In any event, the proposed distribution of gifts would not violate the terms of Rule 7.3(a)(2)(iv). Indeed, this would be true even if the pen or calendar, by including more than the firm logo, were to constitute advertising. The fact that some recipients of the gifts might be expected to be in a frail physical, emotional or mental state does not mean that otherwise permissible distributions to the hospital-patient population as a whole would be barred. Distributions to any broad segment of the population would be expected to reach some persons who are covered by Rule 7.3(a)(2)(iv), but that does not mean that the entire distribution is prohibited. Of course, under the actual inquiry, the items would be marked only with the firm logo. Because the proposed distribution of promotional gifts would therefore not constitute advertising, it also would not constitute solicitation and could not violate the rule against solicitation of frail recipients.

8. Nor would the proposed distribution violate Rule 7.3(a)(1), which bars in-person solicitation. Again supposing that the items were to include enough information so as to constitute advertising, their distribution, without any accompanying oral communication about the firm, would not be the kind of in-person contact barred by the rule.[2] And again returning to the actual inquiry, because there would be no advertising, there could be no violation of the rule against in-person solicitation.

Conclusion

9. A law firm may cooperate with a local hospital to include promotional gifts branded with the law firm's logo in a welcome package distributed to all patients.

Endnotes

1. Rule 1.0(a). "Solicitation" is defined to include "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain," other than a proposal or other writing prepared and delivered in response to a specific request of a prospective client. Rule 7.3(b).
2. In N.Y. State 659 (1994), this Committee opined that including a law firm advertisement in an "information package" that would be distributed by a car dealer to car buyers, without discussion, would not constitute in-person solicitation. We subsequently opined that even a lawyer's paid paralegal employee could deliver a solicitation to neighboring buildings provided the paralegal "simply [left] a name-change announcement at a residence…[and had] no personal contact with the recipients." N.Y. State 857 (2011).

(43-12)

Ethics Opinion 938

Committee on Professional Ethics of the New York State Bar Association (10/9/12)

Topic: Law firm ownership of business that provides nonlegal services and pays for "leads."

Digest: Law firm that owns an entity providing nonlegal SSDI services is not subject to legal ethics rules as to those services, and no ethical violation would arise from entity's purchase of leads to market those services, if the entity includes no lawyers, operates separately from the law firm, and disclaims the provision of legal services.

Rules: 5.7, 7.2(a).

Facts

1. The lawyers in inquiring attorney's law firm contemplate forming a separate entity (the "SSDI Entity") for the purpose of providing services to persons with respect to Social Security Disability Insurance claims ("SSDI services"). The inquirer states that while "lawyers can handle these cases, one does not have to be a lawyer to do so"[1] and notes that "Licensed Hearing Representative" is the term used to describe a nonlawyer authorized to handle such cases. The SSDI Entity would have a different name from the firm, would be housed in a different facility and would have its own letterhead, business cards, phone number and employees, including a nonlawyer Licensed Hearing Representative.

2. No employee of the SSDI Entity would be a lawyer.[2] The SSDI Entity would advise customers and potential customers, in writing, that the SSDI services "are not legal services and do not come within any attorney-client relationship."

Question

3. May the SSDI Entity, if established and owned by inquirer and his colleagues, purchase SSDI leads from a marketing organization? The organization, which advertises heavily on the internet, would forward to the SSDI Entity the information of people who respond to its website if the SSDI Entity agrees to pay for a certain number of leads in a certain geographic area each month.

Opinion

4. Rule 7.2(a) of the New York Rules of Professional Conduct states that a lawyer "shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client" with exceptions not relevant here. The inquirer notes our opinion N.Y. State 779 (2004) in which we relied upon Disciplinary Rule 2-103(B), the predecessor to Rule 7.2(a), in concluding that it is improper for an attorney to pay money to a marketing organization in return for "leads" to potential clients. The inquirer recognizes that his law firm would not be permitted to purchase leads for its law practice but seeks to clarify whether the SSDI Entity, because of its separate nature, could purchase leads without giving rise to an ethical violation by the lawyers in the firm.

5. Rule 5.7, entitled "Responsibilities Regarding Nonlegal Services," is the key Rule to consider. Rule 5.7(c) defines "nonlegal services" to mean "those services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." We assume, based on assertions in the inquiry, that nonlawyer Licensed Hearing Representatives are permitted by federal law to provide (and accordingly are not prohibited by New York law from providing) the contemplated services. Thus the services qualify as "nonlegal services" for purposes of the Rule.

6. Because there will be no "lawyer or law firm that provides" any SSDI services, Rules 5.7(a)(1) and 5.7(a)(2) do not apply. The relevant provision, Rule 5.7(a)(3), says:

> "A lawyer or law firm that is an owner, controlling party or agent of, or that is otherwise affiliated with, an entity that the lawyer or law firm knows to be providing nonlegal services to a person is subject to these Rules with respect to the nonlegal services if the person receiving the services could reasonably believe that the nonlegal services are the subject of a client-lawyer relationship."

7. The question, then, is whether recipients of the SSDI services could reasonably believe that those services are the subject of a client-lawyer relationship. We first consider the way the SSDI Entity will present itself to prospective and actual customers. Although the SSDI Entity will be affiliated with the law firm through common ownership, in its outwardly visible aspects it

will be separate and distinct from that firm, it will intentionally eschew any reference to the affiliation between them, and it will explicitly disclaim any attorney-client relationship. Unless there are further relevant facts not mentioned in the inquiry (such as perceptible connections between the two entities, or forms of advertising tending to create an impression of legal services), there would be no apparent basis on which customers could reasonably believe they were receiving legal representation.

8. We must, however, consider another relevant provision. Rule 5.7(a)(4) states that for purposes of Rule 5.7(a)(3), "it will be presumed that the person receiving nonlegal services believes the services to be the subject of a client-lawyer relationship" unless one of two conditions are met. One of those conditions, and the only one available to the inquirer, is that "the lawyer or law firm has advised the person receiving the services in writing that the services are not legal services and that the protection of a client-lawyer relationship does not exist with respect to the nonlegal services." Here, the inquirer proposes to do just that. The written disclaimer must be made at a time and in a manner "sufficient to ensure that the person understands the significance of the communication." Rule 5.7, Cmt. [3]. If it is, then the presumption set forth in Rule 5.7(a)(4) would not apply.

9. Because the law firm would not be subject to the Rules with respect to services provided by the SSDI Entity, Rule 7.2(a) would not preclude the purchase of leads as contemplated. However, the lawyers in the firm should be mindful that they always remain subject to some other Rules, such as those prohibiting lawyers from engaging in illegal or deceptive conduct, including when they engage in conduct incidental to ownership of the SSDI Entity. *See* Rule 5.7, Cmt. [4].

Conclusion

10. Members of a law firm who establish and own an entity to provide nonlegal SSDI services are not subject to the Rules with respect to those services if the entity includes no lawyers, operates wholly separately from the law firm, and disclaims the provision of legal services. Under those circumstances, no ethical violation would arise if the entity purchases leads for the purpose of marketing the SSDI services.

Endnotes

1. The inquirer cites 42 U.S.C. 406 §206(a)(1): "The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys…representing claimants before the Commissioner of Social Security…."
2. Different questions would arise if a lawyer (whether one from the firm or one newly employed by the SSDI Entity) were to participate in providing SSDI services, for example by meeting with customers or editing documents drafted by a Licensed Hearing Representative. This opinion does not address such scenarios.

(44-12)

Ethics Opinion 939

Committee on Professional Ethics of the New York State Bar Association (10/16/12)

Topic: Maintaining confidentiality of client information as between independent lawyers sharing office space and computer.

Digest: Independent lawyers sharing office space may share computer for client-related information if they exercise reasonable care to assure that confidential information is not disclosed.

Rules: 1.6(a) & (c).

Facts

1. Two private lawyers share space, but are not partners or otherwise practicing as one firm. They share one computer, as to which they have separate administrative passwords not known to each other. They maintain separate paper files.

Question

2. May private lawyers who share space also share a computer for confidential, client-related information where they have separate administrative passwords to the computer that are not known to each other?

Opinion

3. Rule 1.6(a) of the Rules of Professional Conduct states: "A lawyer shall not knowingly reveal confidential information," with exceptions not relevant to the issue presented. Rule 1.6(c) provides, also subject to an exception not relevant here: "A lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client...."

4. A lawyer's duty of reasonable care is not limited to overseeing the conduct of others. The lawyer must also take reasonable care to avoid improper disclosure by the lawyer himself or herself.[1] In addition to whatever support for that broader duty may be found in the text of Rule 1.6, support from other sources has been cited by some ethics opinions. *See* A.B.A. 11-459 (citing Rule 1.1(a), which calls for a lawyer to provide competent representation to a client, and stating that "a lawyer must act competently to protect the confidentiality of clients' information"); N.Y. City 1994-11 (stating that a duty to preserve client confidences and secrets "inheres in the fiduciary relationship between lawyer and client").

5. When a lawyer uses a particular technology to store or transmit confidential information, the degree of care that is required may depend on factors such as the security of that technology and the sensitivity of the information. If the technology, taking into account legal as well as technological safeguards, does not provide a reasonable expectation that confidentiality will be protected; if circumstances put the lawyer on notice of a heightened risk that confidentiality may be compromised; or if the information is extraordinarily sensitive, then further security measures may be required. *See* Rule 1.6 Cmt. [17]; N.Y. State 842; N.Y. State 709; A.B.A. 11-459. The lawyer, upon considering such factors, must take reasonable precautions to ensure privacy.

6. The facts provided by the inquirer are insufficient to resolve whether the proposed shared computer can be used for client-related information without violating the duty of reasonable care to protect confidentiality. The fact that the lawyers have separate computer passwords is certainly an appropriate precaution. Whether it is sufficient would depend on further factors. Some password systems may be more resistant to unauthorized access than others. Protection of the password is also important; for example, a password kept on a piece of paper stuck to the computer and readily visible to any user does not provide much protection. On the other hand, if a robust password system provides a degree of protection similar to that of locked file cabinets, then its proper and consistent use may well constitute reasonable care. Admittedly there could be some risk of extraordinary efforts to hack into even a well-secured computer, or to steal it from the premises for more leisurely hacking, just as there could be a risk that file cabinets could be broken into or removed. The lawyer's obligation, however, is not to guarantee preservation of confidentiality at all costs; it is to protect confidentiality by taking reasonable care.

Conclusion

7. Lawyers practicing as sole practitioners but sharing space may share a computer to store and process client confidential information, but only if, under the actual circumstances relating to the computer, including its software and passwords and their use, the lawyers take reasonable precautions to ensure that the privacy of the confidential information is protected.

Endnote

1. Rule 1.6, Cmt. [17] (when transmitting a communication relating to representation of a client, "the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients"); N.Y. State 842 ¶4 (2010) (a lawyer must "take reasonable care to affirmatively protect a client's confidential information"); N.Y. State 709 (1998) ("an attorney has a duty to use reasonable care to protect client confidences and secrets"); N.Y. County 733 (2004) (attorney "must diligently preserve the client's confidences"); N.Y. City 1994-11 (lawyer who possesses client confidences and secrets must take reasonable steps to secure the information against misuse or inappropriate disclosure).

(50-12)

Ethics Opinion 940

Committee on Professional Ethics of the New York State Bar Association (10/16/12)

Topic: Use of off-site backup tapes to store a client's confidential information; retention of files in original paper form.

Digest: Lawyer may store confidential information on off-site backup tapes if lawyer takes reasonable care to ensure adequacy of systems to protect confidentiality. When records must be retained, nature of the records determines whether lawyer (i) must maintain originals, (ii) may discard originals and maintain electronic copies in particular formats, or (iii) may maintain electronic copies in any format.

Rules: 1.6(a) & (c), 1.15(d).

Facts

1. The inquiring attorney's firm scans all documents and makes them part of an electronic case management system. The electronic data is backed up daily on tapes, and the tapes are stored outside of the firm's office. Thus, in the event of a catastrophic loss to the office building or server, no more than a single day's data would be lost. The inquiry does not describe the entity that will handle the off-premise storage of the backup tapes, but it is presumably a commercial service provider rather than the firm itself.

Questions

2. May an attorney use a tape backup system to store a client's confidential information away from the firm's premises?

3. When the New York Rules of Professional Conduct (the "Rules") obligate an attorney to maintain certain records, may the attorney satisfy that obligation by keeping electronic copies such as backup tapes, or is the attorney required to keep the paper originals?

Opinion

A. Tape Backup Systems

4. The Rules address not only intentional disclosures of confidential information by a lawyer but also the exercise of reasonable care to avoid such disclosures by others. Rule 1.6(a) provides that, subject to certain exceptions, a lawyer "shall not knowingly reveal confidential information." Rule 1.6(c) provides that a lawyer "shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client," except for certain disclosures authorized by the rule.[1]

5. We previously addressed a related inquiry. The question in N.Y. State 842 (2010) was whether a lawyer could use internet server ("cloud") storage to store and back up confidential information. In that opinion, the Committee opined that such use is permissible "provided that the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained." The opinion gave several examples of steps that a lawyer might take to exercise such care.

6. We believe the principles governing use of a "cloud" storage system would also govern use of backup tapes maintained away from the firm's premises. A lawyer may use such backup tapes to store client information if the lawyer exercises reasonable care to protect the confidentiality of that information.[2]

7. Opinion 842's examples of conduct bearing on reasonable care are also relevant to the use of backup tapes. Thus, for example, it may be appropriate for the lawyer to:

   A. Ensure that the provider maintaining the backup tapes "has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information"; and

   B. Investigate the provider's "data storage security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances."

   N.Y. State 842.

B. May a Lawyer Satisfy Retention Requirements with Electronic Copies?

8. In asking the second question, the inquirer references the ethical requirement that certain kinds of records be maintained "for seven years after the events that they record." This includes, for example, records of certain bank accounts, copies of retainer agreements, copies of bills to

clients, copies of closing statements, and all checkbooks and bank statements. Rule 1.15(d)(1).

9. For most kinds of records listed in Rule 1.15(d)(1), it suffices under the terms of that Rule to keep "copies" of those records. However, for the records listed in Rule 1.15(d)(1)(viii)—namely, "checkbooks and check stubs, bank statements, prenumbered canceled checks and duplicate deposit slips"—it is necessary to maintain the records in their original form for the required seven years. This does not mean, however, that a lawyer must use a bank that routinely returns paper copies of cancelled checks, or must pay an extra charge to obtain paper copies. In N.Y. State 758 (2002), we said:

> "If these items are returned to the lawyer in paper form by the lawyer's bank in the ordinary course of business, the lawyer should retain them in that form. However, the lawyer is not required to undertake extraordinary effort or incur extra expense to obtain these items in paper form."

10. Thus, lawyers need not obtain original cancelled checks just to satisfy the retention rule. Rather, lawyers must preserve cancelled checks and the other items listed in Rule 1.15(d)(1) in whatever form the law firm receives or initially maintains these items in the ordinary course of business. *See generally* Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* 617-18 (2012 ed.).

11. For the documents that may be kept as copies, the Rule provides further guidance. Requirements of maintaining copies are satisfied by maintaining "original records, photocopies, microfilm, optical imaging, and any other medium that preserves an image of the document that cannot be altered without detection." Rule 1.15(d)(3). Whether a particular storage format meets this standard may not be obvious, in which case consultation with an information technology specialist may be appropriate. *See Simon's New York Rules of Professional Conduct Annotated* 619 (2012 ed.).

12. The answer to the inquirer's question thus depends on the kinds of record involved. It will not suffice to keep electronic copies of certain paper records like checkbooks, bank statements, and deposit slips when they are originally received or maintained by the law firm in paper form. Those must be kept in their original paper form. As to other kinds of records, for which Rule 1.15(d)(1) requires only the keeping of copies, those copies may be kept electronically, but only in a format that preserves an image that cannot be altered without detection, per Rule 1.15(d)(3).

13. A lawyer may also be ethically obligated to preserve various records other than those records subject to the seven-year retention requirement imposed by Rule 1.15. *See, e.g.*, N.Y. State 623 (1991) (opining that documents in closed files may be destroyed unless there are legal preservation requirements or "extraordinary circumstances manifesting a client's clear and present need"); N.Y. State 460 (1977) (opining that absent legal requirement to preserve records or specific instructions from client, retention period may be determined on basis of client's foreseeable need); N.Y. City 2010-1. Other obligations may be imposed by law or court rule. *See, e.g.*, N.Y. State 460 (1977); N.Y. City 2010-1; 22 NYCRR § 603.7 (1st Dep't rule requiring lawyers to preserve specified records in personal injury cases). Whether retention of electronic copies would satisfy these various obligations outside Rule 1.15 will again depend on the kind of record involved.

14. For example, it may be necessary to preserve the originals of documents such as wills, deeds, contracts, and promissory notes. *See* N.Y. City 2010-1. For other kinds of documents subject to preservation obligations, it may suffice to keep copies if "the legal effect or evidentiary value of such records is not thereby impaired," because, for example, the copies "may be introduced into evidence or otherwise used in place of the originals" if the need should arise. *See* N.Y. State 460 (1977); N.Y. County 624 (1974). In still other cases, there may an obligation to keep records based on foreseeable client need, yet that need would be only for the information in those records, and not for the records themselves. In such a case there would be no ethical constraints on the form in which electronic copies are kept.

Conclusion

15. A lawyer may use off-site backup tapes to store confidential client information if the lawyer takes reasonable care to ensure that the storage system, and the arrangements for its use, adequately protect the confidentiality of such information.

16. For certain kinds of records, the Rules require that original paper documents be kept if the lawyer receives or initially maintains paper originals in the ordinary course of business. For certain other kinds of records, the Rules require retention but permit a lawyer to keep electronic copies in lieu of paper originals if the electronic copies are in a format that preserves an image not subject to alteration without detection. For yet other kinds of records that must be retained, the Rules permit electronic copies to be kept in lieu of paper originals without restriction.

Endnotes

1. Some opinions also address whether a duty of reasonable care to protect confidential information applies to a lawyer's conduct in general. *See, e.g.,* N.Y. State 842 (2010) ¶4 *(citing* opinions); N.Y. State 709 (1998). We need not address that topic here, because the inquiring lawyer will be entrusting the tapes to others rather than maintaining them personally.
2. Indeed, given proper safeguards, use of an off-site backup system may be not just permissible but advisable for those lawyers who choose to maintain their records in electronic form. The primary, on-site storage system may have vulnerabilities that a backup system could help mitigate. *See* Roy D. Simon, *Simon's New York Rules of Professional Conduct Annotated* 619 (2012 ed.) ("Disciplinary authorities are not likely to be sympathetic if records disappear because of a computer malfunction.").

(4-12)

Ethics Opinion 941

Committee on Professional Ethics of the New York State Bar Association (10/16/12)

Topic: Conflict of interest involving an attorney's spouse.

Digest: A lawyer on a county panel of the Attorneys for Children Program may serve as "attorney for the child" even though another party in the proceeding is represented by the lawyer's spouse (an Assistant Public Defender) or by another lawyer who works in the same office as the lawyer's spouse, unless (i) the circumstances create a conflict of interest under Rule 1.7(a)(2) or Rule 1.10(h), and (ii) the child has no legal representative who can and does consent to the conflict on the child's behalf.

Rules: 1.0(h), 1.7(a) & (b), 1.10(a), (d) & (h).

Question

1. May a lawyer on a county panel of the Attorneys for Children Program serve as attorney for the child in court proceedings if the petitioner or respondent is represented by the lawyer's spouse (who is an Assistant Public Defender) or by another lawyer who works in the same office as the lawyer's spouse?

Background

2. Under New York Law, children (minors) in many kinds of court proceedings (including juvenile delinquency matters, custody and visitation disputes, and child protective proceedings) are entitled to be represented by counsel in Family Court, Supreme Court, Surrogate's Court, and appellate courts. A governmental office entitled the Attorneys for Children Program ("AFC Program") maintains a list or "panel" of attorneys qualified to represent children, and assigns an attorney from the panel to children involved in the judicial system who qualify by law for an appointed attorney.

3. When an AFC Program panel member is assigned to a case, the panel member plays the role of "attorney for the child," and functions as the child's lawyer. An attorney for the child is generally responsible for representing and advocating the child's wishes in the proceeding, which may or not be in the "best interests" of the child.[1]

4. The AFC Program operates under the supervision of the Appellate Division in each judicial department, and is governed by §7.2 of the Rules of the Chief Judge.[2] That section, entitled "Function of the Attorney for the Child," provides that the attorney for the child "is subject to the ethical requirements applicable to all lawyers, including but not limited to constraints on…conflicts of interest…."

5. The inquirer, Attorney X, is on the panel of the Attorneys for Children Program in a particular county. Attorney X's spouse is an Assistant Public Defender in the same county. When Attorney X represents a child in a proceeding, the petitioner or respondent is often represented by an attorney from the same Public Defender's Office in which Attorney X's spouse works. Attorney X does not directly oppose the petitioner or respondent in those proceedings, but rather represents the child.

Opinion

Rule 1.10(h): *Spouse v. Spouse*

6. In the New York Rules of Professional Conduct (the "Rules"), only one provision directly addresses conflicts between spouses. Rule 1.10(h) provides:

> A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client.

7. If Attorney X is assigned to represent a child in a proceeding in which Attorney X's spouse is representing another party to the matter whose interests differ from the child's interests, then Attorney X must decline or withdraw from the representation of the child per Rule 1.16(b) (lawyer "shall withdraw" from representing a client if the lawyer "knows…that the representation will result in violation of these Rules or of law") unless, per Rule 1.10(h), the child (Attorney X's client) "consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client."[3]

8. However, a client who is a child may be incapable of consenting to the conflict under Rule 1.10(h). In a prior opinion involving a minor client, we cited three opinions decided under the old Code of Professional Responsibility—N.Y. State 256 (1972), N.Y. State 274 (1972), and N.Y. State 790 n.4 (2005)—in which "this Committee determined that a minor by himself or herself could not consent to a conflict," and we added that "[n]othing in the Rules of Professional Conduct changes this conclusion." N.Y. State 895 (2011) ¶15. Although

a child acting alone lacks capacity to consent to a conflict, consent may be possible if the child has a separate law guardian or other representative who has power to consent on the child's behalf. Whether a representative does have such power is a question of law that we cannot answer. *See* N.Y. State 895 ¶ 16 (2011). (Nor do we know whether any of the children Attorney X will represent will have a law guardian or other legal representative.)

Rule 1.7(a)(2): Personal Interest Conflicts

9. Attorney X, even if not barred from the representation by Rule 1.10(h), must also consider another Rule when another party in the proceeding is represented by Attorney X's spouse or another Assistant Public Defender. Spousal conflicts may arise not only under Rule 1.10(h), but also under New York's more general rules on conflicts of interest. In particular, Rule 1.7(a)(2) provides that a lawyer generally may not represent a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client would be adversely affected by the lawyer's own financial business, property or other personal interests. Even in such cases, however, the lawyer may represent the client if each of four conditions is met. Among these are the conditions that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client," and that "each affected client gives informed consent, confirmed in writing." Rule 1.7 (b).

10. We lack sufficient facts to determine whether there is a "significant risk" that the professional judgment of the attorney for the child will be thrown off course ("adversely affected") by the lawyer's "personal interests" in the success of the spouse's employer (here, the Public Defender). The fear, stated in the abstract, is that when an Assistant Public Defender represents another party, Attorney X will somehow pull punches or represent the child-client less diligently than if the spouse did not work at the Public Defender's Office. Whether that abstract fear would become a reality may depend on multiple factors such as (a) the position the spouse holds at the Public Defender's Office, (b) how secure the spouse's job is at that office, (c) the relationship between the spouse and the Assistant Public Defender involved in the case, (d) whether the interests of the child and of the party represented by the Assistant Public Defender are aligned or antagonistic, and (e) whether the case is attracting attention from the press or from politicians. Those are just illustrative factors, not an exhaustive list. When the Assistant Public Defender involved in the case is actually Attorney X's spouse, then—even if there were not differing interests creating a Rule 1.10(h) conflict—there would be a heightened likelihood of a personal interest conflict.[4] Each matter will turn on its own circumstances, and Attorney X must exercise his or her own best judgment in identifying and weighing the relevant factors. *See, e.g.*, N.Y. State 895 ¶ 11 (2011) (applying various factors to analyze a potential conflict with a spouse's law firm).

Rule 1.10(a): Imputed Conflicts

11. If Rule 1.7(a)(2) disqualifies Attorney X from representing a child in a particular matter, then Rule 1.10(a) ordinarily imputes that conflict to every other lawyer who is associated in the same "firm." We must therefore determine whether the AFC Program is a "law firm" within the meaning of Rule 1.0(h), which provides as follows:

    (h) "Firm" or "law firm" includes, but is not limited to, a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a qualified legal assistance organization, a government law office, or the legal department of a corporation or other organization.

12. As we understand the AFC Program, it falls outside that definition. Nor are the attorneys on the panel of the AFC Program automatically deemed to belong to a single firm for conflict of interest purposes, such as sometimes happens when attorneys share offices in a way that gives each other access to the confidential information possessed by other attorneys in the office-sharing arrangement. *See, e.g.*, N.Y. City 80-63 (1980) (two firms that shared offices could not represent opposing parties in litigation because of the "strong likelihood" that the separate law firms could not maintain the confidences and secrets of their respective clients); N.Y. County 680 (1990) ("Even though lawyers who share office space are not partners, they may be treated as if they were partners for some purposes" if they share confidential information.)

13. Rather, the only connection between the attorneys on the panel, aside from a common purpose, is that they obtain assignments and seek reimbursement from the same administrator. This does not transform them into a law firm. *Compare Rosenblum v. Great Neck Teachers Ass'n Benefit Trust Fund*, 36 Misc. 3d 1203(A) (Nassau County Sup. Ct. 2012) ("organization that makes referrals to a panel of lawyers" falls outside the definition of "law firm" under Rule 1.0(h)) *with* N.Y. State 804 (2006) (independent private practitioners who formed a "qualified legal services corporation" to

represent indigent clients, and who each received a pro rata share of the fees paid by the county to the corporation, constituted a "law firm" for conflicts purposes). Because the AFC Program is not a law firm within the meaning of the Rules, a conflict for Attorney X will not be imputed to other lawyers in the AFC program (but if Attorney X is associated with other lawyers in some firm, a Rule 1.7 conflict will be imputed to them).

14. The Public Defender's Office, however, is a law firm, assuming it either is a "government law office" or comes within the definition of a qualified legal assistance organization under Rules 1.0(p) and 7.2(b)(1). *See* N.Y. State 862 (2011) (finding that Public Defender's Office was a firm). Thus its lawyers, unlike those of the AFC Program, are subject under Rule 1.10(a) to mutual imputation of personal-interest conflicts.[5]

15. We note—as we did in N.Y. State 895 at ¶ 14—that an Assistant Public Defender who works in the same office as Attorney X's spouse may have a "mirror-image conflict under Rule 1.7(a)(2)." Whether such a conflict arises will depend on the kinds of factors discussed in paragraph 10 above. If it does arise, then under Rule 1.10(a), the conflict will be imputed to every lawyer "associated in" the Public Defender's Office who knowingly undertakes a representation despite the conflict. However, if the client of the Public Defender's Office has the capacity to give informed consent to a conflict, then that client's consent may cure the imputed conflict. *See* Rule 1.10(d) (clients may waive imputed conflicts "under the conditions stated in Rule 1.7"). But the consent of the Assistant Public Defender's client will not cure any conflict that Attorney X may have in representing the child-client.

16. Finally, we point out that whenever Attorney X is called upon to serve as attorney for a child, he should heed the mandate of Rule 1.14(a) by seeking, "as far as reasonably possible, [to] maintain a conventional relationship with the client."

Conclusion

17. A lawyer on a county panel of the Attorneys for Children Program may serve as attorney for the child even though another party in the proceeding is represented either by the lawyer's spouse, who is an Assistant Public Defender, or by another lawyer who works in the same office as the lawyer's spouse, unless (i) the circumstances create a conflict under Rule 1.7(a)(2) or Rule 1.10(h), and (ii) the child has no legal representative who can and does consent to the conflict on the child's behalf.

Endnotes

1. According to a Fourth Department publication entitled *Ethics for Attorneys for Children* (Aug. 2011):

   > [T]he role of the attorney for the child is very different from that of a guardian ad litem. A guardian ad litem, who need not be an attorney, is appointed as an arm of the Court to protect the best interests of a person under a legal disability. In contrast, the role of the attorney for the child is to serve as a child's lawyer.

   The publication is available at http://www.nycourts.gov/courts/ad4/AFC/AFC-ethics.pdf.

2. 22 N.Y.C.R.R. §7.2. Rule 7.2(c) and (d) help to understand the role of an attorney for the child. They provide as follows:

   > (c) In juvenile delinquency and person in need of supervision proceedings, where the child is the respondent, the attorney for the child must zealously defend the child.
   >
   > (d) In other types of proceedings, where the child is the subject, the attorney for the child must zealously advocate the child's position.
   >
   > (1) In ascertaining the child's position, the attorney for the child must consult with and advise the child to the extent and in a manner consistent with the child's capacities, and have a thorough knowledge of the child's circumstances.
   >
   > (2) If the child is capable of knowing, voluntary and considered judgment, the attorney for the child should be directed by the wishes of the child, even if the attorney for the child believes that what the child wants is not in the child's best interests. The attorney should explain fully the options available to the child, and may recommend to the child a course of action that in the attorney's view would best promote the child's interests.
   >
   > (3) When the attorney for the child is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment, or that following the child's wishes is likely to result in a substantial risk of imminent, serious harm to the child, the attorney for the child would be justified in advocating a position that is contrary to the child's wishes. In these circumstances, the attorney for the child must inform the court of the child's articulated wishes if the child wants the attorney to do so, notwithstanding the attorney's position.

3. In contrast to Rules 1.7(b)(4), 1.9(a), and various other rules, Rule 1.10(h) does not expressly require that the client's consent be "confirmed in writing." However, in N.Y. State 895 (2011), we pointed out that a client's consent to a Rule 1.10(h) conflict must be confirmed in writing because Rule 1.10(d) says: "A disqualification prescribed by this Rule may be waived by the affected client…under the conditions stated in Rule 1.7." The conditions stated in Rule 1.7 include informed consent, confirmed in writing. In any event, confirming a client's consent to a conflict in writing is a wise policy because it impresses on the client the importance of that consent, and avoids later confusion about whether consent was given.

4. "When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent, as defined in Rule 1.0(j)." Rule 1.7, Cmt. [11].

5. Spousal conflicts under Rule 1.10(h), on the other hand, are not among those listed as requiring imputation under Rule 1.10(a).

(54-12)

Welcome New General Practice Section Members

Erika M. Achtziger
Judith A. Ackerman
Elizabeth A. Adekunle
Karmella Marie Ressler Aiken
Candice Amber Andalia
Andrew Andela
David Arocho
Jacob Aronauer
Justin T. Ashenfelter
Zachary Zimmer Augustine
Benjamin H. Babcock
Carol Ann Bahan
Patricia Owens Bahrenburg
Michele A. Baptiste
Harold J. Bauman
Brendan Francis Baynes
Joseph Becker
Andria L. Bentley
John Berton
Elana Alexandria Bertram
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Felipe Bohnet-Gomez
Melissa E. Bonaldes
Jeanne Bonney
Catherine Ladson Bonventre
Shirley Boutin
Ross Brady
Alan Charles Brennglass
James M. Brooks
Erika C. Browne
Florian Bruno
Alissandra Celia Burack
Benjamin D. Burge
Kristina A. Burns
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Berenice Busson
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Michael V. Cibella
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Adam Citron
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Francis Lyman Ellis
Danielle Angelica Erickson
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