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ONEONONE

A publication of the General Practice Section
of the New York State Bar Association

Message from the Chair

The General Practice Section is offering several new valuable membership services. The first is a newly developed membership Directory. It will be available by the Annual Meeting this coming January 2005. The Directory will provide a list of all General Practice members, as well as locations of practices, fax and phone numbers, and e-mail addresses. The goal is to provide an opportunity for members to begin to dialogue with one another throughout the state. Future Directories will also include areas of practice. The Directory will be available to all members of the General Practice Section.

In the area of continuing legal education, the Section will be offering an exciting program this Spring entitled "Closing or Selling a Law Practice." This program will be offered in New York City, Long Island and Rochester. It will qualify for 4 MCLE credits, including 1 Ethics credit.

The program will provide comprehensive information to solo and small firm practitioners regarding how to develop and implement a plan to close or sell a law practice. The program will explore closing as a result of voluntary termination, including retirement or sale. The program will also explore issues pertaining to involuntary termination, resulting from disability, disbarment, or death.

In speaking with practitioners throughout the state, it is apparent that most solo and small firm practitioners do not have a plan in place to deal with the closing of their law firm. The failure to put a plan in place can result in serious adverse consequences to clients and the family members of solo and small firm practitioners.

I would highly suggest that anyone engaged in solo and small firm practice consider attending this program. It will assist in providing valuable information as part of a comprehensive personal and professional estate planning process. Watch for specific locations and dates in the spring of 2005. This program will be offered in conjunction with the CLE Department.

The Section has also begun to reach out to the membership throughout the state. Town Hall meetings have

Inside

been held in Syracuse, White Plains, Albany and Batavia. The response has been quite positive. The goal of these Town Hall meetings is to listen to the needs and concerns of the membership and determine how we can provide even better services to them. We are also reaching out to the members of the Section to become involved in program development and/or leadership in the Section.

As we move forward as a Section, we will continue to reach out to our members and provide information in areas of substantive law, as well as in areas of practice management. In addition, we will continue to provide networking opportunities to our members throughout the state.

GP members who would like to become involved in the leadership of the Section can contact me at FGDANGELOESQ@AOL.COM.

I look forward to hearing from the members and I hope you enjoy this issue of the *One on One*.

Respectfully submitted,
Frank G. D'Angelo

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General Practice Section

ANNUAL MEETING PROGRAM

Tuesday, January 25, 2005

New York Marriott Marquis

From the Editor

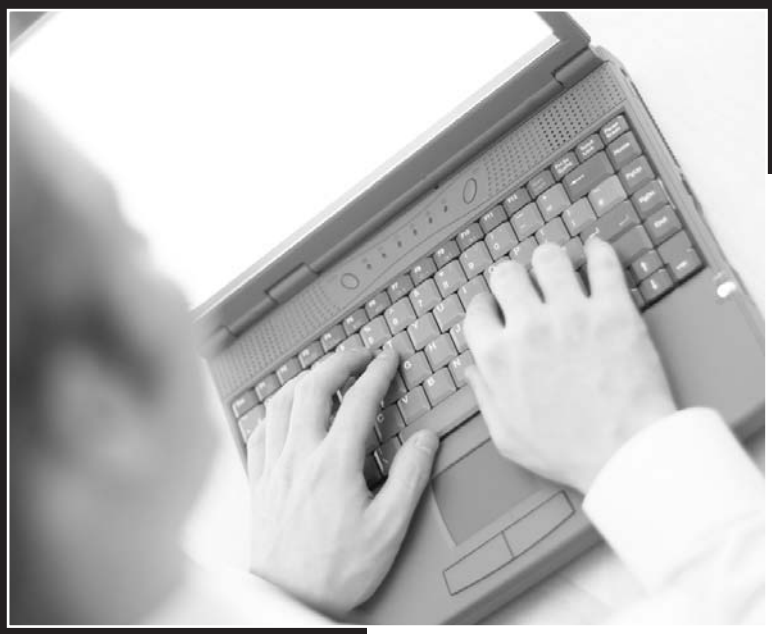
We are fortunate in this edition to have a variety of topics ranging from prenuptial agreements to workers' compensation. Our readers have told me that one of the most interesting portions of our newsletter is the opinions on professional ethics, which they find to be informative and helpful in their practices. I have, therefore, incorporated into this year-end edition three of the most recent opinions of the Committee on Professional Ethics of the New York State Bar Association. It is good to get feedback from our readers so that we can better meet your needs. You can address your comments to the State Bar, Law Practice Management Committee, or to me directly at Stroock.

I look forward to hearing from you. Again, as always, if you have an article that would be of interest and be helpful to the members of the Bar, I would appreciate receiving it from you for publication in *One on One*.

I hope the Holiday Season is good to you!

Martin Minkowitz
Co-Editor

A Pro Bono Opportunities Guide For Lawyers in New York State *Now Online!*



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VOLS
Volunteers of Legal Service

The Elements of a Technology Plan

By Paul McLaughlin

I. Vision

1. **Hi-tech**—using technology to revolutionize law practice
   - not for everyone—maybe 10% of lawyers
   - requires commitment to
     - creating a culture that is enthusiastic about technology
     - spending money and time on technology
     - reorganizing every aspect of practice and embedding business processes in technology
     - integration
2. **Mid-tech**—using technology to improve law practice
   - this is where most lawyers want to (and should) be
   - uses technology to perform traditional functions faster, more accurately, more reliably
   - usually involves stand-alone programs
   - Examples:
     - accounting program
     - document assembly using HotDocs
     - electronic diary and "rolodex"
3. **Lo-tech—**not an option

II. The Technology Planning Process

1. Analyze the legal and business processes to be automated and how they relate to each other.
2. Identify and acquire the software needed to automate the processes.
3. Identify and acquire the hardware needed to run the software.
4. Develop and implement the data architecture needed to achieve the automation goal.
5. Articulate and implement written business procedures to ensure consistent and effective use of the technology.
6. "Case-harden" the system so it is reliable (firewall, spam control, backup, encryption, passwords).

III. The Elements

1. **Case Management** includes:
   - *Contact management*—keeping track of people
     - database for all contacts, with multiple categories for easy sorting
     - powerful search tool including conflicts searching
     - ability to use contact information in other processes
     - telephony
   - *Calendaring*—keeping track of events and deadlines
     - calendar for events (meetings, appointments, appearances, etc.)
     - deadlines management for reminders, limitations
     - shared information
     - linked or chained events and deadlines
     - autoposting of time and billing information from appointments and deadlines
   - *Matter management*—keeping track of file-related information
     - file opening and closing
     - categorizing matters for marketing and financial analysis
     - managing related documents, e-mails, phone calls, correspondence, notes, memos, etc.
     - managing time & billing information, accounts receivable status, trust status
   - *Litigation support*—matter management on steroids
     - issue management (outlining)
     - data repository
     - production and discovery management
     - trial preparation and presentation support

2. **Document/Correspondence Production and Management** (more than just word processing)
   - *Style management*
   - *Document assembly*—use information from case management system to automate the production of routine documents and correspondence
     - engagement letters
     - routine correspondence
     - standard court documents
     - wills, EPAs, PDs
     - probate, real estate documents
   - *Document management*
     - making sure documents are easy to find (e.g., through file/folder naming conventions)
     - having documents linked to matters in case management system
     - version control
     - meta-data
     - electronic storage (.doc, .wpd or .pdf?)
   - *Incoming correspondence management* (mail, fax, e-mail, drop-offs, couriers)
     - how to link to case management system
   - *Paper-less office*
3. **Accounting** (more than just bookkeeping)
   - *Comprehensive program* that
     - meets LSA requirements
     - produces the reports needed to manage the business
       - budget and variance
       - aged accounts receivable, WIP, unbilled disbursements
       - P&L and trial balance
       - electronic trust and general reconciliation
       - financial snapshot
4. **Communication**
   - *Telephone*
     - cutting edge = VOIP
   - *E-mail/Fax*
     - challenge is to link incoming and outgoing e-mail/faxes to matters
     - internal e-mail is a powerful tool for improving the clarity of delegated instructions
   - *World Wide Web*
     - to communicate marketing information
     - to find legal and other information
     - to generate communication from potential clients
   - *Extranets*

Request for Articles

If you have written an article, or have an idea for one, please contact *One on One* Co-Editor:

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mminkowitz@stroock.com

Articles should be submitted on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

The Power of Planning

By Jim Calloway

"Plan Your Work, Work Your Plan"— Not-So-Ancient Maxim

Most everyone understands the power of good planning and the consequences of poor planning. But taking time for good planning is often difficult for time-challenged lawyers. That is not to say that lawyers are not good planners. In my estimation, they are among the best. But after spending their primary efforts crafting the exacting details of a client's estate plan or mapping out a complex litigation strategy, sometimes long-range planning for the law firm or completing the law firm's marketing or succession plan is put off for another day.

In a similar vein, we all understand many of the basics of good time management. Organize. Prioritize. Make lists. Delegate where appropriate. Good planning of a workday will lead to more tasks accomplished that day.

The fact that we understand the concepts does not mean that we practice them well at all times. Most of us would admit to wasting time or being disorganized at times. It is a part of the human condition. For those of us who work desk jobs in offices, there is often the nagging feeling that we could do better and handle things more efficiently.

Spring is most often thought of as the season of beginnings. But now would also be a good time to set out a smorgasbord of organization and planning-related ideas. These are short and simple ideas and we hope that they can be used by even the most busy lawyers to improve their practices.

We invite you to pick one or two of these ideas to sample in your office. But just like a real smorgasbord or feast, you may only want to sample a few of the delicacies. Trying them all at once might prove to be more than you can easily digest.

1. Make a List

We all make lists. From grocery lists to checklists for legal projects, most of us are generally pretty big on lists. Lawyers often mention their daily to-do lists in conversation. Do you have a written to-do list on your desk right now with all of your pending tasks listed? A few readers are now furrowing their brows at this question, wondering how any lawyer could possibly function without a to-do list on the desk at all times. Others are convinced that they have their to-do's firmly committed to memory with no need to reduce them to writing. Others are wincing because they recall an earlier time when they lived by the to-do list, but they now seem to have fallen out of the habit. My guess is that most readers have a to-do list, but there are additional important tasks that have not made the list today.

Many have observed that successful lawyers work from lists rather than from files. A good system of to-do lists can mean that more files are in the filing cabinet instead of being stacked on your desk.

If you can stand some improvement in this area, here's an experiment to try over the next few days. Take 20 minutes to write down all of your current to-do's on a list in no particular order. Then get back to work. As you come up with new tasks that you left off the list, add them. When you complete a task, draw a single line through it on the list. Do not obliterate it. Make sure the list reflects everything you do, even if that means writing down an item and drawing a line through it immediately.

At the end of the day, take a blank sheet of paper and transfer over all of the undone tasks to a list for the next day. This time try to place the most urgent and important tasks at the top of the list. Save the old lists.

It is a common misconception that planning the day is best done at the very beginning of the day. While we each may have different rhythms and different work patterns, for most of us the best time to update our to-do list is at the end of the day. Then we are likely tired and acutely aware of what was not accomplished that day. It is much easier to prioritize the things that need to be done tomorrow and committing all of the undone tasks to paper leaves a sense of closure for the day. You can leave the office knowing that you are prepared to "hit the ground running" in the morning.

After three or four days, take a few minutes to review all of your old task lists to see if there are time-wasters or things that should have been delegated to a staff person in the office. For those of you who fell out of the to-do list habit, you've re-established the good habit now, if you can just keep it up.

Remember, it only seems easier to have many files piled on and around your desk. Try working from more lists and less from files. You may actually find it is easier that way.

2. Plan Some Time This Week Just to Work

You may have heard this from me before and likely will again. We've all noted the fact that we often get

more done in a few hours of evening or weekend time at work than in an entire regular workday in the office. The reason is that you have no interruptions or, at least, fewer interruptions. In fact, it is the practice in many law firms that a large amount of the work gets done every day after the staff leaves and the phone lines are no longer answered.

It is very important for you to schedule some time without interruption for you to get your work done. Hopefully you can schedule this every day, but if not, you can at least schedule it several times a week. Be very clear with everyone else in the office that you should not be interrupted except for emergencies. Allow your staff the same luxury—of scheduling some time when you and the other lawyers will stay out of their hair.

An article was written about one law firm which scheduled a whole afternoon each week where the phone was not even answered. Clients are told that their calls will not be returned until after 4 p.m. on Wednesdays. That may seem a bit radical for some, and is difficult when so much of the work involves telephone conversations, but the idea of having an entire afternoon each week where you could work with no interruptions is certainly appealing.

3. Practice Prioritization

If you only manage to get one thing done each day, make sure it is the most important thing that you have to do. Of course, one hopes that a lawyer will get dozens of things done each day.

It is tempting to try and wrap up a few quick tasks, like returning phone calls or routine correspondence, before turning to the major task. That may be appropriate in some situations, like only having ten minutes before you leave for lunch.

But generally speaking, you should prioritize your most important or pressing projects and start on one of them first.

Here's an exercise in this area. Every morning write down your three most important tasks. Then score yourself at the end of the day on how well you did getting those tasks completed first. You might even make a note as to when you completed each task. Hopefully, you will find the office stress a bit lessened as the "have to" tasks are finished earlier in the day.

Most law practices are deadline driven. Some lawyers assert that working under a tight deadline focuses them and inspires them to do their best work. They even admit to getting a certain thrill from filing a case after 4 p.m. on the date the statute of limitations runs. Well, for most of us, life and the law practice bring sufficient anxiety and stress to our door without having to artificially generate more. Your quality of professional life should increase and stress level should decrease if you are not spending every afternoon proofing the documents that have to be filed that day.

4. Take a Brief Meeting

Meetings can be huge time-wasters in law firms with everyone expending billable time. But you can also gain productivity and avoid errors by such coordination.

If you've given up on firm meetings, only having them a few rare times per year, maybe you could consider a mini-meeting. The key to these meetings is to start precisely on time, have a limited agenda and finish on time. You may be surprised what you can accomplish in 20 or 30 focused minutes where everyone knows that is all the time there is. To emphasize the point, a kitchen timer can be used to enforce discipline. The small-firm lawyer can bring everyone together, shifting the phone off to the answering service for those few minutes. In larger firms, the group meeting will be of a practice or department.

The agenda might be as brief as asking everyone what they are working on the next couple of days, whether they have any problems, and whether they might have extra time available to work on other projects. Make sure everyone gets to speak, even if they do not get to cover every point that they wish to discuss.

Scheduling a couple of these 20-minute mini-meetings each week may reduce interruptions because everyone knows when they will have a chance to bring up issues that develop about their assignments and work flow.

5. Do Some Long-Term Planning

How's life going? How's your practice going? Are you where you hoped to be at this stage in your career?

Most lawyers see themselves as immersed in the day-to-day practice of law, with little time for long-range planning. Long-range planning for a medium-size to large law firm can be very time-consuming. There is the coordination of schedules, review of a significant amount of data, discussions toward arriving at a consensus, drafting and many other tasks. Realistically, the best way for a good-sized firm to accomplish this is to schedule a law firm retreat.

But for the individual lawyer, whether operating within a firm or as a solo practitioner, long-range personal planning can be a much more simple process. Simply schedule a day out of the office in a pleasant setting and notify everyone that you will be out of con-

tact for that day. You can use your laptop computer or a couple of legal pads, according to your personal preference. Spend the first hour or so writing out your goals for the next year and the next five years.

Next review all of your goals and make a determination whether they are realistic or achievable. It never hurts to dream big, but it is also counterproductive to delude yourself with a series of unachievable goals. Some of your goals may be inconsistent. It may be nearly impossible to both increase your income by 50 percent over the next two years and spend more time with your family and coach both children's basketball teams. If you haven't run for years, it's probably best to set a goal of running once or twice a week over the next year instead of running 25 miles a week.

Once you have synthesized a reasonable set of one-year and five-year goals, outline all of the steps that it takes to accomplish these goals. This may take a bit of time, but it's a five-year plan after all. You can invest a few hours. Then set out the time frame for accomplishing the initial steps during the next six months. Hopefully at the end of this process, you will have a reasonable number of long-term goals, combined with a list of the steps you need to take during the next six months to head toward those goals. Then put everything away except for your six-month task list. Docket a date to review your progress in six months. Docket other items as you need to and make a note (or calendar entry) to refer to your six-month list every week or so.

More than likely you will not be able to give yourself an A+ when your six-month review comes up. But it is also likely that you will have made much more progress toward your long-term goals than you have done in any prior six-month period. Revise your time lines (and perhaps some of your goals) and give yourself another six months to complete those one-year goals. Long-term planning is tough for many of us because it involves so much delayed gratification. But, in the words of the immortal Yogi Berra, "You've got to be very careful if you don't know where you're going, because you might not get there."

6. End Something Old and Begin Something New

This is only related to planning on a tangent, but it still fits within our overall subject.

If you are just too busy and too strapped for time, then it is time to cut something from your schedule. This may be easy or painful. It may be that you need to take a six-month break from that civic club you've faithfully attended and worked for all these years. If you are an active, busy volunteer, it may mean learning to say "no" when asked to take on that next project.

From a business standpoint, it may mean pruning your practice of an area that you have done for a long time that is only marginally profitable. It may mean not doing as much of something you enjoy or finally giving yourself permission to stop doing something you have grown to detest. But the point is that each of us, if pressed to examine our professional lives, can probably find something that we truly do not have to be doing any longer.

One of the most precious commodities of 21st century life is time. While we all have the same amount of it, for most of us it often seems like we have too little. Just like the tree will grow stronger if it is regularly pruned, we can benefit by strategically pruning our activities.

On the other hand, sometimes adding a new activity or practice area can be invigorating or exciting. Most of us enjoy challenges, and doing the same old thing all the time can be very dull. While it may seem contradictory, it may be a great plan to both cut something old and add something new. You certainly should not be bored.

Maybe it's finally time to take those piano lessons or expand your litigation practice to the federal courts.

Conclusion

Planning, whether long-range, short-term or daily tasks, is not the most stimulating subject. This is particularly true for busy professionals who spend their time planning many other matters for clients. This article is intended to provide some "bite-size" ideas that can be used to perfect your practice without a huge commitment of resources. Sample one of these ideas from our planning smorgasbord. Hopefully you will find something that fits your taste.

If any of you are willing to share your experiences with law firm planning or an idea in this vein that worked or failed, please feel free to e-mail me at: jimc@okbar.org. I'd truly love to publish a follow-up to this article with many new ideas from lawyers.

Jim Calloway is the Director of the Oklahoma Bar Association Management Assistance Program.

Coming to Broadway: Tax Law?

Let's face it. Tax law is not known for its hilarity. But in *Calarco v. Commissioner of Internal Revenue*, Judge Holmes of the U.S. Tax Court decided to have a bit of fun in a case involving some challenged business deductions by a theater professor who wants to be a playwright. The opening paragraph gives a taste of the opinion (interesting footnotes omitted):

> It is a truth little remarked on by scholars that tax law has been a fount of literature for 5,000 years. The oldest literary work still extant—the Epic of Gilgamesh—is a long narrative of a friendship begun during a protest against government exactions. In more recent times, some of our language's most notable authors have used fiction to delve into tax policy: consider Shakespeare's criticism of the supply-side effects of a 16-percent tax rate; Swift's precocious suggestion of a system of voluntary assessment; and Dickens' trenchant observation on the problems of multijurisdictional taxing coordination . . .

The prof didn't fare too well before the court. In an opinion divided into a Prologue, Act I, Act II and Epilogue, the court did find that petitioner "approached his playwriting in a business-like manner," but disallowed many of his business deductions, including, for example, approximately 100 expenditures for "Performances, Viewing." Petitioner testified at trial "that

"Let's face it. Tax law is not known for its hilarity."

every time he listens to a CD or watches a movie, he is engaged in playwriting and not recreation." The court found this to be a "less than candid" assessment of his business expenses.

—*Calarco v. Commissioner of Internal Revenue*,
T.C. Summary Opinion 2004-94,
Docket No. 1530-03S, July 20, 2004

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One on One Index

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Challenge to Jurisdiction

By Martin Minkowitz

Issues of jurisdiction over the subject matter of a claim are not only important for the courts, but for the workers' compensation tribunal as well. The Workers' Compensation Board can accept or reject cases upon finding that the injury should be compensated in some other jurisdiction and not the state of New York. That is not to suggest that an injury that occurs outside of the state must be compensated outside of the state by another state tribunal or system. The New York Board will make an evaluation as to whether there have been such significant contacts by the claimants' employment with the state of New York, so that it can claim that it possesses subject matter jurisdiction over the claim.[1] If it does not find the necessary contacts between the employment and the state, it will reject the claim. That, of course, is not a finding on the merits, merely on the issue of jurisdiction.

The Board will look into a number of factors in making its decision. In each case, it is important to identify where the employer's offices are located; where the employee was hired; who paid and how the expenses were paid; and the nature and degree of control that the employer exercised and from where that control emanated.

A good example of a challenge to a claim based on lack of jurisdiction recently was reported in the case of *Sanchez v. Clestra Cleanroom, Inc.*[2] In that case, the claimant, who was a Georgia resident, was hired by a New York corporation to work on a construction project in Argentina. The contract was prepared, agreed to and executed by mail and facsimile correspondence from the employer's office in New York to the claimant's Georgia office. The injury occurred in Argentina and the claimant returned from there to Georgia for medical attention. An infection to the claimant's injured leg resulted in amputation below the knee. The claimant then filed for benefits to the Georgia Workers' Compensation Board. The Georgia Workers' Compensation Board denied the claim on the grounds that it lacked jurisdiction since it found the employment contract had been executed in New York.

The claimant applied for workers' compensation benefits in New York. It concluded that it had jurisdiction of the claim and awarded benefits. The Appellate Division affirmed the Board's decision. The court found that even though the claimant did not reside in New York, and in fact was never required to travel to New York in connection with his employment, the fact that the agreement was faxed to the employer's New York offices and was accepted in New York constituted New York as the place of hire. It also noted, in support of its finding of jurisdiction, that the facts revealed that the claimant received his instructions on a daily basis from the employer's New York-based supervisors when he was working in Argentina. Travel and lodging expenses were also paid by the employer who provided most of the tools and material for the project. Interestingly, the decision also notes that the employer assumed responsibility for ensuring that the claimant received coverage under its workers' compensation policy, without further elaborating. It is difficult to understand that additional fact-finding since workers' compensation policy generally does not identify employees by name.

Cases on jurisdiction where the claimant has had no physical contact in the state of New York, but receives an award, are rare. Forum shopping occurs in the world of workers' compensation claims, as well as in civil litigation in the courts. The obvious reason is that benefits are not the same throughout the country or even between federal and state courts. New York is hardly in the higher range of indemnity award limits and so the issue of what constitutes significant contacts for a state to assume jurisdiction is important when there is a possibility of jurisdiction options.

Endnotes

1. *Nashko v. Standard Water Proofing Co.*, 4 N.Y.2d 199 (1958); *Palagurchi v. Mengs Service*, 302 A.D.2d 648 (2003).
2. ___ A.D.3d ___ (Oct. 24, 2004).

Martin Minkowitz is a partner at the Law Firm of Stroock & Stroock & Lavan, LLP.

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Prenuptial and Postnuptial Agreements in Business and Estate Planning

By Jeffrey M. Fetter and Alan S. Burstein

Business and estate planners are generally very careful about having documentation and agreements in place that address what is to happen with a person's business interests in the event of death, disability, termination of employment, etc. Buy-sell and shareholder agreements spell out in detail the various procedures that will be followed in order to ensure that business interests stay with the parties that are active in the operation of the business. Wills and trusts will carefully dictate how family business assets and other assets will be distributed among business and nonbusiness heirs in the event of death. However, what is often overlooked in business and estate planning is how such assets are to be protected in the event a business owner is involved in a matrimonial action. As a result, not only is the business owner's interests in the business at risk, but the entire business operation may be disrupted as a result of having to be involved in the matter.

"Divorce is too prevalent to ignore. The planner must assume that during the life of a business, one or more of the owners is going to go through a divorce."

Business and estate planners must understand and appreciate the value of having marital agreements in place for their clients. If a client dies intestate, it is the law that directs how a person's assets are distributed at death. Similarly, without a written prenuptial or postnuptial agreement in place, it is the law of equitable distribution and the courts that direct how business and other assets are to be divided between spouses in the event of divorce.

Divorce is too prevalent to ignore. The planner must assume that during the life of a business, one or more of the owners is going to go through a divorce. It may even be the case where the husband and the wife are the only owners of the business. In any case, advance planning is important to protect the business. Without a plan in place, the business may not survive and as a result, everyone suffers. Many times it is the business that suffers the most.

This article will address the basic structure of marital agreements and how they can be used in connection with business succession planning.

Prenuptial or Antenuptial Agreement

"A contract made between persons in contemplation of marriage, remains in full force after the marriage takes place" (General Obligations Law § 3-303).

Postnuptial Agreement

This is an agreement entered into between husband and wife during the marriage.

Separation Agreements

Economic and family issues may be resolved by a separation agreement. Under section 170(6) of the Domestic Relations Law, a separation agreement can be used to facilitate a divorce. That is, living separate and apart pursuant to a separation agreement for at least one year provides grounds for divorce.

DRL § 236(B)(3) provides that an agreement made before or during the marriage shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed to by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Prenuptial and postnuptial agreements, when properly prepared and executed, allow spouses to "opt out" of the statutes and rules and address between themselves:

- Testamentary issues between the parties or a waiver of any right to elect against the provisions of a will;
- Provision for the ownership, division or distribution of separate and marital property;
- Maintenance and support arrangements between the parties (so long as such arrangements are not deemed to be unfair or unconscionable and, with respect to children, meet the requirements of DRL § 240).

Family business assets may be the greatest but the most illiquid asset of a family. If a business owner is required to liquidate business assets in order to satis-

fy an obligation to a former spouse of an owner, the business may have to be sold in its entirety. If the business must borrow funds from third parties, the adverse effect on cash flow may cripple the business's operations and its ability to borrow for business operations purposes.

One spouse may be a party to shareholder or other owner agreements within the business and it is necessary to plan for the orderly transfer of one owner's interest to the other:

- Owners wish to keep business and business assets out of an owner's marital problems (and vice versa). Marital problems cause a great deal of emotional distress within the business.
- Owners do not want their partner's former spouse as co-owner or creditor of the business.
- The long-term family business succession plan may be disrupted by divorce.
- Family business may be multi-generational. The family may intend on keeping business assets within the family.

A prenuptial or postnuptial agreement can determine how spouses' assets will be divided in the event of divorce. Without such an agreement, the definitions of "Separate Property" and "Marital Property" under the law will control.

Separate Property as Defined Under DRL § 236(B)

- Property acquired before marriage.
- Property acquired by bequest, devise or descent or by gift from a party other than the spouse.
- Compensation for personal injury (pain and suffering).
- Property described as separate property by written agreement of the parties, i.e., a prenuptial agreement.
- Property acquired in exchange for or the increase in value of separate property, except to the extent the appreciation is due in part to contributions or efforts of the other spouse.

Marital Property as Defined Under DRL § 236(B)

This is all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held.

Requirements for Valid Prenuptial Agreement

Financial Disclosure. Both parties must acknowledge that there has been full and sufficient disclosure of each party's assets and liabilities. Insufficient disclosure can create the presumption of overreaching and misrepresentation, which may invalidate the agreement.

Representation by Counsel. It is important that both parties be independently represented by counsel. The fact that one party was not represented does not, per se, invalidate the agreement. However, it is a consideration if taken into account with other factors. New York State Bar Association Ethics Opinions have determined that it is improper for an attorney to represent both a husband and a wife even if it is a friendly separation or uncontested divorce (NYSBA Ethics Opinion No. 258).

Acknowledgment of Signatures. Both parties' signatures must be notarized, using the same language as is used to record a deed.

Timing. A prenuptial agreement may appear to be induced by undue influence and signed under duress if entered into close to the day of the wedding, causing the agreement to be invalid.

Fairness. The agreement must be free from undue and unfair advantage and overreaching on behalf of one party over the other.

Legal Authority. New York Domestic Relations Law § 236 B(3) provides the legal authority for prenuptial agreements. DRL § 236 B(3) requires that the agreement is subject to the terms of New York General Obligations Law § 5-311.

Writing. Agreements must be in writing, since oral agreements are not enforceable.

Signatures. Agreements must be signed by the parties.

Acknowledgment. Agreements must be acknowledged or notarized *in the same manner as required to record a deed.* Simply having an agreement notarized is not sufficient.

Designing a Marital Agreement for a Closely Held or Family-Owned Business Owner

Spouses' Intentions and Issues to Be Addressed in the Agreement

Do the parties intend to segregate "business assets" from the marriage? If so: In all cases? Death and divorce?

Parties may only wish to have the agreement apply in the event of divorce or separation, not in the event of death.

Will the agreement expire after a period of time?

If the agreement applies in the event of death, have other arrangements been made for the surviving spouse? E.g., if there are children and the former spouse has no independent means of support, life insurance or other forms of financial support may be required in the agreement. In a second-marriage situation, it may be appropriate to have a life insurance policy on the life of the business owner with the spouse or a trust the beneficiary. This then assures the spouse of being protected while the business owner ensures that the business itself if protected.

Is maintenance for the nonbusiness spouse to be waived? If not, on what basis will maintenance be determined?

If business assets are excluded from equitable distribution, how are "business assets" defined?

Original business interests only? What if the family business expands and a new "business" is acquired by the business spouse (i.e., ownership in the "new" family business)? Will the new entity be excluded?

What if all or part of a "business asset" is sold? Are the proceeds "business assets"? If income is earned on the investment account holding those assets, is the income "separate property" or "marital property"?

How is "income" from family business assets (other than compensation) categorized? E.g., if dividends are received and placed in separate account, does it remain "separate property"?

What if business assets are utilized to buy a home for the couple? What if business assets are used by one spouse for a down payment on a home? Does that down payment retain its separate property character?

What if the husband and wife are the only owners of the business? The agreement should address who stays and who leaves in order to "divorce-proof" the business. Otherwise, marital disharmony can have a disastrous impact on the business operations. If there are multiple businesses, the agreement should address who receives each business asset. There is a need to address when the responsibilities are to be divided in order to protect the business (i.e., it should not wait until formal divorce decree?).

Other Business Owners' Intentions

Does buy-sell agreement among business owners cover "divorce"?

Owners may not wish the act of being in a divorce proceeding as an event that triggers a buyout, but may it be desirable to have as a triggering event any act that results in a spouse acquiring ownership in the entity? E.g., a divorce decree or written separation agreement. Such an event would then allow the remaining owners or the entity to purchase the interest of the nonbusiness spouse. Should this be mandatory on the part of the entity and other owners or an option?

Should an agreement give "call" rights to an entity and/or other owners in the event an owner is involved in a matrimonial action, to avoid being subjected to depositions, appraisals, investigations by a spouse's advisors, etc.? If so, a court may determine that having such a provision only applicable in such an event may be unconscionable and unenforceable.

If an entity incurs expenses as a result of an owner being involved in a matrimonial proceeding, who incurs those expenses? E.g., appraisal fees, loss of income from having to participate in depositions, hearings, trials, etc.

The agreement may provide that in the event of a transfer to a spouse pursuant to a divorce decree that the interest acquired is a nonvoting interest.

The agreement *may not* provide that the business owners' interest is valued differently in the event of a divorce proceeding. Such provisions have been determined to be unenforceable.

What if each of the spouses is an owner of the business? A spouse may be an owner for estate planning purposes, tax purposes, creditor protection purposes or because the spouse is active in the operation of the business. Should the agreement specify how the ownership of the "less active" spouse will be acquired and when?

As the business expands to multiple generations, care must be taken in ensuring agreements address how divorce will affect future ownership, management, etc.

Summary

Business succession planning must take into consideration the likelihood that an owner and a spouse may be divorced at some point in the future. In order to protect "family business assets," appropriate agreements should be entered into prior to the marriage.

The business must be protected from disruption whether it is a two-person, husband-and-wife operation or a multiple-owner entity with related and unrelated individuals as owners.

Agreements should be carefully designed depending on the facts and circumstances surrounding the marriage and the business operations.

Review the agreement periodically to determine if the agreement is consistent with the structure of the business and the estate plans of the owners of the business. A review may be appropriate at the same time that a client would review his or her estate planning. That is, if there have been changes in business ownership, financial situations, family situations, or in the tax and other laws that affect a business's operations, the agreement should be reviewed.

If you are representing a multiple-generation family business, remember to express to parents that in the past, one of them was the "in-law." Therefore, it may be appropriate to terminate or modify agreements at some point in the future.

Keep tax considerations in mind when discussing and entering into a prenuptial or postnuptial agreement. It is difficult to determine the most tax-advantageous provisions to include in a prenuptial agreement when the effective date of a split-up is (1) not contemplated and (2) many years in the future. Therefore, the need to periodically review the agreement remains necessary (keeping in mind that at least one of the parties probably would prefer not to have an agreement at all and this can be re-raising a very sensitive issue within the family (and within the business)).

Be consistent with all the business owners. If a prenuptial agreement is necessary for one owner, it should be necessary for all owners. The buy-sell agreement must be kept up-to-date to reflect the then-current intentions of the parties.

The subject of a prenuptial agreement is always difficult to broach. The initial reaction is many times one of feeling distrusted. The bride- or groom-to-be believes his or her fiance's family or partners do not have trust in them. However, as difficult a subject as it is to bring up, it is important to do so as part of the overall succession plan for a family or closely held business. It may have to be the attorney or other advisor involved in the planning that proposes prenuptial agreements as part of the long-term plan for the business. It may need to be the same advisor who discusses this with the parties involved.

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Ethics Opinion No. 777

Committee on Professional Ethics of the New York State Bar Association

(8/30/04)

Topic: Acquiring interest in subject matter of litigation, conflict of interest, lawyer testifying

Digest: A lawyer may represent a client in litigation notwithstanding that the lawyer owns a preexisting interest in the subject matter of the litigation, if the lawyer's interests and the client's interests in the outcome of the litigation are not in conflict and the lawyer will not be called as a witness.

Code: DR 5-101, DR 5-102(A), (B), DR 5-103(A), EC 5-3, EC 5-7.

Question

May a lawyer who owns an interest in land that is the subject of an annexation dispute between two neighboring towns represent one of the towns in the dispute?

Facts

The inquirer is a lawyer who owns an interest in land located in the Town of A. The lawyer filed a petition with the Town of A and with the neighboring Town of B to annex a portion of the property into the Town of B. The A Town Board opposed the annexation; the B Town Board supported it. Inquirer asks whether it is permissible to represent the Town of B *pro bono* in litigation between the two towns over the issue.

Opinion

The inquiry raises issues under three disciplinary rules: DR 5-101, relating to conflicts between a client's interests and a lawyer's personal interests; DR 5-103(A), barring a lawyer from acquiring an interest in the subject matter of litigation; and DR 5-102, relating to lawyers acting as witnesses in matters in which they act as counsel.

Personal conflicts. DR 5-101 provides that:

> A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

The inquirer believes that the inquirer has a unity of interest with the Town of B in the outcome of the litigation, as both the inquirer and the Town wish to annex the land to the Town of B. The inquirer would proceed only after full disclosure of the interest to the Town B Board.

If the interests of the lawyer and the Town of B are fully aligned, then it is likely that a disinterested lawyer would conclude that the inquirer's representation of the client would not be adversely affected by the inquirer's interest in the land, so that Town B may validly consent to the representation after full disclosure. This determination depends on all the facts and circumstances, however. For example, the inquirer should consider whether the inquirer's interests and the Town's may diverge at some time in the future. "Even if the property interests of a lawyer do not presently interfere with the exercise of independent judgment, but the likelihood of interference can be reasonably foreseen by the lawyer, the lawyer should explain the situation to the client and should decline employment or withdraw unless after full disclosure the client consents, preferably in writing, to the continuance of the relationship." EC 5-3. The inquirer also should consider whether the Town can validly consent to waive the conflict under the standards set forth in N.Y. State 629 (1992).

Proprietary interest in subject matter of litigation. DR 5-103(A) provides that:

> A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client, except that the lawyer may:
>
> 1. Acquire a lien granted by law to secure the lawyer's fee or expenses.
>
> 2. Except as provided in section DR 2-106(C)(2) or (3), contract with a client for a reasonable contingent fee in a civil case.

DR 5-103(A) does not prevent the inquirer from representing the Town of B, notwithstanding the ownership of an interest in the land that is the subject matter of the litigation, because the Code only prohibits the *acquisition* of an interest in the subject matter of litigation, not the preexisting possession of such an interest.

Other ethics committees have likewise reached the conclusion that DR 5-103(A), or the similar ABA Model Rule 1.8(i), do not prevent a lawyer with a preexisting interest in the subject matter of a litigation from representing a client whose interests are aligned with the lawyer's in that litigation. *See, e.g.*, Maine Opinion 92 (1988) (the rule "does not extend so broadly as to prohibit a lawyer who has an interest in his client from representing the client in litigation provided the lawyer's interest was acquired for reasons independent of and apart from any consideration of litigation which might thereafter be contemplated"); Alabama Opinion 85-23 (attorney who is one of the heirs may represent self and other heirs in filing a petition for division and sale); Alabama Opinion 84-159 (lawyer who is member of property owner's association may represent other property owners in seeking to prevent liens on their property); *see also Capobianco v. Halebass Realty, Inc.*, 72 A.D.2d 804 (2d Dep't 1979) (action to foreclose on mortgage not champertous "if the attorney had a legitimate business interest in acquiring the assignment, e.g., as an incidental part of a commercial transaction"); *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 105 (5th Cir. 1978) ("Ordinarily there would be no objection to an attorney representing his wife in litigation").[1]

This does not mean that a lawyer with a preexisting interest in the subject matter of the litigation may represent a party to the litigation without any restrictions. Such an interest will generally give rise to a conflict or potential conflict under DR 5-101. *See also* EC 5-7 ("The possibility of an adverse effect upon the exercise of free judgment by the lawyer on behalf of the client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of the client or otherwise to become financially interested in the outcome of the litigation"). As indicated by the facts here, however, the conflict under DR 5-101 will often be waivable. Without deciding the issue, we observe that DR 5-103(A) appears to bar acquisition of an interest in the subject matter of the litigation regardless of whether the client is willing to consent. One explanation for this treatment is that the roots of DR 5-103(A) lie in the prohibitions on maintenance and champerty. *See, e.g.*, ABA 00-416 ("Rule 1.8(j) (now 1.8(i) which is virtually identical to DR 5-103(A)) is rooted in the common law doctrines of maintenance and champerty. The present Rule is intended to prevent conflicts of interest that might interfere with the lawyer's exercise of independent professional judgment on the client's behalf").

Lawyer as witness. DR 5-102(A) provides that, with certain exceptions:

> A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client . . . .[2]

DR 5-102(B) also bars a lawyer from accepting employment in contemplated or pending litigation if the lawyer or a lawyer in his or her firm "may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client."

Thus, the inquirer may be barred from accepting employment on behalf of the Town of B if the lawyer "ought to be" called as a witness on the client's behalf (and no exception applies) or if the inquirer might be called as a witness adverse to the client. *See also* ABA Inf. Op. 899 (1965) (where an attorney both appears *pro se* and represents others in a legal proceeding, "there is . . . the possibility he might become a witness in the proceedings in which case he should not act as an attorney except in rare and unusual circumstances"); *Walz*, 1996 WL 88556, at *3-4 (disqualification would not be appropriate under DR 5-102 where other witnesses could testify about the same facts).

Conclusion

The inquirer may represent the Town of B in the dispute with the Town of A, notwithstanding the preexisting ownership interest in the subject matter of the litigation, where the inquirer's interests are aligned with the Town of B's interests and informed consent has been obtained from the Town of B, unless the inquirer ought to be, or in certain circumstances may be, called as a witness on a significant issue.

(12-04)

Endnotes

1. *See also Peggy Walz, Inc. v. Liz Wain, Inc.*, No. 94 Civ. 1579, 1996 WL 88556, at *3 (S.D.N.Y. 1996) (disqualifying plaintiff's counsel, citing DR 5-103(A), where the lawyer had formed the plaintiff corporation with a client after the dispute had arisen). *But see Bachman v. Pertschuk*, 437 F. Supp. 973, 976–77 (D.D.C. 1977) (federal employee cannot represent a class of federal employees against employer-agency, citing, *inter alia*, DR 5-103).
2. The exceptions are:
    1. If the testimony will relate solely to an uncontested issue.
    2. If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
    3. If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client.
    4. As to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case.

Ethics Opinion No. 778

Committee on Professional Ethics of the New York State Bar Association

(8/30/04)

Overrules (in part): N.Y. State 555 (1984)

Topic: Conflicts of interest; representing multiple defendants.

Digest: Lawyer engaged by insurance company may not represent two defendants, one of whom has a potential indemnification claim against the other, unless a disinterested lawyer would believe the lawyer can competently represent the interests of each, the one defendant waives the right to assert indemnification as cross-claim, and both defendants otherwise consent after full disclosure.

Code: DR 5-105(A), (B), (C); DR 5-108 (A); EC 5-15, 5-16, 5-17

Question

May a lawyer engaged by an insurance carrier represent two co-defendants who are named insureds when the amount of the plaintiff's claim exceeds the policy limits and one co-defendant has an indemnification claim against the other?

Opinion

The owner of a building hired a general contractor who agreed to procure a liability insurance policy naming both the general contractor and the owner as insured, and also agreed to defend and indemnify the owner with regard to any claims arising from the construction. A subcontractor's employee was injured and sued both the contractor and the owner for an amount in excess of the policy limits. The insurance carrier seeks to engage one lawyer to defend both the general contractor and the owner.

Under DR 5-105(A) and (B) of the Code of Professional Responsibility (the "Code"), a lawyer must decline to represent multiple clients if the exercise of independent professional judgment on behalf of one client will be or is likely to be adversely affected by the lawyer's representation of the other client, or if it would be likely to involve the lawyer in representing differing interests. DR 5-105(C) nevertheless permits a lawyer to represent multiple clients if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. *See* EC 5-15, 5-16, 5-17.

Under the Code, the "differing interests" include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest." Code Definitions. In the facts at issue, differing interests arise from the owner's contractual rights to indemnification from the contractor with respect to the amount of the claim exceeding the policy limits.[1]

Consequently, the lawyer must first determine if a disinterested lawyer would believe that the lawyer can competently represent the interest of both the owner and the contractor. For example, a disinterested lawyer may determine that he or she could not competently represent the interests of both if the lawyer believes that the owner should assert the indemnification rights as a cross-claim or if the complaint alleges an independent claim of negligence against the owner so that the trial will necessarily involve determining the apportionment of liability between the two defendants.[2] Assuming that a disinterested lawyer would believe that the lawyer can competently represent the interest of both the owner and the contractor, the lawyer may do so only if each consents to the representation after full disclosure of the implications of the joint representation and the advantages and risks involved.

Such disclosure should explain the potential advantage to both clients of presenting a unified defense to the plaintiff employee's action and the offsetting disadvantage to the owner of the owner's consequent inability to assert indemnification rights as a cross-claim in the same action. Although the owner could defer asserting the indemnification claim until such time (if ever) as the plaintiff obtains a judgment, the owner would face the risks of (1) necessary witnesses becoming unavailable, (2) a judgment being enforced by the plaintiff against the owner before the indemnification claim has been fully litigated, and (3) the possibility of the general contractor becoming judgment-proof. On one hand, both parties would likewise endure the expense and inconvenience of two trials rather than one.[3] On the other hand, if the original litigation were to result in a verdict or settlement for less than the policy limit, joint representation would have, in retrospect, greatly simplified the litigation with no risk to the owner.

In seeking consent to a joint representation the lawyer should explain to both clients any other potential consequences, including (1) the lawyer's obligation, absent each client's agreement to other arrangements, to disclose to one client any confidences and secrets communicated to the lawyer by the other client, N.Y. State 761 (2003),[4] (2) circumstances which may require the lawyer to withdraw from the representation entirely or, with appropriate consent, to continue to represent only one of the clients, N.Y. State 674 (1995), and (3) possible consequences at trial, such as the number of peremptory challenges granted to the defendants.

Because the claim here exceeds the policy limits, both defendants should be advised of their right to have separate counsel with respect to the excess claim. The lawyer contacted by the insurance company may find it advisable to recommend to the owner that he or she seek separate counsel to advise both as to the excess claim and as to the advisability of asserting a cross-claim in the present litigation.

If the owner ultimately determines that the advantages of a unified defense outweigh the disadvantages of deferring the indemnification claim, and the parties otherwise consent, the lawyer may represent both parties. In that event, the lawyer would be precluded from representing either party in a subsequent action to enforce the indemnification rights without obtaining the separate consent of the other client after full disclosure. DR 5-108(A).

The conclusion of this opinion is in harmony with prior opinions of this Committee. N.Y. State 560 (1984) involved two defendants in a medical malpractice action, one of whom as a passive tortfeasor had a potential claim against the other as an active tortfeasor. Because one of the defendants did not consent to a joint representation, the Committee concluded that the lawyer could not represent them both. In N.Y. State 191 (1971) the issue was whether a lawyer could represent both the driver of one car and his adult daughter-passenger against the driver of the other car if the daughter, fully informed, chose to waive any cause of action against her father. Because that opinion involved plaintiffs and did not involve the possibility of a subsequent indemnification action, the opinion discussed only a cross-claim and joint representation and concluded that the lawyer could not represent both the father and the daughter unless the daughter confirmed that in no event would she want to sue her father, no matter how good a cause of action she might have against him. *See also* N.Y. State 349 (1974) (absent special circumstances, lawyer may not represent driver-husband and wife-passenger as plaintiffs if defendant may assert proportionate liability against one plaintiff to reduce damages sought by the other plaintiff).

On the facts of this opinion, it does not appear that it is necessary for the owner to waive any indemnification cause of action against the builder as long as the owner agrees not to assert that cause of action as a cross-claim and otherwise consents.

Conclusion

A lawyer engaged by an insurance company to represent two defendants, one of whom has a potential indemnification claim against the other, may not do so unless the lawyer determines a disinterested lawyer would believe the lawyer can competently represent the interests of each defendant, the defendant with the indemnification claim waives the right to assert it as a cross-claim, and both defendants otherwise consent after full disclosure.

(49-03)

Endnotes

1. If the claim did not exceed the policy limits, the indemnification right becomes irrelevant if the carrier is not disclaiming liability as to any claim against the owner.
2. If the trial will necessarily involve an apportionment of liability between two defendants, a subsequent action by one seeking indemnification from the other may be precluded by the doctrine of collateral estoppel. *Schwartz v. Public Adm'r of County of Bronx*, 24 N.Y.2d 65 (1969).
3. Issues regarding the obligation of the carrier to provide a defense to its insured, the extent to which that obligation may include bringing or defending a cross-claim for an excess amount, and how the responsibility to pay lawyer fees should be divided between the insured and the carrier with respect to the cross-claim are considerations which may be relevant in the insured's determination as to consenting to the joint representation, but are matters of law and of contract on which this Committee does not opine. However, we note that New York courts have generally held that an insured defendant is entitled to defense by a lawyer of his or her own choosing at the insurer's expense when the insurer's interest in defending the lawsuit is in conflict with the defendant's interest. *See, e.g., Public Service Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392 (1981); *Bryan v. State-Wide Ins. Co.*, 144 A.D.2d 325 (1988); *cf. Nat. City Bank v. N.Y. Cent. Mut. Fire Ins. Co.*, 6 A.D.3d 1116 (2004) (if carrier provided defense, hiring separate counsel to pursue cross-claims was responsibility of insured); *Goldberg v. American Home Assurance Co.*, 80 A.D.2d 409 (1981) (no conflict so no entitlement to separate counsel). Regardless of the extent to which lawyer fees may be paid by the carrier, the insured is the client of the lawyer engaged by the carrier, and the lawyer is obligated to represent the insured with undivided fidelity. N.Y. State 73 (1967).
4. To the extent that N.Y. State 555 (1984) suggests that full disclosure to both clients is not required even absent an agreement to that effect "where disclosure to the other joint client would obviously be detrimental to the communicating client," it is overruled.

Ethics Opinion No. 779

Committee on Professional Ethics of the New York State Bar Association

(11/5/04)

Topic: Paying a national marketing organization for referrals

Digest: Improper for an attorney to pay money to a marketing organization in return for that organization providing the attorney with "leads" to potential clients.

Code: DR 2-103(B)

Question

May an attorney pay a marketing organization a fee in return for being furnished with a bundle of pre-screened client "leads," consisting of potential clients who may need representation in connection with their federal income taxes?

Background

A marketing organization ("Marketer") advertises nationally, seeking customers to whom Marketer can provide certain federal income tax reduction services. Marketer obtains intake data from interested customers and screens the file to see if the customer is likely to qualify for various sorts of relief from the Internal Revenue Service. Marketer offers New York attorneys the opportunity to purchase bundles of 20 pre-screened customer "leads" in return for the attorney paying Marketer a one-time sign-up fee of $500 and a fee of $1,400 for each bundle of 20 "leads." After an attorney buys a bundle of "leads," Marketer will seek to have the customer sign a power of attorney form and a copy of the attorney's retainer agreement and will collect and transmit to the attorney the suggested partial fee of $1,000 obtained from the customer. If the customer decides not to go forward, Marketer makes no refund of the $1,400 fee paid by the attorney for the bundle of "leads." Attorneys may purchase as many bundles of "leads" as they wish. The attorney then represents the customer in dealings with the Internal Revenue Service and collects the balance of the agreed-upon fee. May an attorney ethically participate in the proposed arrangement?

Opinion

We note initially that the services in question may be performed by non-attorney CPAs and enrolled agents without those persons being considered to be engaged in the unauthorized practice of law. This Committee has recognized that there are a number of services that can be performed appropriately by both lawyers and non-lawyers, such as tax return preparation, N.Y. State 557 (1984), financial planning, N.Y. State 633 (1992) and legal research done for lawyers, N.Y. State 721 (1999) (outside research service required by an insurance company may be staffed by lawyers or non-lawyer personnel), but we have also consistently held that "when such services are performed by a lawyer who holds himself out as a lawyer, they constitute the practice of law and the lawyer, in performing them, is governed by the Code." N.Y. State 662 (1994) (quoting N.Y. State 557 (1984)). *See also* N.Y. State 636 (1992) (lawyer's operation of business selling standard will forms to public is not practice of law if forms are not individualized and advice is not rendered as to selection of form); ABA 297 (1961) (if activity is the practice of law when performed by lawyer, lawyer does not escape ethical requirements by "announcing he is to be regarded as a layman" for that particular purpose). So the services performed by the lawyer in the question presented constitute the practice of law and the lawyer would be governed by the Code in connection with these services.

We believe that the participation of an attorney in the arrangement proposed by Marketer is governed by DR 2-103(B):

> B. A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that:
>
> 1. A lawyer or law firm may refer clients to a nonlegal professional or nonlegal professional service firm pursuant to a contractual relationship with such nonlegal professional or nonlegal professional service firm to provide legal and other professional services on a systematic and continuing basis as permitted by DR 1-107, provided however that such referral shall not otherwise include any monetary or other tangible consideration or reward for such, or the sharing of legal fees; or

> 2. A lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2-107.

The payment by an attorney of $500 and $1,400 for a bundle of "leads" to prospective clients would violate DR 2-103(B) because neither of the exceptions in subparagraphs (1) or (2) applies. The payments would be compensation paid to Marketer "to recommend or obtain employment by a client," so it would be improper for an attorney to participate in the proposed transaction with Marketer. *See* N.Y. State 741 (2001) (lawyer may not participate in business network that requires reciprocal referrals) and the opinions cited therein. N.Y. State 705 (1998) does not compel a different result; that opinion indicated that a tax reduction company, acting as an agent for a client, could engage a lawyer to represent the client and that the lawyer's fee could be a portion of the money paid by the client to the company, provided that the company's own fee was separate and distinguishable from the payment for the lawyer's services. N.Y. State 705 is not applicable because it did not involve a lawyer paying for referrals.

Conclusion

It would be improper for an attorney to pay money to a marketing organization in return for that organization providing the attorney with "leads" to potential clients.

(28-04)

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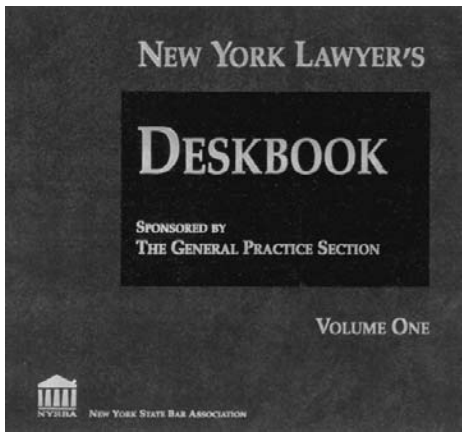

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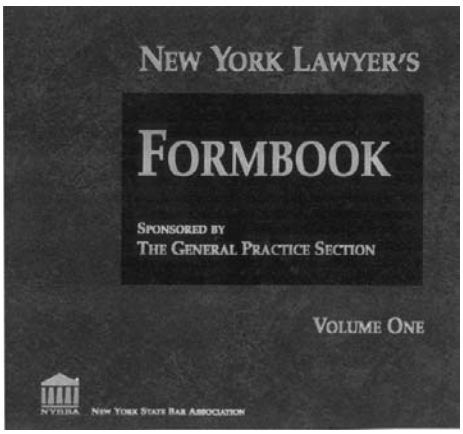

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