NYSBA WINTER 2006 | VOL. 27 | NO. 2

ONEONONE

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

A Message from the Chair

"And now for something completely different . . . " If you are of the right age and inclination, you'll recognize this from Monty Python's Flying Circus as the introduction to a complete non-sequitur. I have several areas to cover this month; they aren't related but I hope you'll bear with me.

The Co-Chairs of our Annual Meeting program, Paul O'Neill and Harriette Steinberg, have put together four hours that you will want to attend on January 23 at 9 a.m. Segments will include Hot Tips from the Experts; a CPLR update including the recent changes affecting the conduct of depositions; problems and planning opportunities under the Deficit Reduction Act of 2005 (affecting Medicare eligibility); and as part of our continuing emphasis on "best practices" information, a panel discussion on Will Execution Techniques and Depositions of Attesting Witnesses. In addition, our Section will be co-sponsoring a program (with the Corporate Counsel Section) on "The Lawyer as Employer and Employee" and (with the Special Committee on Law Practice Continuity and the Committee on Attorney Professionalism) a program on the closing, transfer or sale of a law practice. I know it's hard to take a day or two away from your office but the scope, variety and excellence of programs at NYSBA's Annual Meeting really make it worthwhile.

"And now . . .

GP's new committees are up and running and now have the benefit of a Handbook for Committee Chairs, the fruit of combined labors by State Bar staff and our Section's Chair Elect, Harriette Steinberg, and Secretary, Paul O'Neill. As you can see, they have figured out how to multi-task and I can't thank them enough for shouldering this responsibility.

"And now . . .

Some years back I got a primer in "cooperative learning" from my partner's wife, a teacher, at a time that I was mystified about why there was so much emphasis in my son's school about doing projects in groups. In the cooperative learning model, students are both teachers and learners; you learn a lot by teaching. I think this technique is a mixed bag for elemen-

Inside

tary school students, but what I learned has influenced my thoughts about one of our strengths as a Section—we as individual lawyers are an incredible potential resource to other Section members. Our list serve has offered one way to tap that resource but it has its limitations. A more managed and refined way to allow members to be cooperative learners is via an internet weblog—a blog. I envision an online resource where members can post information about useful forms and practice tips, unreported cases (practically everything below appellate division level is unreported), and tell others about interesting cases that are wending their way through the system but not yet adjudicated. Members will doubtless think of other areas where they can share. Unlike a list serve where the initiating communication is typically a question, the blog model will let you post information and let others log on to find it. We are fortunate that NYSBA is almost ready to roll out its new blogging application and if all goes well, GP will be one of the beta testers, starting soon. Check our page of the NYSBA website at www.nysba.org/gp for news. If you have no idea of what I am talking about—I do, but just a little bit—ask your kids; it's how I learned.

"And now . . .

I recently read a quote attributed to founding father John Adams: "One useless man is a shame, two are a law firm and three are a Congress." Perhaps this was an apt description of lawyers in the eighteenth century, but I would wager that small law firms, the mainstay of our Section, are not composed of useless men—or women. Our small size, if we use it right, makes us more sensitive to clients' particular problems and needs and more useful to them but can leave us feeling like one-armed paperhangers, with just not enough bodies to cover multiple court appearances or to draft and serve multiple papers. We are doing several things to make sure that we effectively represent the views of solo and small firm lawyers on issues that affect day-to-day practice: our members are serving on NYSBA's task force considering E-Filing in the state courts, and on another task force set up to review and comment on a recent OCA report on solo and small firms. Let me know if you think there are other places we should weigh in.

"And now . . .

There is one last thought I want to share with you. Last week I flew to Dallas to take some depositions; the arrangements, including notice, copying exhibits, the court reporter, etc., were being taken care of by local counsel in Dallas whom I had met only over the phone. A few days before the scheduled date he called me to say that he was going to be late to the deposition and needed as much lead time as possible on the exhibits because, due to a death in the family, he had to go out of state and would not return until mid-morning the day of the depositions. He started apologizing and I stopped him, saying, "Practicing law is only a job, real life comes first." Later on in the conversation he told me that I was the only person during his entire career who had ever said such a thing.

You may be practicing law because it's your livelihood, or because you love it, or both, but don't give short shrift to your real life and the people in it. It's become popular to use the catch phrase "life/work balance" for this issue but there are times when "balance" is impossible if you are going to meet the needs of the people you love and care about it. Make sure your real life comes first.

Happy Holidays!

Linda Margolin

From the Editor

Our final edition of *One on One* for this year takes a different course. We have, at the recommendation of our readers, devoted a significant portion of this edition to reporting articles that were published in the newsletters of other New York State Bar Sections during the year, which we believe should be of interest to the members of the General Practice Section.

I would like to have your comments as to whether you believe you found these articles to be informative and useful in your practice. That will enable us to better evaluate whether to do this again at the end of next year. We continue to report, as it has become to be a popular area of our newsletter, the recent opinions of the State Bar Ethics Committee.

I look forward to seeing many of you at our Annual Meeting and those who have comments should approach me and let me know how you think *One on One* can better serve you.

Best wishes for a Happy Holiday.

Martin Minkowitz

Ten Frequently Asked Questions About Social Security Disability Benefits

By Steven P. Lerner

Introduction

Elder Law Practitioners most often represent clients that are over the age of 65. However, the practitioner may come in contact with a younger individual who alleges that he/she is disabled. Clients may be eligible for Social Security benefits through the programs under the Social Security Act[1] and accompanying Regulations.[2] The Social Security Act provides many benefit programs, which include the Disability Insurance Program,[3] the Supplemental Security Income Program,[4] Childhood Insurance Disability Program,[5] Survivor's Benefits[6] and Retirement Benefits.[7] This article will focus upon Social Security Disability benefits under the Disability Insurance Program.

I. What Benefits Does Social Security Disability Provide and Who Is Eligible?

While the Social Security Act provides for benefits for retired workers, it also provides for payments in the form of Disability Insurance Benefits[8] to former workers who are now disabled and unable to work. It provides monthly income during a period of disability while the individual is unable to perform substantial gainful activity[9] so long as he/she is currently under insured status.[10] After two years, one receives Medicare.[11] Unlike Medicaid, one's assets and income do not affect a person's eligibility for Social Security Disability benefits. Assets and income of a spouse are also not countable in determining a person's eligibility for Social Security Disability benefits.

II. How Does One Qualify for Disability and Disability Insurance Benefits?

The disabled wage earner must have paid into the Social Security system, i.e., Federal Insurance Contributions Act (FICA),[12] which is federal withholding paid to the Social Security system.

In order for an individual to be eligible for a period of disability and Disability Insurance Benefits, one must be "currently insured."[13] One is currently insured if one has sufficient quarters of coverage. Each year is divided into four quarters of possible employment and taxation. The parameters for eligibility state, in general, that the individual must have paid taxes into (FICA) for a period of twenty (20) quarters out of the last forty (40) quarters, or, translated, five (5) years out of the last ten (10) years prior to the application for Social Security Disability Benefits.[14] Those under the age of thirty-one (31) require fewer quarters of coverage, but never fewer than six (6) quarters.[15]

III. What Are the Medical Criteria for Eligibilty for Disability Insurance Benefits?

The Social Security program of Disability Insurance Benefits provides monthly payments to a wage earner who is totally and permanently disabled. The Social Security Administration has issued a Listing of Impairments[16] and Medical Vocational Guidelines,[17] which are used to establish that one is disabled. If an individual presents medical evidence that there is a medically diagnosed impairment with the symptoms, signs, and test results that meet those identified in the listings, then a finding of a period of disability is indicated.[18] If an individual does not specifically meet a listed impairment, that individual can still qualify for Social Security Disability benefits if the severity of the person's impairments rise to the level of a listed impairment, taking into account the functional limitations created by the impairments.

IV. What Is Meant by Total and Permanent Disability?

One must be totally and permanently disabled in order to receive Social Security benefits.[19] One is permanently disabled if one is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve (12) months;[20] or in the case of an individual who has attained the age of 55 and is blind, inability by reason of such blindness to engage substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time.[21] One is totally disabled if his/her physical or mental impairment or impairments are of such severity that he/she is not only unable to do previous work but cannot, after considering the individual's age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy.[22]

The Social Security Administration must also consider the combined effects of all of the individual's impairments without regard to whether or not any such impairment, if considered separately, would be of such severity as to rise to a level that would impair the individual's ability to perform substantial gainful activity.[23] The statute defines a physical or mental impairment as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."[24]

V. What Does Substantial Gainful Activity Really Mean?

The courts have uniformly ruled that substantial gainful activity is work of a functional nature that the disabled individual can realistically perform in a competitive work environment.[25] The distinction between a competitive work environment and a non-competitive work environment is generally seen with younger individuals who perform work services in a sheltered environment.[26] Those who may require a job coach to assist him/her with day-to-day work activities and requires and receives oversight, supervision, coaching and assistance in performing the work, would not be considered performing substantial gainful activity in a competitive work environment.

VI. How Does One Apply for Disability Insurance Benefits?

One applies for disability insurance benefits through the Social Security Administration.[27] The application requests information concerning the individual's personal data, as well as the disabling condition, the date that the applicant last worked, the income earned by the applicant in the form of wages for the three years prior to the application, and information regarding the applicant's children who are under the age of 18. As part of the application process, the applicant will also complete a Disability Report and a Work History Report in order to establish the individual's capacity to perform his/her past work. After reviewing the application, the Social Security Administration will issue a Notice of Approved Claim or a Notice of Disapproved Claim.[28]

VII. How Does One Appeal a Denial of Disability?

If the application is denied, the applicant must file a Request for a Hearing before an Administrative Law Judge of the Office of Hearings and Appeals of the Social Security Administration within sixty (60) days of the Notice.[29]

An Administrative Law Judge conducts the disability hearing.[30] At the Administrative Hearing, the Administrative Law Judge acts as an independent fact-finder to render his/her own determination on the claimant's application for benefits. The Administrative Law Judge will review all of the documents in the evidentiary record, hear sworn testimony and then render a decision. The Administrative Law Judge is not bound by any of the prior determinations made by the Social Security Administration and as there is no one present at the Administrative Hearing from the Social Security Administration to cross-examine the claimant, the Rules of Evidence are dispensed with.

The Social Security Administration utilizes a five-step sequence to evaluate disability claims.[31] The Second Circuit has summarized the procedure as follows:

> First, the Commissioner considers whether the claimant is currently engaged in substantial gainful activity. If he is not, the Commissioner next considers whether the claimant has a "severe impairment" which significantly limits his physical or mental ability to do basic work activities. If the claimant suffers such an impairment, the third inquiry is whether, based solely on medical evidence, the claimant has an impairment which is listed in Appendix 1 of the regulations. If the claimant has such an impairment, the Commissioner will consider him disabled without considering vocational factors such as age, education, and work experience; the Commissioner presumes that a claimant who is afflicted with a "listed" impairment is unable to perform substantial gainful activity. Assuming the claimant does not have a listed impairment, the fourth inquiry is whether, despite the claimant's impairment, he has the residual functional capacity to perform his past work. Finally, if the claimant is unable to perform his past work, the Commissioner then determines whether there is other work which the claimant could perform.[32]

If the decision is unfavorable, an appeal may be filed through the Appeals Council of the Office of Hearings and Appeals of the Social Security Administration.[33]

Once the Appeals Council makes its determination, the individual may appeal an unfavorable decision in the United States District Court, naming the Commissioner of the Social Security Administration as a defendant.[34]

VIII. Does Eligibility for Private Disability Insurance Automatically Establish Eligibility for Social Security Disability?

Private disability policies often provide for coverage if one is unable to perform one's prior work, or if one is temporarily unable to work, or if one is partially disabled. These standards differ from those used by the Social Security Administration's Disability Insurance Benefit Program, which requires a total and permanent disability from all competitive employment.[35] Coverage by private disability insurance does not mean an automatic finding of disability for Social Security.

IX. If One Returns to Work and Is No Longer Receiving Social Security Disability, Must One Reapply if One Cannot Work in the Future?

As some individuals who return to work are not able to continue their return to competitive employment, the law provides for a trial work period.[36] A trial work

period is defined as an attempt to perform substantial gainful activity, where the individual may test his/her ability to work and still be considered disabled.[37] If the individual is not able to continue working within the nine-month period, then one may return to the disability rolls without any interruption in coverage.[38] If the individual is able to continue working, then his/her benefits will cease. However, if one becomes disabled again within three years from returning to competitive employment, one can receive disability benefits without proving disability again.[39] This is a wonderful tool to allow individuals to make attempts at working, without risking their benefits.

X. How Is the Attorney Paid in This Type of Practice?

An applicant may retain an attorney to act as his/her representative before the Social Security Administration.[40] An attorney is entitled to charge a fee of 25% of past-due retroactive benefits or $5,300, whichever is less.[41] Unless directed otherwise, the Social Security Administration will automatically withhold 25% from the retroactive benefits that are being paid to the disabled individual.[42]

Conclusion

Although an application for Social Security Disability benefits may be denied initially, once successful, the individual who is totally and permanently disabled will receive a monthly disability income to sustain him/her in difficult times.

Endnotes

1. 42 U.S.C. §§ 401 *et seq.*
2. 20 C.F.R. §§ 404.1 *et seq.*
3. 42 U.S.C. § 423.
4. 42 U.S.C. §§ 1381 *et seq.*
5. 42 U.S.C. § 402(d).
6. 42 U.S.C. § 402(e), (f).
7. 42 U.S.C. § 402(a).
8. 42 U.S.C. § 423.
9. 42 U.S.C. § 423(d), (e). Substantial gainful activity means work that involves doing significant and productive physical or mental duties and is done (or intended) for pay or profit. 20 C.F.R. § 404.1510. *See also* 20 C.F.R. §§ 404.1571 *et seq.*
10. 42 U.S.C. § 423(c); 20 C.F.R. §§ 404.101 *et seq.*
11. 42 C.F.R. § 406.12.
12. 42 U.S.C. § 409.
13. 42 U.S.C. § 423(c)(1); 20 C.F.R. § 404.120.
14. 42 U.S.C. § 423(c)(1)(B)(i); 20 C.F.R. § 404.130.
15. 20 C.F.R. § 404.130(c).
16. 20 C.F.R. § 404, Subpart P, Appendix 1, Part A.
17. 20 C.F.R. § 404, Subpart P, Appendix 2.
18. 20 C.F.R. § 404, Subpart P, Appendix 1, Part A.
19. 42 U.S.C. §§ 423(d)(1)(A), 416(i)(1).
20. 42 U.S.C. §§ 423(d)(1)(A), 416(i)(1).
21. 42 U.S.C. §§ 423(d)(1)(B), 416(i)(1).
22. 42 U.S.C. § 423(d)(2)(A).
23. 42 U.S.C. § 423(d), (e). Substantial gainful activity means work that involves doing significant and productive physical or mental duties and is done (or intended) for pay or profit. 20 C.F.R. § 404.1510. *See also* 20 C.F.R. §§ 404.1571 *et seq.*
24. 42 U.S.C. § 423(d)(3), 20 C.F.R. § 404.1508.
25. *City of New York v. Heckler*, 578 F. Supp. 1109 (D.C.N.Y., 1984), *aff'd*, 742 F.2d 729 (2d Cir., 1985), *aff'd*, 106 S.Ct. 2022, 476 U.S. 467, 90 L.Ed. 2d 462 (1987).
26. 20 C.F.R. § 404.1573(c).
27. 42 U.S.C. § 423(a)(1)(c); 20 C.F.R. § 404.611. Online, one can apply at www.ssa.gov.
28. 20 C.F.R. § 404.900 (a)(1).
29. 42 U.S.C. § 423(b)(1); 20 C.F.R. § 404.900(a)(3). In the past, the applicant that was denied benefits would have to request a reconsideration determination before the hearing process, but that phase has been eliminated for disability cases, however, the reconsideration phase is still part of the administrative review process in other Social Security matters. (*see* 20 C.F.R. § 900(a)(2)).
30. 20 C.F.R. §§ 404.914, 404.915 and 404.916.
31. 20 C.F.R. §§ 404.1520 *et seq. See Bluvband v. Heckler*, 730 F.2d 886, 891 (2d Cir. 1984).
32. *Bluvband v. Heckler*, 730 F.2d 886, 891 (2d Cir. 1984).
33. 20 C.F.R. §§ 404.900(a)(4), 404.967 *et seq.* There is one Appeals Council, located in Falls Church, Virginia, and it handles all of the cases under review.
34. 20 C.F.R. § 404.900 (a)(5).
35. 42 U.S.C. § 423(d)(2)(A).
36. 42 U.S.C. § 422(c).
37. 20 C.F.R. § 1592(a).
38. 20 C.F.R. § 1592.
39. 20 C.F.R. § 1592a.
40. 20 C.F.R. § 404.1705(a).
41. 42 U.S.C. § 406(a)(2)(A); 20 C.F.R. §§ 404.1720, 404.1730.
42. 20 C.F.R. § 404.1720(b)(4).

Steven P. Lerner, a member of the firm of Kassoff, Robert, & Lerner, LLP, is a member of the National Organization of Social Security Claimants' Representatives and the National Academy of Elder Law Attorneys. A graduate of Syracuse University School of Law, Mr. Lerner's special areas of expertise are Social Security Disability, Social Security Retirement, Social Security Overpayment, Elder Law, Estates and Real Estate. He is listed in *Who's Who in American Law*. Mr. Lerner has lectured extensively on Social Security matters and Elder Law issues. He has written numerous articles on various legal matters ranging from Elder Law to Social Security. Mr. Lerner is a member of the Elder Law Section of the New York State Bar Association, and also the Nassau County Bar and American Bar Associations.

This article originally appeared in the Winter 2006 issue of the Elder Law Attorney, *Vol. 16, No. 1, published by the Elder Law Section of the New York State Bar Association.*

Tenancy by the Entirety and Same Sex Marriage in New York

By James M. Pedowitz

The estate of tenancy by the entirety is created by "a disposition of real property to a husband and wife. . . ."[1] Since June 24, 1975, a conveyance of real property, or on or after January 1, 1996, of shares of stock of a cooperative apartment corporation, to persons who are not legally married to one another, but who are described as husband and wife, creates in them a joint tenancy, unless expressly declared to be a tenancy in common.[2]

Tenancy by the entirety existed under the common law, and its antecedents were based on the legal fiction that husband and wife were considered to be one person. That old fiction has persisted into modern times so that in a tenancy by the entirety, unlike a joint tenancy, both tenants own 100% of the entire property, but subject to their survivorship of the other spouse; and upon a divorce or annulment the estate automatically converts into a tenancy-in-common in equal shares.[3]

This article was prompted by the recent article in the New York State Bar Association *Journal* issue of January 2006, Vol. 78, No. 1 entitled "Same Sex Marriage under New York Law," by Derek B. Dorn, Esq. That article should be read by all attorneys with clients who contemplate or have contracted a same sex marriage. As that article points out, although New York Law does not now permit same sex marriages, there is nothing to prevent a New York resident from going to Canada, Massachusetts or where else permitted to consecrate a same sex marriage, and then return to New York. If that couple should then buy a home in New York and take title by a deed that described them as "husband and wife," would they own the property as tenants by the entirety or as joint tenants? Under many circumstances, there could be a vast difference in the outcome of a dispute dependent upon whether the party's interest is that of a joint tenant or a tenant-in-common.[4]

Would a title insurance company insure that the title acquired by a same sex couple describing themselves as married, or even as "husband and wife," be a tenancy by the entirety? The parties would certainly own the property, and with a mutual right of survivorship. If as tenants by the entirety they would both own 100% of the property, subject to surviving the other spouse, while in the other case (joint tenancy) they would each own a 50% interest, which on the death of the first to die would be "transferred" by operation of law to the survivor. In the tenancy by the entirety, any liens created by the deceased tenant would not survive the transfer by their death, but in the joint tenancy those liens do survive the decedent. A cautious title insurer should not insure the nature of their estate other than that they both together own a title in fee.

A competent court dealing with this problem should review some of the older cases that considered somewhat similar problems dealing with impediments to marriage, such as affecting the guilty party after a divorce based on adultery.[5]

Tenancy by the entirety existed under the common law, and its antecedents were based on the legal fiction that husband and wife were considered to be one person.

In *Van Voorhis v. Brintnall,* the adulterous spouse who was prohibited from re-marrying in New York while his divorced innocent spouse was still alive went to Connecticut to re-marry where there was no impediment to the marriage, and then returned to New York with his new spouse, and they then had a child in New York.

The court of appeals held that the second marriage in Connecticut would be recognized as valid in New York, and the child of that marriage was legitimate.

The decision was lengthy and thorough and held that "the validity of a marriage contract is to be determined by the law of the State where it was entered into; if valid there it is to be recognized as such in the courts of this State, unless contrary to the prohibitions of natural law, or the express prohibitions of a statute."[6] The decision then goes on to more fully discuss the latter part of the sentence with respect to the prohibitions of natural law or in statutes. The court refers to incest or polygamy as coming within the prohibitions of natural law.

Since the state of matrimony has always, at least until very recent times, been a union between a man and a woman, would it not be interpreted as part of "natural law," especially since the court in the *Van Voorhis* decision, *supra*, referred to "incest or polygamy" as prohibitions of natural law? Observations of sexual encounters among animals always involve a male and a female, and that would seem to be part of "natural law." Although it may not be politically correct to say so, the creation of children was also considered to be the "natural" result of a marriage between a man and a woman.

A man can love a man, and a woman can love a woman, but a same sex union cannot create children, except by some artificial intervention. Society can properly recognize those same sex relationships, but it cannot be "marriage" as society has known it ever since Adam and Eve, or whoever else may have been our antecedents according to Darwin.

It would also seem that the use of the words "husband and wife" in EPTL § 6-2.2(b) could not be interpreted as applying to two persons of the same sex. Although Black's Law Dictionary does not contain a specific definition for "husband," there is a definition for "wife" as "a woman united to a man by marriage; a woman who has a husband living and undivorced."

In light of both the decisional law in New York, and the language of EPTL § 6-2.2(b), it is highly unlikely that a same sex couple who have been "married" in a state where same sex "marriage" is permitted could be recognized by a court as tenants by the entirety of real property in New York.

Endnotes

1. EPTL § 6-2.2(b).
2. EPTL § 6-2.2(d).
3. *See e.g., Stelz v. Schreck,* 128 N.Y. 263 (1891).
4. *See* "Tenancy by the Entirety in New York" N.Y.S.B.A. N.Y. Real Property Law Journal, Winter 2005, Vol. 33 No. 1.
5. *Van Voorhis v. Brintnall,* 86 N.Y. 18 (1881).
6. *Van Voorhis,* at 18.

James M. Pedowitz is counsel to Berkman, Henoch, Peterson & Peddy, P.C., in Garden City, New York. He is a past chair of the section, and has written and lectured extensively on real estate, title insurance, mortgage foreclosure and various other real property subjects.

This article originally appeared in the Spring 2006 issue of the N.Y. Real Property Law Journal*, Vol. 34, No. 1, published by the Real Property Law Section of the New York State Bar Association.*

Service of Process and Traverse Hearings in Landlord-Tenant Actions and Proceedings

By Gerald Lebovits and Matthias W. Li

I. Introduction

Service-of-process requirements in summary proceedings are more technical than in plenary actions.[1] Practitioners who do not understand the often seemingly arbitrary rules can lose cases they should win. This article untangles the law on service under the New York Real Property Actions and Proceedings Law (RPAPL) and the New York Civil Practice Law and Rules (CPLR) and discusses how practitioners can get or oppose traverse hearings and have them sustained or overruled.

II. Service of Process

A. Service Generally

A landlord must effect proper service of process for the court to obtain personal jurisdiction over a tenant. Service of process in landlord and tenant actions and proceedings in New York is governed by RPAPL 735, which covers service of process in summary proceedings, and by CPLR Article 3, which covers service of process in plenary actions.[2]

RPAPL 735 is a statutory remedy. The right to maintain a summary proceeding does not exist at common law. RPAPL 735 is strictly construed, as is CPLR Article 3. A departure from the requirements of RPAPL 735 or CPLR Article 3 for service of process is not curable and mandates that the proceeding be dismissed.[3] That a tenant has actual notice of the proceeding is not what confers jurisdiction on the court, even though constitutional due process requires simply that service be reasonably calculated under the circumstances to appraise the litigants about the case and to give them a chance to object.[4] What counts is not notice or receipt but whether service complies with the RPAPL or the CPLR.[5]

Service of process effected under the RPAPL sometimes conforms to the CPLR's dictates, but not always.

The terms of residential lease obligations about service, place of service, or other manner of notice may not modify or restrict RPAPL 735. If a conflict arises about service between a residential lease and RPAPL 735, the conflict must be resolved in favor of the statutory requirements,[6] although a lease may require notice in addition to what the RPAPL requires.[7] In commercial cases, courts are more likely than in residential cases to accept lease terms that limit statutory requirements.[8]

The respondent in a summary proceeding must be served with a notice of petition and a petition.[9] Each named respondent must be served individually,[10] even if each named respondent is part of the same family.[11] Additionally, each lease signatory must be made a respondent and served separately.[12]

In *Friedlander v. Ramos*, the court held that "[t]he object of the RPAPL 733 (1) service requirement is to ensure that respondents receive adequate notice and an opportunity to prepare defenses that they may have."[13] Under RPAPL 733, the process server should serve the petition and notice of petition on each respondent "at least five and not more than twelve days before the time at which the petition is noticed to be heard."[14] If a petition and notice of petition, served pursuant to RPAPL 735, are served fewer than five days before the return date, service is defective and the court will lack jurisdiction over the proceeding.[15] Similarly, a petition served more than 12 days before it is noticed to be heard is defective.[16]

The question sometimes arises whether a court may grant *nunc pro tunc* relief and retroactively permit short filing under RPAPL 733(1) when a tenant has received less than the required five-day notice. In *445 East 85th Street v. Phillips*, the landlord, which had not timely sought *nunc pro tunc* relief, argued that its filing short was excusable and not a jurisdictional defect.[17] The court disagreed and stated that "[s]hort filing denies a tenant adequate time to prepare for court. It is not a simple, ministerial indiscretion."[18] In *K.N.W. Assocs. v. Parish*, however, the court held that the short filing did not prejudice the respondent and thus granted the petitioner's motion for *nunc pro tunc* relief.[19]

B. Service Methods

RPAPL 735 permits a process server to effect service in three different ways: personal delivery, a form of personal service; substituted service to a person of suitable age and discretion who lives or is employed at the premises sought to be recovered, the other form of personal service; or conspicuous-place service, sometimes referred to as "nail and mail" or "affix and mail."[20]

1. Personal Delivery

RPAPL 735(1) provides that "service of the notice of petition and petition shall be made by personally deliv-

ering them to the respondent." Similarly, CPLR 308(1) provides that personal delivery on a natural person is effected "by delivering the summons within the state to the person to be served." Personal service can be in-hand delivery or substituted service. Personal delivery is effected when the petition and notice of petition are hand-delivered to the named respondent under RPAPL 735.[21] Personal service is the optimal method of service for a landlord because it always satisfies the service requirements for money judgments under CPLR Article 3 and decreases the possibility that traverse will be raised and sustained;[22] it is also the optimal method for a tenant because it most assures that the tenant is apprised of the action or proceeding and has an opportunity to defend.

Personal delivery of the petition and notice of petition may be made wherever the tenant, or an authorized representative, may be found.[23] RPAPL 735(1)(a) forbids a default to be entered against tenants not served at their last residence address, even if the landlord learns about the tenant's other residence through attempts to serve. This rule prevents landlords from accidentally evicting people who are in hospitals or nursing homes, or temporarily living with relatives or friends.[24]

Personal delivery is complete immediately on the delivery of a copy of the papers to the intended recipient.[25] The original petition and notice of petition, or order to show cause, should be filed with the court clerk, along with proof of service, within three days after personal service has been effected.

When effecting service on a corporate respondent, personal delivery must be made pursuant to RPAPL 735(1) and comply with CPLR 311(1), which permits personal delivery to be made on an officer, director, managing, general agent, cashier or assistant cashier, or any other agent authorized by appointment or law to receive service on the entity's behalf.[26] Delivery of papers to a mere employee, without any inquiry about the employee's status in the corporate hierarchy or any effort to determine whether the employee is authorized to accept service, is insufficient to effect personal delivery on the corporation, unless the employee is an authorized agent or enumerated corporate official.[27]

Unlike service under CPLR Article 3, RPAPL 735 forbids service on a corporate tenant through the Secretary of State. When effecting service under RPAPL 735 to a corporate respondent, and when a corporate officer, director, agent, or cashier cannot be found, substituted or conspicuous-place service should be used.[28]

Unlike the CPLR, the RPAPL does not specify how personal delivery is effected on a partnership. When serving a partnership, reference should be made to CPLR Article 3.[29] CPLR 310, which governs personal service on a partnership in civil actions, authorizes delivery of papers to any partner of the partnership, the managing or general agent of the partnership within the state, the person in charge of the office within the state of the partnership, or any agent or employee of the partnership authorized by appointment to receive service.[30]

2. Substituted Service

If personal delivery cannot be made on the named respondent, the petitioner may effect service under RPAPL 735(1) "by delivering to and leaving personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered, a copy of the notice of petition and petition, if upon reasonable application admittance can be obtained and such person found who will receive it. . . ."[31] CPLR 308(2) provides that service on a natural person is effected "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served."

To determine whether the person served is of suitable age and discretion under RPAPL 735, courts look to whether that individual was likely to transmit the papers to the actual tenant.[32] When effecting substituted service of process, the recipient must reside or be employed at the premises and have the kind of relationship to the tenant from which it can reasonably be expected that the recipient will deliver the papers to the tenant.[33] A process server should ascertain the individual's identity and nexus to the tenant.[34]

When delivery is made to a minor, courts will inquire about the minor's discretion and authority.[35] The age of the person receiving process is a relevant factor, and the statute does not set a fixed minimum age for that person. Courts have therefore been reluctant to establish a benchmark under which service is defective. In *Village of Nyack Housing Authority v. Scott*, the court found that "[w]hile the adoption of the 'suitable age' language in RPAPL 735 implies that 'at some point a person should be deemed by the court, as a matter of law, to be too young to have a valid status as deliveree' we cannot say that a 13-year-old is incapable of accepting service as a matter of law, under RPAPL 735."[36] Other courts have held in the context of service or process that minors as young as age 12 are persons of suitable age and discretion.[37]

Delivery of process to a commercial tenant's employee at the premises sought to be recovered is sufficient to establish jurisdiction over the tenant, regardless of the individual's status in the business organization. In a commercial holdover proceeding, *Manhattan Embassy Co. v. Embassy Parking Corp.*, the court found that the process server properly effected substituted service

on the corporate respondent by delivering papers to a garage attendant, who was tenant's employee, who was employed at the premises sought to be recovered, whose job involved performing responsible functions, and who was served only after he told the process server that no manager was on the site.[38]

When effecting service of process on a landlord's employee, a person will be considered of suitable age and discretion if the nature of the relationship with the person to be served makes it more likely than not that the employee will deliver process to the named party.[39] If building personnel like a security guard, doorman, or concierge unreasonably impede a process server's efforts, these individuals should not be served or accept service on the respondent's behalf.[40] If repeated attempts to secure access are unsuccessful, an *ex parte* application authorizing an alternate means of service under CPLR 308(5) is a wise procedural course.[41]

When delivery is made on a commercial tenant's subtenant, service of process may be insufficient, absent a "unity of interest," to confer jurisdiction over the tenant, if the tenant was not also served with process.[42] In *Ilfin Co., Inc. v. Benec Industries, Inc.*, the court held that service on an employee of the respondent's co-tenant failed to comply with RPAPL 735. According to the court, the individual was not a person of suitable age and discretion, and the process server unreasonably believed that the employee was an appropriate person to accept service for this co-tenant.[43] When several companies are under one person's control at the same premises, however, acceptance of process by an employee of one is effective as to all.[44]

Because RPAPL 735 requires that the person accepting service reside or work in the actual premises sought to be recovered, delivery to a tenant's temporary visitor or neighbor might prove insufficient to confer jurisdiction.[45] By contrast, a person living in the subject premises with the respondent's permission and having no other place to live is a person who "resides" at the premises. The Legislature has not provided a specific time period in which a person must remain in the premises to be said to reside there. Determining a sufficient length of time for an individual to be a "resident" is a question of fact.[46]

Unlike personal delivery, which may be effected wherever the respondent or appropriate agent may be found, substituted service requires the delivery to be made at the premises sought to be recovered.[47] Additionally, when substituted service is used, a copy of the papers must be mailed to each respondent both by registered or certified mail and by regular first-class mail within one day of the delivery.[48]

Proof of substituted service should be filed with the court clerk within three days after completing the mailings.[49] Service is complete on filing proof of service.[50]

3. Conspicuous-Place Service

The third method of service of process is conspicuous-place service, or nail-and-mail or affix-and-mail. RPAPL 735(1) provides that conspicuous-place service of the petition and notice of petition may be effected "if admittance cannot be obtained . . . by affixing a copy of the notice and petition upon a conspicuous part of the property sought to be recovered or placing a copy under the entrance door of such premises."

Similarly, CPLR 308(4) provides that nail-and-mail service may be effected on a natural person when "service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode."

Conspicuous-place service may not be effected under RPAPL 735 until a reasonable application has been made to obtain admittance and find a person who will receive process. It is thus the least desirable of the three RPAPL service methods.[51] An allegation of conspicuous-place service is the most easily controverted at a traverse hearing. It is the service method most likely to raise an inference of improper service.

With affix-and-mail service, the pleadings may be affixed to a conspicuous part of the premises. "Affixing" means that the pleadings should be affixed to the front entrance or doorway of the tenant's unit or space, if possible, or "placed" under that entrance door.[52] The papers should be affixed in a place where, in the process server's reasonable opinion, it will be sufficiently obvious that the tenant will see them.[53] Service must not be unlikely to succeed, or predestined to failure, or the court may find it equivalent to no attempt at all.[54] If the papers are inappropriately affixed, the action or proceeding will be dismissed.[55]

In *Citibank, N.A. v. Mendelsohn*,[56] after affixing the petition and notice of petition to the door of the building rather than to the door of the apartment sought to be recovered, the petitioner argued that the outer bounds of the premises extended to the outside of the building because unidentified occupants did not allow its process server in. The court found that the tenants had no control over access to the building and that the process server, who was working on the buildings owner's behalf, could have easily gained access to the building. The court concluded that the pleadings were not affixed to a conspicuous part of the premises.

In *Pentecost v. Santorelli*, however, the court held that the "conspicuous part" of the premises may "extend to the location at which the process server's progress is arrested."[57] Similarly, in *F. I. duPont, Glore Forgan & Co. v. Chen*, the court found that "if a process server is not permitted to proceed to the actual apartment by the doorman or some other employee, the outer bounds of the actual dwelling place must be deemed

to extend to the location at which the process server's progress is arrested."[58]

4. "Reasonable Application" Standard

Before engaging in conspicuous-place service, a process server must make reasonable application to effect personal service on a tenant. The process server may make either personal delivery or substituted service. Legally, neither method of personal service is preferred to the other,[59] although in-hand service is the safest mode of service for both landlord and tenant. Courts will determine the meaning of "reasonable application" by assessing whether the process server's efforts were calculated to succeed.[60] If landlords have information about a tenant that would make service easier to effectuate, and therefore more likely that the tenant is notified of the action or proceeding, the reasonable-application standard requires the landlords to pass the information along to their attorneys, who in turn should notify their process server.[61] A landlord's knowledge is imputed to a process server.[62]

In *Elizabeth Broome Realty Corp. v. Sakas*,[63] the process server, at her first attempt at personal service, accepted the concierge's word that the tenant was not at home and therefore did not visit the tenant's apartment. On her second attempt at personal service, the process server affixed the pleadings to the apartment's entrance door. The court held that the first attempt was a nullity because the process server did not attempt to gain admittance to the apartment. The court explained that to perfect a reasonable attempt at personal delivery or substituted service, a process server must use a method with some expectation of success.[64]

Absent information about when the respondent may be expected to be at home, and to adhere to the reasonable-application requirement, a process server should make at least two attempts to deliver the papers: one during regular business hours, the other before or after regular business hours.[65]

The reasonable-application standard under RPAPL 735 is not as stringent as the due-diligence requirement under CPLR Article 3. Although no rigid rule determines whether due diligence has been exercised in attempting to effect service so as to permit substituted service under CPLR 308, several courts, like the *Lara v. 1010 E. Tremont Realty Corp*.[66] court, have held that three attempts to serve on three different days and at different times during the day constitutes "due diligence" under CPLR 308(4).

The differences in service requirements under the RPAPL and CPLR have been cause for controversy over the years. One controversy is whether a court must award a money judgment against a tenant who defaults after receiving a petition and notice of petition by substituted or duly diligent conspicuous-place service.[67] One line of cases, following *In re McDonald*,[68] holds that only personal jurisdiction is gained and therefore that a monetary judgment can be awarded only when a tenant is served in hand or has appeared. *McDonald* requires landlords in nonpayment proceedings and in holdovers seeking use and occupancy to institute two cases against a defaulting tenant: one, a summary proceeding for possession; the other, a plenary action for rent.

On the other hand, the Appellate Term, First Department, in *Oppenheim v. Spike* stated, albeit in dictum, that duly diligent conspicuous service entitles a landlord to a default money judgment.[69] The *Oppenheim* court found that the only reason the Civil Court's "*money* judgment for rent was a nullity" was that "there is no indication that the process server had used due diligence before resorting to conspicuous service."[70] This issue was examined in *Dolan v. Linnen*, in which the court wrote that *McDonald* should not apply to modern-day residential nonpayment or holdover proceedings and that "no constitutional, statutory, or practical reason prevents duly diligent plenary action CPLR 308 (4) conspicuous service from conferring personal jurisdiction in RPAPL summary proceedings"[71] if the landlord complies in effecting service with both the RPAPL and the CPLR.

Even when the process server has reason to believe that the tenant will be at home during normal business hours, a single service attempt made at that time is insufficient.[72] Courts will require that a second attempt be made before or after normal work hours.[73] In *Eight Associates v. Hynes*, for example, the process server effected conspicuous-place service after making only one attempt at personal service shortly after 12 p.m. on a Friday.[74] The court found that one attempt to serve process during normal working hours before effecting conspicuous-place service did not satisfy the RPAPL 735 reasonable-application standard.

In *Metropolitan Life Ins. Co. v. Sharpf*, the court asked, "What then are normal working hours? The court finds that such hours are 9:00 a.m. to 5:00 p.m. (Monday through Friday) with one hour subtracted at the beginning and added at the end of the day for transportation."[75] Following that case, service should not be attempted when it would be reasonable to expect the recipient to be resting or asleep.[76]

Similarly, attempts at service of process on Sundays are prohibited, as are efforts on other days that the landlord knows are days of religious observance for the tenant, if service is maliciously designed to harass.[77] Attempts at service on Saturdays or before normal work hours will not be rejected if the process server's inquiry reveals that it is a time when a residential

respondent could reasonably be expected to be home.[78] In some cases, reasonable application might require that a delivery attempt be made at all other known locations before conspicuous-place service may be effected at the premises sought to be recovered.[79]

If finding out the tenant's whereabouts proves impractical, or if service cannot be made at the tenant's home or business, a landlord may move ex parte under CPLR 308(5) for leave to use an alternate service method.[80] In *BHNJ Realty Corp. v. Rivera*,[81] for example, the petitioner used conspicuous-place service and respondent defaulted. After discovering that respondent was incarcerated, petitioner moved to withdraw the original proceeding and pursuant to CPLR 308(5) serve the Riker's Island Detention Center office designated to receive legal documents on its inmates' behalf. The court granted the petitioner's motion, stating that "[i]f a petitioner has knowledge of the whereabouts of respondent and that service of process at the premises in the manner prescribed by statute will not give notice to respondent then the attempt to serve respondent by the statutory modes of service will not meet constitutional due process standards since it is not reasonably calculated to apprise respondent of the proceeding."[82]

When a process server effects conspicuous-place service, a copy of the petition and notice of petition must be mailed to each respondent by certified mail or registered mail and by regular mail within one day of the papers' affixation.[83] Proof of service should be filed with the court clerk within three days after completing the mailings.[84] Service is complete on filing of the petition (outside New York City), the notice of petition, or order to show cause, and proof of service with the court clerk.[85]

C. Commercial Tenants

Service on a commercial respondent should be attempted when that party normally conducts its business. Otherwise, service might be deemed unreasonable, and the case will be dismissed.[86]

As with service on a residential tenant, service on a commercial tenant must comply with CPLR Article 3 to obtain a monetary judgment unless the tenant appears and waives its objections to personal jurisdiction.[87] Service under Business Corporation Law (BCL), allowing service on the Secretary of State as agent of a domestic or authorized foreign corporation, may not be used to commence a summary proceeding.[88] In *Puteoli Realty Corp. v. Mr. D's Fontana di Trevi Restaurant, Inc.*,[89] the landlord began a proceeding under the RPAPL and served the tenant under BCL 306. The court noted that summary proceedings under the RPAPL are statutory devices by which jurisdiction may be acquired quickly and that because the petitioner failed to follow the RPAPL 735 service requirements, the tenant's motion to dismiss for lack of personal jurisdiction had to be granted.

To comply with the reasonable-application requirements, a process server may be required to make delivery attempts at all other known locations before conspicuous-place service may be effected at the premises sought to be recovered. Doing so assures that the tenant is afforded actual notice of the proceeding's pendency.[90] If finding out the tenant's whereabouts proves impractical, a landlord may move the court *ex parte* for leave to use an alternate service method.[91]

D. Mailing Requirements

A petitioner that effects substituted or conspicuous-place service must comply with RPAPL 735(1)(a) or (b), which require the petitioner to mail a complete copy of the petition and notice of petition to the respondent both by regular mail and by registered mail or certified mail within one day after the substituted or conspicuous-place service. The process server must be able to demonstrate that the mailings carried the correct postage and were deposited with the post office.[92] RPAPL 735(1)(a) and (b) require mailings to locations other than the subject premises if the respondent does not reside at the subject premises or, if a business, its principal place of business is elsewhere.[93]

Mailings to a natural person should be addressed to the tenant at the property sought to be recovered. If the premises are not the tenant's current place of residence, or if other addresses are known to the landlord, the landlord must make additional mailings to those alternate addresses.[94] If the respondent does not appear to reside at the premises sought to be recovered, and the petitioner has no knowledge of the respondent's actual residence address, the papers may be sent to the respondent's last known place of business or employment.[95]

If the tenant is a corporation, joint-stock, or other unincorporated association, the mailings should be sent by registered or certified mail and by regular first-class mail to the premises sought to be recovered. If the premises are not the tenant's principal place of business or principal office, then an additional mailing should be made to the respondent's principal office or place of business in the state, if the landlord has written information of that address. If the landlord has only actual or constructive notice of another office or business address for the tenant, other than the premises sought to be recovered, a copy of the papers should be sent to the other known addresses.[96] Although RPAPL 735 requires mailings only to business addresses in the state, it is advisable to send the mailings to principal offices outside the state, if those addresses are available.[97]

When effecting substituted or conspicuous-place service, which require a mailing, the failure properly to address envelopes that contain the predicate notice and pleadings might result in the proceeding's dismissal.[98] In *Avakian v. De Los Santos*,[99] the court held that it lacked personal jurisdiction over the defendant because the zip code in the defendant's summons and complaint was incorrect. Later, in *New York City Housing Authority v. Fountain*, the court, citing *Avakian*, found under the RPAPL that "[a]ny delay in receipt may result in an unjustified default. Therefore, zip codes are significant and particularly necessary in summary proceedings."[100] The rule is different in plenary actions. CPLR 308(2) service is valid even if the mailing following substituted service contains the wrong zip code.[101] To avoid the possibility of dismissal, all mailings should include at least the recipient's name; street number or name; unit designator; city and state or authorized two letter abbreviation, and correct five digit ZIP+4 Code.[102]

E. Filing Requirements

RPAPL Article 7 is strictly construed. Cases are often dismissed for lack of adherence to filing requirements. It is important that practitioners are aware of the fine points concerning the filing requirements.

When a court clerk or a judge of the New York City Civil Court, a City Court outside New York City, or a District Court issues a notice of petition, a copy of the notice should be filed with the court clerk, when an index number is usually assigned.[103] In the New York City Civil Court, the original petition should be filed with the court clerk upon issuance of the notice of petition.[104] Once service is complete, the notice of petition or order to show cause (and the petition in courts outside the New York City Civil Court), together with proof of service, which is typically in the form of a notarized affidavit, should be filed with the court clerk within three days after personal delivery to the respondent or the completion of the mailings when service has been effected by substituted or conspicuous-place service.[105]

Defects in the content of an affidavit of service are treated as minor or amendable. They will not lead to dismissal if service was properly effected.[106] Proof of service not timely filed is a jurisdictional defect. The court may issue a *nunc pro tunc* order authorizing a late filing, which will allow the tenant time to answer the petition to run anew upon service of the order permitting the late filing, with notice of entry.[107] On the other hand, because RPAPL 735(2) directs that proof of service be filed with "the clerk of the court," technical noncompliance with the RPAPL, such as filing proof of service with the judge instead of the clerk, has sometimes resulted in dismissal.[108]

When filing a notice of petition with proof of service in the New York City Civil Court in a residential Housing Part proceeding, the petitioner must also submit stamped postcards addressed to all respondents at the premises sought to be recovered and to the other address(es) at which process was served.[109] No default judgment for failure to answer may be entered against a tenant unless the petitioner has complied with the postcard requirement.[110] This postcard should state the respondent's name, address, and ZIP Code. The postcard's return address should reflect the appropriate address of the court clerk's office to which the respondent is being directed.[111] The reverse side of the postcard must contain the following notice in English and Spanish:

> Papers have been sent to you and filed in court asking this court to evict you from your residence. You must appear in court and file an answer to the landlord's claim. If you have not received the papers, go to the housing part of the civil court immediately and bring this card with you. If you do not appear in court, you may be evicted. You may also wish to contact an attorney.

III. Traverse Hearings

Service of process that violates the strict requirements of RPAPL 735 will make the landlord vulnerable to attack based on lack of *in personam* jurisdiction.[112] The objection may be made by a motion or pre-answer motion to dismiss or as an affirmative defense in the tenant's answer.[113]

The hearing held on the issue of service is known as a "traverse" hearing. When no answer or motion to dismiss for lack of personal jurisdiction is made, an objection to jurisdiction is waived, and the court has full jurisdiction for *in personam* and *in rem* judgments.[114] Additionally, in *Textile Technology Exchange, Inc. v. Davis*,[115] the court held that "interposing a counterclaim related to plaintiff's claims will not waive the defense of lack of personal jurisdiction, but that asserting an unrelated counterclaim does waive such defense because defendant is taking affirmative advantage of the court's jurisdiction." And in *Washington v. Palanzo*,[116] the court held that extensive participation in litigation causes the party to waive objections to personal jurisdiction. However, merely filing a notice of appearance and procuring an extension of time to answer does not waive personal-jurisdiction objections.[117]

Although some trial courts have characterized notice-related irregularities as impinging on the court's subject-matter jurisdiction, this characterization has not met with appellate concurrence.[118] It is a defense of personal jurisdiction.

A. Obtaining a Traverse Hearing

When material issues of fact regarding personal jurisdiction arise, a traverse hearing is required.[119] It is necessary to have a sworn affidavit denying proper service to be entitled to a traverse hearing.[120] An affidavit from a person with personal knowledge—not an attorney—is required.[121]

The affidavit creates only a presumption of service. For a tenant to merit a hearing on whether service was done according to RPAPL or the CPLR, the tenant's answer or motion must set forth specific factual allegations that raise genuine issues of fact about the propriety of the process server's efforts. Conclusory statements that the service of process was defective because it was not served in accordance with RPAPL 735 are insufficient.[122] Instead, the process server's affidavit must be credibly and specifically refuted.[123] Otherwise, the objection or affirmative defense may be stricken, or the pre-answer motion or motion to dismiss denied, without a hearing.[124] Courts have applied these rules to objections to service of predicate notices, petitions, notice of petitions, and HP proceedings.[125] An affidavit of service may be insufficient to give the court jurisdiction if it fails to show that service could not be made personally.[126] Additionally, an affidavit of service, on its own, is inadequate when the tenant disputes not only the service but also what was attached to the petition.[127]

The facts of *230 Equity Inc. v. Kahn*[128] illustrate what a tenant may allege to secure a traverse hearing. One of the respondents averred that she was in her studio apartment when the process server claimed to have effectuated conspicuous service and that it was impossible for the server to have attempted personal service before he resorted to conspicuous service. According to that respondent, if the process server had attempted to serve the petition and notice of petition personally, she would have heard him knock, given that she was then on the telephone in her studio apartment. Petitioner argued that the respondents presented a conclusory denial of a knock on the door and that they did not deny any relevant fact in the server's affidavit of service. Granting the respondents' motion for a traverse hearing, the court wrote that "[a]lthough [the process server's] affidavit notes [that] he effected service when [the respondent] would have been dialing the telephone, respondents have created an issue of fact about whether [the process server] engaged in a reasonable attempt to serve personally before resorting to conspicuous service."[129]

B. The Process Server

A petition and notice of petition may be served by anyone who is not a named party to the action or proceeding and who is at least 18 years old.[130] A licensed process server under the New York General Business Law is defined as person, other than attorneys to an action acting on their own behalf, who (1) derives income from the service of papers in an action; or (2) has effected service of process in five or more actions or proceedings in the 12 month period immediately preceding the service in question.[131] Unlicensed persons who serve process must state by affidavit that they have not served process more than five times in that year.[132] The New York City Administrative Code requires that process servers be licensed.[133] But an otherwise-valid service of process is not rendered invalid, and the court is not deprived of jurisdiction, solely because the process server violated the New York City Administrative Code.[134] In that case, the process server should be punished, however.[135]

People who serve process are regulated by legislative enactments because improper service of process causes those who might have insufficient knowledge or legal assistance to suffer the most. To this end, process servers who testify at traverse hearings conducted in New York City must bring their license and all records in their possession relating to their service efforts.[136]

C. The Logbook

The General Business Law requires process servers to keep legible records of all service effected. The record is referred to as a process server's "logbook." The logbook should include the action's or proceeding's title; physical description and name of the person served, if known; date and time all service attempts were made and completed; address where service was affected; nature of the papers served; court where the papers are returnable; and action's or proceeding's index number, if one has been assigned. If conspicuous-place service was effected in New York City, the logbook should also note the color of the door on which any papers were affixed. [137] These entries should be kept chronologically in a bound volume and maintained for two years.[138]

If the propriety of service of process is challenged, the process server will be required to present the logbook containing these records. Strict compliance with a process server's record-keeping rules is required when a tenant questions the propriety of service.[139]

D. The Traverse Hearing

At a traverse hearing, the petitioner or plaintiff bears the burden of proving the propriety of service of process.[140] That burden is usually met by introducing the process server's testimony and records. If the landlord is successful, the traverse is overruled and the case may proceed to trial. Otherwise, the tenant's challenge is sustained and the proceeding is dismissed.[141]

The court will determine whether service was properly effected based on the *prima facie* evidence

and the witnesses' credibility.[142] Although some courts excuse the process server's failure to present a license during traverse hearings, the absence of other relevant records might result in dismissal.[143] This combats the persisting problem of process servers who fail to use appropriate efforts to effectuate service, a scourge called "sewer service."[144]

CPLR 4531 permits an affidavit of service to be admitted as *prima facie* evidence of the delivery, posting, or affixing of a document when the process server is dead, mentally ill, or cannot be compelled with due diligence to attend the hearing. An affidavit of service that omits a process server's license number is "unlawful."[145]

Once a case is referred to a hearing judge for traverse, the judge is advised to wait a reasonable time for the process server to appear, and to appear with the necessary license and records. Several impatient judges who have dismissed cases have been reversed.[146]

IV. Conclusion

Before delivery of service of process is effected, or when the time might come to attack or defend a case on personal jurisdiction, the wary practitioner, whether for the landlord or the tenant, should become familiar with the technical requirements of RPAPL 735 and CPLR Article 3. The requirements are technical, to be sure, but one person's technicality is another's due process.

Endnotes

1. *See generally Dolan v. Linnen*, 195 Misc. 2d 298, 299, 753 N.Y.S.2d 682, 683 (Civ. Ct., Kings & Richmond Co. 2003) (Gerald Lebovits, J.).
2. *See* CPLR 101, which provides that "[t]he civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute."
3. Andrew Scherer, *Residential Landlord-Tenant Law in New York* at § 7:153, at 7–61 (2005 ed.).
4. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950); *see also Velazquez v. Thompson*, 451 F.2d 202 (2d Cir. 1971) (holding that RPAPL 735 service is constitutional because it is reasonably calculated to inform tenants of proceedings against them).
5. *E.g.*, *Raschel v. Rish*, 69 N.Y.2d 694, 697, 512 N.Y.S.2d 389, 390, 504 N.E.2d 22, 24 (1986) (mem.); *Macchia v. Russo*, 67 N.Y.2d 592, 595, 505 N.Y.S.2d 591, 593, 496 N.E.2d 680, 682 (1986) (*per curiam*); http://www.courts.state.ny.us/reporter/3dseries/2006/2006_26008.htm, 2006 N.Y. Slip Op. 26008, at *3 (Civ. Ct., N.Y. Co., Jan. 13, 2006) (Gerald Lebovits, J.) (finding that "notice is a matter of due process, not getting lucky").
6. *Lana Estates, Inc. v. Nat'l Energy Reduction Corp.*, 123 Misc. 2d 324, 326, 473 N.Y.S.2d 912, 914 (Civ. Ct., Queens Co. 1984); 2 Joseph Rasch, Landlord and Tenant Incl. Summary Proceedings § 29:12, at 425 (Robert F. Dolan 4th ed. 1998).
7. *E.g.*, *Lana Estates*, 123 Misc. 2d at 326, 473 N.Y.S.2d at 914.
8. *See, e.g.*, *Bogatz v. Extra Touch Int'l, Inc.*, 179 Misc. 2d 1029, 1031, 687 N.Y.S.2d 558, 560 (Civ. Ct., Kings Co. 1998) (finding subject matter jurisdiction in commercial summary proceeding although required predicate notice was not served as required by RPAPL 735).
9. *See Dep't of Hous. Pres. & Develop. v. Cauldwest Realty Corp.*, 15 H.C.R. 34A, N.Y.L.J., Feb. 10, 1987, p. 5, col. 1 (App Term 1st Dep't (*per curiam*) (holding that party never served with process cannot be added as respondent, even if that party testified on corporate respondent's behalf).
10. *Lam v. Wrzesinki*, 25 H.C.R. 61B, N.Y.L.J., Feb. 10, 1998, p. 18, col. 6 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.) ("While each petition set forth the names of the three respondents, [leaving two sets with the undertenants] was insufficient to satisfy the requirements of section 735 . . . as the petitioners were required to serve a copy upon each respondent.").
11. *World's Busiest Corner Corp. v. Cine 42nd St. Theater Corp.*, 134 Misc. 2d 281, 282, 510 N.Y.S.2d 796, 797 (Civ. Ct., N.Y. Co. 1986).
12. *Sohn v. Kong*, 21 H.C.R. 667A, N.Y.L.J., Dec. 22, 1993, p. 25, col. 2 (Civ. Ct., Bronx Co.) ("Where a party has signed a lease, the landlord-petitioner has knowledge and is required to name and serve the leaseholder tenant. Failure to do so requires a dismissal of the petition.").
13. 3 Misc. 3d 33, 34, 779 N.Y.S.2d 327, 328 (App. Term 2d Dep't 2d & 11th Jud. Dists. 2004) (mem.).
14. RPAPL 733(1); *accord Berkeley Assocs. Co. v. Di Nolfi*, 122 A.D.2d 703, 705, 505 N.Y.S.2d 630, 632 (1st Dep't 1986) (holding that when landlord used conspicuous-place service and filed affidavit of service one day before proceeding was noticed to be heard, RPAPL 733(1) not strictly adhered to because, under RPAPL 735(2)(b), conspicuous-place service is complete on filing of proof of service).
15. *See 445 E. 85th St. v. Phillips*, 2003 N.Y. Slip Op. 51270(U), 2003 WL 22170112,, at *2, 2003 N.Y. Misc. LEXIS 1182 (Civ. Ct., N.Y. Co., Sept. 12, 2002) (Gerald Lebovits, J.) ("The statute's requirements give a tenant some time to consult with an attorney to prepare for the first court date, to appear in court, to gather evidence, and to negotiate a settlement."); *Interstate Realty v. Smalls*, N.Y.L.J., Apr. 23, 1996, p. 27, col. 4 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.) ("Inasmuch the notice of petition and petition were not served at least five days before the time at which the petition was noticed to be heard, the petition must be dismissed. . . .").
16. *Frank v. Ange*, 82 Misc. 2d 465, 465, 370 N.Y.S.2d 365, 366 (Rochester City Ct. 1975).
17. 2003 N.Y. Slip Op. 51270(U), WL 22170112, 2003 N.Y. Misc. LEXIS 1182.
18. *Id.*, WL 22170112, at *2; *accord* B*ranson Assocs., L.P. v. Bentley*, 6 Misc. 3d 1040(A), 800 N.Y.S.2d 343, 2005 N.Y. Slip Op. 50361(U), 2005 WL 670729 (Albany City Ct., Mar. 23, 2005).
19. 5 Misc. 3d 1019(A), 799 N.Y.S.2d 161, 2004 N.Y. Slip Op. 51462(U), 2004 N.Y. Misc. LEXIS 2362 (Civ. Ct., N.Y. Co., Sept. 23, 2004).
20. *See* RPAPL 735; *City of N.Y. v. Clark*, 234 A.D.2d 120, 650 N.Y.S.2d 709 (1st Dep't 1996) (holding that CPLR 308(5) permits alternate service methods in context of summary proceeding).
21. N.Y. Jur. 2d, Real Property: Possessory and Related Actions § 180; Rasch, *supra* note 6, at § 29:12, at 425.
22. CPLR 308(1); *see, e.g.*, *Walber 419 Co. v. Office Design Assocs./Shepard Martin, Inc.*, 20 H.C.R. 257A, N.Y.L.J., May 5, 1992, p. 21, col. 1 (Civ. Ct., N.Y. Co.).
23. *Rodney Co. N.V., Inc. v. Riverbank Am.*, 25 H.C.R. 525B, N.Y.L.J., Oct. 7, 1997, p. 26, col. 5 (Civ. Ct., N.Y. Co.).
24. *See, e.g.*, *Parras v. Ricciardi*, 185 Misc. 2d 209, 212–13, 710 N.Y.S.2d 792, 795 (Civ. Ct., Kings Co. 2000).
25. RPAPL 735(2)(a); *Park Holding Co. v. Grossman*, 21 H.C.R. 129C, N.Y.L.J., Apr. 2, 1993, p. 25, col. 2 (App. Term 1st Dep't) (*per curiam*).

26. CPLR 311(a)(1); *Manhattan Embassy Co. v. Embassy Parking Corp.*, 164 Misc. 2d 977, 979, 627 N.Y.S.2d 245, 246 (Civ. Ct., N.Y. Co. 1995).

27. *Manhattan Embassy Co.*, 164 Misc. 2d 977 at 979, 627 N.Y.S.2d 245 at 246.

28. *Trump-Equitable 5th Ave. Co. v. McCrory*, 19 H.C.R. 544A, N.Y.L.J., Sept. 4, 1991, p. 22, col. 3 (Civ. Ct., N.Y. Co. 1991).

29. *See* CPLR 101; Daniel Finkelstein & Lucas A. Ferrara, *Landlord Tenant Practice in New York* at §§ 14:151, at 14–89, 15:310, at 15–188 (2006 ed.).

30. CPLR 310; Finkelstein & Ferrara, *supra* note 29, at §§ 14:151, at 14-89, 15:310, at 15–188.

31. *Accord 319 W. 48th St. Realty Corp. v. Al's Pub Corp.*, 18 H.C.R. 608C, N.Y.L.J., Dec. 27, 1990, p. 21, col. 5 (App. Term 1st Dep't) (*per curiam*).

32. *See, e.g.*, *Ilfin Co. v. Benec Indus., Inc.*, 114 Misc. 2d 411, 413, 451 N.Y.S.2d 643, 645 (Civ. Ct., N.Y. Co. 1982) ("When determining whether service was proper the inquiry must be: Under the circumstances, is it fair to say that the manner of service used is one that, objectively viewed, is calculated to adequately and fairly apprise the respondent of an impending lawsuit?").

33. Scherer, *supra* note 3, at § 7:176, at 7–69.

34. *See Manhattan Embassy Co.*, 164 Misc. 2d at 981, 627 N.Y.S.2d at 247.

35. *See Zellars v. Hanse*, 23 H.C.R. 521A, N.Y.L.J., Aug. 16, 1995, p. 24, col. 1 (Civ. Ct., Kings Co.).

36. 1 Misc. 3d 22, 23, 767 N.Y.S.2d 562, 563 (App. Term 2d Dep't 9th & 10th Jud. Dists. 2003) (mem.) (citation omitted).

37. *See, e.g.*, *Durham Prods., Inc. v. Sterling Film Portfolio, Ltd., Series A*, 537 F. Supp. 1241, 1245 (S.D.N.Y. 1982).

38. *Manhattan Embassy Co.*, 164 Misc. 2d at 981, 627 N.Y.S.2d at 247.

39. *50 Ct. St. Assocs. v. Mendelson & Mendelson*, 151 Misc. 2d 87, 91, 572 N.Y.S.2d 997, 998 (Civ. Ct., Kings Co. 1991).

40. *Napic, N.V. v. Fverfa Investments, Inc.*, 193 A.D.2d 549, 549, 597 N.Y.S.2d 707, 708 (1st Dep't 1993) (mem.) (finding jurisdiction over defendant not acquired by delivering process to building's concierge and mailing another copy to defendant's unit); *Colonial Nat'l Bank, U.S.A. v. Jacobs*, 188 Misc. 2d 87, 88, 727 N.Y.S.2d 237, 239 (Civ. Ct., N.Y. Co. 2000) ("Service on a person of suitable age and discretion is effective only at defendant's actual dwelling. Outside that proximity to the intended party, the inference that delivery to her is 'reasonably likely' fails.") (internal citations omitted).

41. *See Clark*, 234 A.D.2d at 120, 650 N.Y.S.2d at 709–10 (holding that Civil Court properly authorized service under CPLR 308(5) after petitioner proved that it had made three unsuccessful attempts to gain access to building through various entrances and that mailboxes in building's front entrance were non-functional); Finkelstein & Ferrara, *supra* note 29, at §§ 14:158, at 14-93, 15:318, at 15–193.

42. *Ilfin Co.*, 114 Misc. 2d at 413, 451 N.Y.S.2d at 645 ("As a general rule, in a business setting, it would be unfair and improper to say that an employee of *another tenant*, not employed by the tenant on whom service is intended, would be one of suitable age and discretion.") (emphasis in original).

43. *Id.* at 414, 451 N.Y.S.2d at 645; *accord* Peter M. Wendt & Lisa S. Ngai, Service of Process in Summary Eviction Proceedings 10 (unpub. manuscript for N.Y. County L. Ass'n CLE, Mar. 31, 2003).

44. *Arvic Realty v. RST Assoc., LP*, 31 H.C.R. 410A, N.Y.L.J., July 30, 2003, p. 19, col. 2 (Civ. Ct., N.Y. Co.).

45. *See Feenjon Corp. v. Tulipane*, 16 H.C.R. 188C, N.Y.L.J., May 27, 1988, p. 22, col. 2 (App. Term 1st Dep't) (*per curiam*) (holding that although papers were delivered to party visiting tenant, petition was dismissed because recipient lacked requisite nexus to unit).

46. *Kahn v. Sosin*, 130 Misc. 2d 515, 516, 496 N.Y.S.2d 678, 680 (Civ. Ct., N.Y. Co. 1985).

47. *Pena v. Aadal*, 17 H.C.R. 12C, N.Y.L.J., Jan. 13, 1989, p. 22, col. 6 (Civ. Ct., N.Y. Co.).

48. RPAPL 735(1); *Cassidy v. County of Nassau*, 146 A.D.2d 595, 597, 536 N.Y.S.2d 520, 521 (2d Dep't 1989) (mem.) (awarding partial summary judgment because sheriff's office failed to mail copies of warrant of eviction within one day of posting it at tenant's apartment).

49. RPAPL 735(2).

50. *Id.* 735(2)(b); *Park Holding Co.*, 21 H.C.R. 139C, N.Y.L.J., Apr. 2, 1993, p. 25, col. 2 ("When service of the notice of petition and petition is made other than by personal delivery to respondent, it is not complete until the filing of the proof of service.").

51. *See Eight Assocs. v. Hynes*, 102 A.D.2d 746, 748, 476 N.Y.S.2d 881, 883 (1st Dep't 1984), *aff'd*, 65 N.Y.2d 739, 492 N.Y.S.2d 739, 492 N.Y.S2d 15, 481 N.E.2d 555 (1985).

52. RPAPL 735; *161 Williams Assocs. v. Coffee*, 122 Misc. 2d 37, 39, 469 N.Y.S.2d 900, 902 (Civ. Ct., N.Y. Co. 1983); *Pentecost v. Santorelli*, 31 H.C.R. 392B, N.Y.L.J., July 17, 2003, p. 25, col. 3 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.).

53. *161 Williams Assocs.*, 122 Misc. 2d at 39, 469 N.Y.S.2d at 902.

54. *See id.*, 469 N.Y.S.2d at 902.

55. *Ark. Leasing Co. v. Farag*, 21 H.C.R. 321A, N.Y.L.J., June 16, 1993, p. 29, col. 5 (Civ. Ct., Queens Co.); *see Rodwin v. Townsend*, 286 A.D.2d 569, 730, 730 N.Y.S.2d 587, 588 (4th Dep't 2001) ("[T]he process server mailed the papers to respondent and left them between the screen door and inner door of respondent's home. The process server did not thereby properly affix the papers to respondent's door . . . .").

56. 25 H.C.R. 598A, N.Y.L.J., Nov. 12, 1997, p. 30, col. 3 (Civ. Ct., Kings Co.).

57. 31 H.C.R. 392B, N.Y.L.J., July 17, 2003, p. 25, col. 3 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.).

58. 41 N.Y.2d 794, 797, 396 N.Y.S.2d 343, 346, 364 N.E.2d 1115, 1117 (1977).

59. *See Palumbo v. Clark's Estate*, 94 Misc. 2d 1, 6, 403 N.Y.S.2d 874, 876–77 (Civ. Ct., N.Y. Co. 1978) ("While it is true that the Legislature removed the higher burden of 'due diligence' from the statute, it did not make conspicuous place service a method of service initially and unconditionally available.").

60. *Eight Assocs.*, 102 A.D.2d at 748, 476 N.Y.S.2d at 883 ("Under the facts present herein, one attempt to serve process during 'normal working hours' did not satisfy the 'reasonable application' standard set forth in RPAPL 735. In so doing we do not rule that such service during 'normal working hours' would be insufficient under all circumstances.").

61. *See Ancott Realty, Inc. v. Gramercy Stuyvesant Indep. Democrats*, 127 Misc. 2d 490, 491, 486 N.Y.S.2d 672, 674 (Civ. Ct., N.Y. Co. 1985).

62. *30-40 Assoc. Corp. v. DeStefano*, 31 H.C.R. 95A, N.Y.L.J., Mar. 5, 2003, p. 18, col. 6 (App. Term 1st Dep't) (*per curiam*); *Sie Jie Mei, Inc. v. Ashare*, 31 HCR 681A, N.Y.L.J., Dec. 10, 2003, p. 19, col. 1 (Civ. Ct., N.Y. Co.) (stating that in landlord-tenant matters, process server has duty, in effecting proper service, to communicate to landlord difficulties with service of process).

63. 21 H.C.R. 515A, N.Y.L.J., Oct. 13, 1993, p. 22, col. 5 (Civ. Ct., N.Y. Co.).

64. *Id.*; *see also Eight Assocs.*, 102 A.D.2d at 748, 476 N.Y.S.2d at 883.

65. *See generally Har Holding v. Feinberg*, 26 H.C.R. 195A, N.Y.L.J., Apr. 2, 1998, p. 29, col. 3 (App. Term 1st Dep't) (*per curiam*)

("Tenant failed to controvert the process server's affidavit which set forth two prior attempts at personal service, one in the afternoon and one in the evening before conspicuous-place service was effected."); *N.Y. St. Hous. Finance v. Fawcett*, 12 H.C.R. 298A, N.Y.L.J., Dec. 19, 1984, p. 19, col. 5 (Civ. Ct., N.Y. Co.) (same).

66. 205 A.D.2d 468, 468, 614 N.Y.S.2d 6, 6 (1st Dep't 1994) (*per curiam*).

67. *See Dolan*, 195 Misc. 2d at 299, 753 N.Y.S.2d at 683.

68. 225 A.D. 403, 233 N.Y.S. 368 (4th Dep't 1929).

69. *See Oppenheim v. Spike*, 107 Misc. 2d 55, 56, 437 N.Y.S.2d 826, 828 (App. Term 1st Dep't 1980) (*per curiam*).

70. *Id.*, 437 N.Y.S.2d at 828 (emphasis added).

71. 195 Misc. 2d at 321, 753 N.Y.S.2d at 698. Since *Dolan*, two Nassau County judges have discussed the matter. Agreeing with *Dolan* is *Guevra v. Cueva*, 5 Misc. 3d 1024(A), 799 N.Y.S.2d 160, 2004 N.Y. Slip Op. 51531(U), 2004 WL 2827675 (Dist. Ct. Nassau Co., Dec. 8, 2004). Disagreeing is *Arnold v. Lyons*, 2003 N.Y. Slip Op. 50766(U), 2003 WL 2004246 (Dist. Ct. Nassau Co., Mar 31, 2003).

72. *See* 102 A.D.2d at 748, 476 N.Y.S.2d at 883 (holding single attempt to effect personal or substituted service during normal working hours insufficient because there is no reasonable expectation that an individual will be at home during those hours).

73. *See, e.g.*, *Kalikow 78/79 Co. v. Naughton*, 17 H.C.R. 384B, N.Y.L.J., Oct. 18, 1989, p. 21, col. 3 (App. Term 1st Dep't) (*per curiam*) (upholding conspicuous-place service because process server made three attempts, two outside normal working hours.).

74. *See* 102 A.D.2d at 746, 476 N.Y.S.2d at 882.

75. 124 Misc. 2d 1096, 1098, 478 N.Y.S.2d 567, 570 (Civ. Ct., N.Y. Co. 1984).

76. *See id.*, 478 N.Y.S.2d at 570 (holding service attempts between 10:30 p.m. and 6:00 a.m. unacceptable).

77. *Hessel v. Hessel*, 6 Misc. 2d 861, 861, 164 N.Y.S.2d 519, 520 (Sup. Ct., N.Y. Co.) ("If this action were commenced by service of the summons and complaint in New York State on Sunday such service would be void.").

78. *See, e.g.*, *45 Prospect Apts. v. Copeland*, 17 H.C.R. 23D, N.Y.L.J., Jan. 2, 1989, p. 26, col. 4 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) ("The actions of the process server in going to tenant's home at 6:45 a.m. on a weekday morning, without making any prior inquiry as to whether tenant would be home at that time, did not suffice as a reasonable application. . . .").

79. *See, e.g.*, *DeStefano*, 31 H.C.R. 95A, N.Y.L.J., Mar. 5, 2003, p. 18, col. 6 ("The record supports Civil Court's finding that landlord had knowledge of tenant's incarceration and that conspicuous place service at the subject apartment would not give actual notice to the tenant, who also suffers from a psychiatric impairment."); *Kalikow 78/79 Co.*, 17 H.C.R. 384B, N.Y.L.J., Oct. 18, 1989, p. 21, col. 3.

80. *See Clark*, 234 A.D.2d at 120, 650 N.Y.S.2d at 709.

81. 144 Misc. 2d 241, 242, 543 N.Y.S.2d 883, 884 (Civ. Ct., N.Y. Co. 1989).

82. *Id.* at 244, 543 N.Y.S.2d at 885.

83. RPAPL 735(1).

84. *Id.* 735(2).

85. *Id.* 735(2)(b); *Park Holding Co.*, 21 H.C.R. 139C, N.Y.L.J., Apr. 2, 1993, p. 25, col. 2 ("When service of the notice of petition and petition is made other than by personal delivery to respondent, it is not complete until the filing of the proof of service.").

86. *See Naman v. Sylveen Realty Co.*, 222 A.D.2d 564, 565, 636 N.Y.S.2d 344, 345 (2d Dep't 1995) (mem.) ("The process server attempted to serve the notice of petition and petition during the [tenant's] posted office hours. This attempt encompassed a reasonable expectation of success and thus satisfied the requirement of 'reasonable application.'"); *Chase Manhattan Bank, N.A. v. Beary*, 14 H.C.R. 176B, N.Y.L.J., May 21, 1986, p. 15, col. 2 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) ("Attempted personal service at 6:30 at night, after usual business hours, on office tenant, is not reasonable attempt at personal service.").

87. *Leven v. Browne's Business School, Inc.*, 71 Misc. 2d 842, 842–43, 337 N.Y.S.2d 307, 308–09 (Dist. Ct., Nassau Co. 1972).

88. Andrew R. Brodnick, *Avoiding the Trap: Service of Process on Commercial Tenants Under RPAPL*, N.Y.L.J., June 8, 1994, p. 5, col. 2 (citing *Omabuild Corp. v. Dolron Rest., Inc.*, 20 H.C.R. 412A, N.Y.L.J., July 1, 1992, p. 24, col. 3 (Civ. Ct., N.Y. Co.)).

89. 95 Misc. 2d 108, 110, 407 N.Y.S.2d 118, 120 (Dist. Ct. Suffolk Co. 1978).

90. *See, e.g.*, *Kalikow 78/79 Co.*, 17 H.C.R. 384B, N.Y.L.J., Oct. 18, 1989, p. 21, col. 3; *30-40 Assocs.*, 31 H.C.R. 95A, N.Y.L.J., Mar. 5, 2003, p. 18, col. 6.

91. *See Clark*, 234 A.D.2d at 120, 650 N.Y.S.2d at 709.

92. *See Marrero v. Escoto*, 145 Misc. 2d 974, 975, 554 N.Y.S.2d 375, 376 (App. Term 2d Dep't 2d & 11th Jud. Dists. 1990) (mem.) ("In the absence of proof by the petitioner that this envelope had the proper postage for certified mail, or in the absence of any stamp by the post office to establish that the envelope was treated as certified mail, it is the conclusion of this court that petitioner has failed to establish that the certified mail copy was ever sent to the appellant.").

93. *Lana Estates*, 123 Misc. 2d at 327, 473 N.Y.S.2d at 915 ("'[S]ubstituted' or 'conspicuous place' service requires that a copy of the notice of petition and petition be sent by regular and certified mail to a corporate respondent addressed to the subject premises *and* also to the corporate tenant's last known principal office or principal place of business if this is 'not located on the property sought to be recovered.'") (emphasis in original); *Delmonico Hotel Co. v. Fiddler Gonzalez & Rodriguez*, 19 H.C.R 360A, N.Y.L.J., June 12, 1991, p. 23, col. 4 (Civ. Ct., N.Y. Co.).

94. *Weise v. Gershman*, 90 Misc. 2d 799, 800, 396 N.Y.S.2d 316, 317 (Civ. Ct., Kings Co. 1977) (noting that RPAPL 735 "provides for substituted service on a natural person, when the premises are not his residence, not only at the premises but also by registered or certified mail at the respondent's residence if petitioner has 'written information' of the residence address").

95. *See* RPAPL 735(1)(a).

96. *See id.* 735(1)(b); *E.O.R.. Five of N.Y. v. Fountain House, Inc.*, 23 H.C.R. 576A, N.Y.L.J., Sept. 22, 1995, p. 26, col. 1 (App. Term 1st Dep't) (*per curiam*) (holding that process must be mailed to corporate address when conspicuous-place service on corporation is attempted and landlord has written information that corporation's principal office of place of business is not located on property sought to be recovered).

97. *See Cooke Props., Inc. v. Masstor Sys. Corp.*, 21 H.C.R. 1A, N.Y.L.J., Jan. 4, 1993, p. 21, col. 3 (Civ. Ct., N.Y. Co. 1993) (noting, in upholding service on sub-tenant's employee, that mailings were made to tenant's out-of-state principal office); *Delmonico Hotel Co.*, 19 H.C.R.360A, N.Y.L.J., June 12, 1991, p. 23, col. 4 (holding that when tenant is partnership, mailings are controlled by RPAPL 735(1)(b), which does not limit mailings to in-state addresses).

98. *See Foster v. Cranin*, 180 A.D.2d 712, 712–13, 579 N.Y.S.2d 742, 743 (2d Dep't 1992) (mem.) (dismissing because of incorrect

mailing); Finkelstein & Ferrara, *supra* note 29, at §§ 14:182, at 14–105, 15:342, at 15–205.

99. 183 A.D.2d 687, 688; 583 N.Y.S.2d 275, 278 (2d Dep't 1992) (mem.).

100. 172 Misc. 2d 784, 794, 660 N.Y.S.2d 247, 254 (Civ. Ct., Bronx Co. 1997) citing 6 RCNY § 2-238.

101. *See Karlsson & Ng v. Cirincione*, 186 Misc. 2d 359, 360–61, 718 N.Y.S.2d 783, 784–85 (Civ. Ct., N.Y. Co. 2000).

102. S*ee* Wendt & Ngai, *supra* note 43, at 11.

103. 22 NYCRR 208.42(h) (Civ. Ct.); 22 NYCRR 210.42(d) (City Ct.); 22 NYCRR 212.42(d) (Dist. Ct.).

104. Civ. Ct. Act § 401(c).

105. CPLR 306(d); RPAPL 735(2); Finkelstein & Ferrara, *supra*, note 29, at §§ 14:147 at 14–87, 15:307, at 15–187.

106. *See, e.g.*, *Halpern v. State Furniture Co.*, 186 Misc. 551, 553, 61 N.Y.S.2d 618, 619 (App. Term 1st Dep't 1946) (*per curiam*) ("[A]n omission to place upon the copy petition served the name of the notary, is not a jurisdictional defect.").

107. Civ. Ct. Act § 411; UDCA § 411; UCCA § 411; UJCA § 411; *Fame Equities & Mgmt. Co. v. Malcolm*, N.Y.L.J., Oct. 28, 1996, p. 27, col. 4 (App. Term 1st Dep't) (*per curiam*).

108. *See, e.g.*, *Shields v. Benderson Dev. Co., Inc.*, 76 Misc. 2d 322, 323 350 N.Y.S.2d 549, 551 (Monroe County Ct. 1973).

109. 22 NYCRR 208.42(i).

110. *Id.* 208.42(i)(2).

111. *Id.* 208.42(i)(1).

112. *Eight Assocs.*, 102 A.D.2d at 748, 476 N.Y.S.2d at 883; Finkelstein & Ferrara, *supra* note 29, at §§ 14:236, at 14–127, 15:393, at 15–227.

113. *See, e.g.*, *Baer v. Lipson*, 194 A.D.2d 787, 787, 599 N.Y.S.2d 618, 619 (2d Dep't 1993) (mem.), *appeal dismissed*, 83 N.Y.2d 788, 611 N.Y.S.2d 127, 633 N.E.2d 481 (1994) (denying respondent's motion to vacate default judgment because respondent failed to assert defense of lack of personal jurisdiction and did not rebut proof of service by affidavit or statement based on personal knowledge).

114. *New Generation Mgmt. Corp. v. Park*, 32 H.C.R. 289A (Civ. Ct., N.Y. Co. 2003).

115. 81 N.Y.2d 56, 59, 595 N.Y.S.2d 729, 730, 611 N.E.2d 768, 769 (1993).

116. 192 Misc. 2d 577, 580, 746 N.Y.S.2d 875, 877-78 (App. Term 2d Dep't 9th & 10th Jud. Dists.) (mem.).

117. *2290 12th Ave. LLC v. Doe*, 30 HCR 695A, N.Y.L.J., Dec. 5, 2002, p. 22, col. 5 (Civ. Ct., N.Y. Co.).

118. *Parkchester Apts. Co. v. Walker*, 24 H.C.R. 488A, N.Y.L.J., Sept. 16, 1996, p. 28, col. 3 (App. Term 1st Dep't) (*per curiam*) ("The purported defects in the demand were not 'jurisdictional.' 'The failure of petitioner to comply with a statutory notice requirement . . . represents merely the failure to comply with a condition precedent to suit and cannot properly be said to affect the court's jurisdiction.'") (quoting *170 W. 85th Tenants Ass'n v. Cruz*, 173 A.D.2d 338, 339, 569 N.Y.S.2d 705, 707 (1st Dep't 1991) (mem.)). (alteration in *Walker*); Finkelstein & Ferrara, *supra* note 29, at § 14:235, at 14–127.

119. *67-25 Dartmouth St. Corp. v. Silberman*, 21 HCR 409A, N.Y.L.J., Aug. 11, 1993, p. 24, col. 5 (Civ. Ct., Queens Co.).

120. *Glorious v. Siegel*, 33 HCR 74A, 5 Misc. 3d 1015(A), 5 Misc.3d 1015(A), 798 N.Y.S.2d 709, 2004 N.Y. Slip Op. 51378(U), *4, 2004 WL 2609413, at *4 (Civ. Ct., N.Y. Co., Sept.15, 2004) (Gerald Lebovits, J) (denying traverse because "[r]espondent did not assert the allegations of improper service in a sworn affidavit included in his answer as required by CPLR 3020"); *106 E. 116th St., LLC v. Vergas*, 33 H.C.R. 185A, N.Y.L.J., Mar. 16, 2005 p. 19, col. 3 (Civ. Ct., N.Y. Co.) (holding that personal-jurisdiction defense will be stricken if process server's affidavit of service is wholly proper on its face and if person with knowledge does not contradict by affidavit).

121. *See, e.g.*, *Hasbrouck v. City of Gloversville*, 102 A.D.2d 905, 477 N.Y.S.2d 486, 487 (3d Dep't 1984) (mem.), *aff'd*, 63 N.Y.2d 816, 483 N.Y.S.2d 214, 472 N.E.2d 1042 (1984) (mem) (discussing summary-judgment motions).

122. *Clarkson Arms v. Arabatiz*, 19 H.C.R. 424B, N.Y.L.J., July 3, 1991, p. 23, col. 6 (App. Term 1st Dep't) (*per curiam*) (holding bare conclusory remarks that service of process fails to comply with RPAPL 735 are insufficient to warrant hearing); *De Meo v. Travalos*, 12 H.C.R. 256C, N.Y.L.J., Nov. 7, 1984, p. 13, col. 3 (holding that sworn denial of receipt of process requires traverse hearing).

123. *Jackson v. Hertz*, 20 H.C.R. 65A4, N.Y.L.J., Aug. 19, 1992, p. 23, col. 3 (Civ. Ct., N.Y. Co.) (holding that when tenant moves to dismiss for lack of personal jurisdiction, landlord must attach copy of affidavit of service to opposing papers).

124. *See In re Shaune TT*, 251 A.D.2d 758, 758, 674 N.Y.S.2d 457, 458 (3d Dep't 1998) (holding respondent's "conclusory denial of service was insufficient to raise an issue of fact necessitating a traverse hearing"); *Carlino v. Cook*, 126 A.D.2d 597, 598, 511 N.Y.S.2d 38, 40 (2d Dep't 1987) (mem.) (allowing party to refute process server's affidavit of service by "detailed and specific controversions" of pertinent allegations).

125. *See Worrell v. 845 E. 136th St., Inc.*, 129 A.D.2d 528, 529, 514 N.Y.S.2d 380, 380 (1st Dep't 1987) (mem.); *see* Wendt & Ngai, *supra* note 43, at 14 (citing *Runyon v. Mirsky*, N.Y.L.J., Feb. 24, 1992, p. 3, col. 1 (App. Term 1st Dep't) (*per curiam*)).

126. *Matthews v. Carman*, 122 App. Div. 582, 586, 107 N.Y.S. 694 (1st Dep't 1907) (*per curiam*).

127. *President St. v. Bernstein.*, 21 H.C.R. 337A, N.Y.L.J., June 23, 1993, p. 30, col. 5 (Civ. Ct., Kings Co.).

128. 7 Misc. 3d 1009(A), 2003 N.Y. Slip Op. 51754(U), 2003 WL 24038304, N.Y. Misc. LEXIS 1992 (Civ. Ct., N.Y. Co., Aug. 8, 2003) (Gerald Lebovits, J.).

129. *Id.*, 2003 N.Y. Slip Op. 51754(U), at *2, 2003 WL 24038304, at *2, 2003 N.Y. Misc. LEXIS 1992.

130. CPLR 2103(a); *Grid Realty Corp. v. Gialousakis*, 129 A.D.2d 768, 768, 514 N.Y.S.2d 760, 760 (2d Dep't 1987) (mem.) (upholding propriety of corporate officer's service of process); *N.Y. City Hous. Auth. v. Smith*, 18 H.C.R. 469A, N.Y.L.J., Oct. 3, 1990, p. 23, col. 4 (Civ. Ct., N.Y. Co.) (upholding landlord's employee's service of petition and notice of petition).

131. GBL §§ 89-u, 89-cc; *see also* GBL § 89-t; N.Y.C. Admin. Code §§ 27–403 (providing that in New York City, process servers are persons who charge a fee or who serve process five or more times "in the twelve month period immediately preceding the service in question" and are subject to licensing and record-keeping requirements).

132. Scherer, *supra* note 3, at § 7:154, at 7–61.

133. N.Y.C. Admin. Code §§ 20–403.

134. *E.g.*, *Timur on Fifth Ave. Inc. v. Jim, Jack & Joe Realty Corp.*, N.Y.L.J., Sept. 29, 2000, p. 29, col. 1 (App. Term 1st Dep't) (*per curiam*); Scherer, *supra* note 3, at § 7:159, at 7–63.

135. *See, e.g.*, *Barr v. Dep't of Consumer Affairs*, 70 N.Y.2d 821, 823, 517 N.E.2d 1321, 1322 (1987) (upholding fine and revocation of license of process server who consistently failed to maintain proper records of service of process); Scherer, *supra* note 3, at § 7:159, at 7–63.

136. 22 NYCRR 208.29; *see also Cent. Conn. Teachers Fed. Credit Union v. Raton*, N.Y.L.J., Apr. 24, 1997, p. 32, col. 3 (App. Term 2d Dep't 2d & 11th Jud. Dists.) (mem.) ("Such records are vital to a proper cross examination."); *Citibank, N.A. v. Mendelsohn*, 25 H.C.R.598A, N.Y.L.J., Nov. 12, 1997, p. 30, col. 3 (Civ. Ct., Kings Co.) ("The first [proceeding] was dismissed because the process server failed to produce his logbook. . . .").

137. GBL §§ 89-u, 89-cc.

138. *Id.* § 89-u; 89-cc; *see generally Leander v. Burnett*, 25 H.C.R 645A, N.Y.L.J., Dec. 3, 1997, p. 25, col. 5 (Civ. Ct., Kings Co.).

139. *Bullen v. Ctr. Garage Corp.*, 31 H.C.R. 486A, N.Y.L.J., Aug. 29, 2003, p. 19, col. 2 (Civ. Ct., N.Y. Co.).

140. *E.g.*, *Liberman v. Gelstein*, N.Y.L.J., Oct. 3, 1990, p. 21, col. 5, 18 H.C.R. 462A (Sup. Ct., N.Y. Co.).

141. On the other hand, the court in *475 Sixth Ave. Props. Corp. v. Otto*, 11 H.C.R. 176B, N.Y.L.J., July 13, 1983, p. 12, col. 1 (App. Term 1st Dep't) (*per curiam*), held that a traverse court may not impose traverse costs on a tenant whose traverse motion is overruled.

142. *E.g.*, *Silber v. A.J. Clarke, Inc.*, 14 H.C.R. 322D, N.Y.L.J., Sept. 26, 1986, p. 12, col. 4 (App. Term 1st Dep't) (*per curiam*) (overruling traverse based on process server's credibility).

143. *Inter-Ocean Realty Assocs. v. JSA Realty Corp.*, 152 Misc. 2d 901, 902, 587 N.Y.S.2d 837, 838 (Civ. Ct., N.Y. Co. 1991) (dismissing proceeding because process server failed to produce police report or other probative evidence about whereabouts of logbook: "Courts must strictly uphold compliance by process servers with the regulations to soundly effectuate a public policy that prevents questionable service practices."); *26th W. Assocs. v. Slattery*, 13 H.C.R. 373A, N.Y.L.J., Nov. 13, 1985, p. 13, col. 6 (Civ. Ct., N.Y. Co.) (holding that process server's log held minimal weight in traverse hearing); *Griffith v. Bessent*, 21 HCR 434A (Civ. Ct., Kings Co. 1993) (holding that failure to maintain bound log of service of process together with lack of independent memory of how many copies of process were served mandates dismissing petition).

144. Scherer, *supra* note 3, at § 7:155, at 7–62.

145. N.Y.C. Admin. Code §§ 89, 20–405.

146. S*ee, e.g.*, *Ezragim Assocs., LLC v. J.H. Design, Inc.*, 4 Misc. 3d 130(A), 791 N.Y.S.2d 869, 2004 N.Y. Slip Op. 50684(U), 2004 WL 1489858, 32 H.C.R. 398B, N.Y.L.J., June, 22, 2004, p. 23, col. 2 (App. Term 1st Dep't, June 17, 2004) (*per curiam*) ("[T]he court's refusal to grant landlord an adjournment of the traverse so that it could produce proof of the certified mailings of the demand for rent and nonpayment petition was an improvident exercise of discretion.").

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at New York Law School. Matthias W. Li is an associate at Finkelstein Newman LLP. This article was written for a series of lectures Judge Lebovits gave in 2006 to New York State court attorneys at the New York State Judicial Institute in White Plains, New York.

This article originally appeared in the Spring 2006 issue of the N.Y. Real Property Law Journal*, Vol. 34, No. 1, published by the Real Property Law Section of the New York State Bar Association.*

Appearances of Impropriety Can Be Deceiving

By Brad Rudin and Betsy Hutchings

An Ethical Issue

As jury selection is about to begin, the ADA asks the court to disqualify you and appoint substitute counsel for the accused. The basis for this motion? A colleague in your public defender office once represented a bystander witness who will testify for the People. While the ADA does not cite any disciplinary rule in support of his motion to disqualify, he tells the judge that the prior representation creates an "appearance of impropriety."

The ethical issue raised in this hypothetical is not uncommon because former clients frequently emerge as prosecution witnesses in criminal cases. Too often, judges presiding over criminal proceedings rely on the imprecise appearances principle to resolve ethical issues arising from counsel's current representation of the accused and prior representation of an accuser.

Undue reliance on the appearances principle in criminal proceedings results from inattention to the disciplinary rules governing conflicts arising from a prior representation. In criminal proceedings, the vague and advisory Canon 9 appearances principle has been allowed to trump the precise and mandatory rules[1] governing former client conflicts.

These disciplinary rules are too frequently ignored in criminal proceedings because virtually all appellate case law interpreting DR 5-108 arises in the context of civil litigation (the rules allowing interlocutory appeals in civil cases favor the development of appellate case law interpreting DR 5-108). The civil context of these cases has discouraged the criminal defense bar from delving deeply into the law of disqualification. Inattention to DR 5-108, in turn, has lead to an excessive reliance on the appearances principle.

The Allure of the Appearances Principle

While the appearances principle, because of its simplicity, has a superficial appeal, the drawback of the principle is that it subordinates the interests of the accused to the interests of the former client. In other words, a judge applying the appearances principle places a premium on the former client's confidentiality interests (even where such interests may not be threatened) and gives less weight to the current client's interest in staying with trusted counsel and avoiding the delay that inevitably results from disqualification.

Thus, when faced with a disqualification motion based on a prior representation, counsel should ask the court to look beyond the *appearance* of impropriety and instead determine whether there exists an *actual* impropriety under the Disciplinary Rules set forth in the New York Code of Professional Responsibility.[2] The basic argument that challenged counsel should make is that the court should apply the rules expressly designed to regulate former client conflicts rather than rely on the ambiguous principle set forth in Canon 9: "A Lawyer Should Avoid Even The Appearance of Impropriety."

This approach effectuates the distinction between canonical principles and disciplinary rules: The Canons of Ethics are pronouncements of principle issued by the New York State Bar Association while the Disciplinary Rules constitute the official standard (promulgated by the Appellate Division) of attorney conduct in the State of New York. Apart from this distinction, it should be argued that DR 5-108 provides a sounder basis of decision because the rule guards against *actual* impropriety while the Canon 9 principle seeks to prevent only *apparent* impropriety. Certainly, the profession has a greater interest in preventing actual improper conduct than in prohibiting conduct that merely appears improper to uninformed or biased observers but is actually consistent with the Disciplinary Rules.

Disciplinary Rule 5-108

Disciplinary Rule 5-108 provides that, with certain exceptions, a lawyer who has represented a client in a matter shall not, without the consent of the former client, and after full disclosure represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client[3] or use confidences or secrets of the former client.[4] Thus, the Disciplinary Rules regulate—but do not prohibit—representations where a former client emerges as an adverse witness or party.[5]

Substantially Related Matters and Materially Adverse Interests

Where the current and prior representations are "substantially related," counsel is barred from representing a client whose interests are "materially adverse" to the interests of a former client.[6] Because counsel's current representation of the accused rarely has any relationship—much less a substantial relationship—to counsel's prior representation of the criminal defendant turned prosecution witness, the (A)(1) rule has limited application in criminal cases.

Nevertheless, where the subject matter of the former and current representation are substantially related, the court must determine whether the interests of the current client are adverse to the interests of the former client. A federal civil case, *Skidmore v. Warburg Dillon Read LLC*,[7] demonstrates that the scope of the adverse interests rule.

In *Skidmore*, plaintiff's counsel in an age discrimination case had previously represented another party who had settled his substantially related discrimination case against the same defendant. Subsequent to the settlement, the former client emerged as a likely witness against counsel's current client.[8]

Citing DR 5-108(A)(1), the Southern District denied the defendant employer's disqualification motion because " . . . [lawyer] Brickman's representation of [current client] Skidmore cannot be considered 'materially adverse' to [former client] Matthews under any possible interpretation of that term. Matthews' settlement with UBS [the pre-merger predecessor of the defendant] has long been completed and no argument has been made that any aspect of the ongoing Skidmore litigation can harm resolution of Matthews' case in any way."[9]

While acknowledging that lawyer Brickman's attempt to discredit Matthews "may be embarrassing to Matthews" and that cross-examination of a former client may appear "unseemly," the Southern District concluded that "there is no tangible prejudice that would result. . . ."[10] Considering the appearances principle, the *Skidmore* Court—restating Second Circuit doctrine—observed that "an appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest of cases."[11]

Shifting our focus back to criminal litigation, it seems clear that, in the unlikely event that the current and prior representations share a common subject matter, the *Skidmore* Court's analysis of DR 5-108(A)(1) would allow counsel to continue the representation of a current client where the former client—now a prosecution witness—had no stake in the outcome of the trial. For example, opposing a motion to disqualify, counsel may argue that a prosecution witness who merely testifies about the color of the getaway car used in the robbery of a supermarket does not have "interests" opposed by the current client.

Confidences and Secrets

Far more likely to arise in a criminal context is the situation where representation of the current client may result in the use of the confidences and secrets of the former client.[12] While the (A)(2) rule simply prohibits counsel from using the confidences and secrets of a former client (subject to certain exceptions), the Court of Appeals has expanded the scope of the rule by holding that disqualification is required where there exists a "reasonable probability" that the impermissible disclosure of confidential information will result from the current representation.[13]

Yet the "reasonable probability" doctrine does not constitute a *per se* rule of disqualification. In the leading case on this issue, the defendant in a products liability case sought to disqualify the plaintiffs' law firm because a lawyer previously associated with that firm, Stroock & Stroock & Lavan, had represented the defendant asbestos manufacturer in a related case in another jurisdiction.[14] Reversing the disqualification order, the Court made a distinction between situations in which the challenged lawyer *personally* represents interests adverse to the former client and those in which the *firm* represents such interests but the lawyer who handled the prior representation has departed.[15]

Although the Court found that a presumption of disqualification applies in either situation, it found the presumption could be rebutted under the facts presented in *Solow*. ". . . [Plaintiffs' counsel] Stroock should be allowed to rebut that presumption by facts establishing that the firm's remaining attorneys possess no confidences and secrets of the former client."[16]

The *Solow* Court's *rebuttable* presumption of disqualification would seem to apply in a situation in which Public Defender A, before his departure from the public defender organization years ago, represented W, now a prosecution witness in a pending case where Public Defender B represents the accused. Under the reasoning set forth in *Solow*, the public defender organization should be allowed to rebut the presumption of disqualification by coming forward with facts showing that confidential information possessed by Public Defender A has not been disseminated through the organization.[17]

The presumption of disqualification may be rebutted even where the "tainted" lawyer remains with the challenged firm. In a case involving The Legal Aid Society of New York City, the respondent in a Kings County parental rights termination proceeding moved to disqualify the Legal Aid Juvenile Rights Division (JRD) because the Criminal Defense Division (CDD) of Legal Aid had represented her in a related criminal case in Bronx County.[18]

Denying the disqualification motion, Family Court—following the reasoning set forth in *Solow*—found that "there is virtually no danger that the Brooklyn JRD attorney may misuse the respondent mother's confidences to the CDD attorney who represented her in the Bronx case."[19] " . . . [T]here is no evidence that any information obtained by the Bronx CDD attorney ever was shared with JRD in Brooklyn. In fact, the [JRD] law guardian avers, without contradiction, that

she obtained no information from Bronx CDD about the mother's prosecution."[20]

T'Challa D. may be cited by challenged counsel in those situations where the District Attorney seeks to vicariously disqualify a public defender organization on the grounds that a staff attorney employed by the organization previously represented a prosecution witness. Yet note that the facts in *T'Challa D.* strongly argued against disqualification of JRD: the two Legal Aid lawyers worked in two separate divisions (JRD and CDD) *and* in different counties (Kings and Bronx). Where possible, challenged counsel should point to facts showing the improbability of an impermissible disclosure of confidential information.[21]

The Rise and Decline of the Appearances Principle

The New York Code of Professional Responsibility was first promulgated in 1970. It was not until the Code was amended in 1990, however, that DR 5-108 was added to the Code. In the absence of a disciplinary rule expressly regulating former client conflicts during this 20-year period, the Canon 9 appearances principle (incorporated in the 1970 Code) emerged as the touchstone for the resolution of former client conflicts.

Yet after the 1990 amendment to the Code there was less reason to apply Canon 9 to disqualification cases based on former client conflicts. For one thing, Canon 9 stands as the ethical principle under which are set forth disciplinary rules unrelated to conflicts rooted in a prior representation. DR 9-101 applies to the conduct of lawyers who are present (or former) holders of public office while DR 9-102 regulates the administration of client funds.[22]

Much criticized by scholars, abandoned by the ABA's more recently promulgated Model Rules (not yet adopted in New York), spurned by federal courts in the Second Circuit,[23] the "mostly dead dog" of appear-ances[24] still lingers in New York jurisprudence pertaining to former client conflicts.

But the bark of the appearances principle is less loud since the 1990 amendment adding DR 5-108 to the Disciplinary Rules. The emphasis on the appearance of impropriety found in *Cardinale v. Golinello*[25] has been replaced with the *Solow* Court's careful attention to DR 5-108.[26]

The Flawed Subjectivity of the Appearances Principle

While beauty may lie in the eye of the beholder, the propriety of counsel's representation of accused should not be based on a similarly subjective evaluation. This is especially true where the ADA—the beholder of the purportedly disqualifying conflict—views counsel for the accused through the biased lens of an adversary. An appearance rooted merely in the bias of an adversary should not form the basis for disqualification.

Similarly, an appearance of impropriety based on the beholder's ignorance should not disqualify counsel from continuing in a case. Suppose John Q. Public—ignoring the disciplinary rules applicable to a former client conflict—concludes that counsel should be disqualified because the representation *appears* improper. Why should uninformed lay opinion about the propriety of a representation serve to disqualify a lawyer where that opinion is not consistent with the disciplinary rules?[27]

As Professor Wolfram observes, if the rules regulating conflicts of interest are soundly based "they should be followed—possible and ill-founded, adverse public opinion to the contrary notwithstanding."[28]

In any event, public opinion (and indeed legal opinion) about what constitutes an appearance of impropriety has little value because of the ambiguity of the appearances principle. Criticizing the vagueness of the appearances principle, another ethics treatise concludes that the "phrase is therefore not really a test but an invitation for *ad hoc* or *ad hominem* decision making."[29]

Responding to a Motion to Disqualify

When confronted with a motion to disqualify based on the Canon 9 appearances principle, counsel for the accused should ask the court to refrain from summarily deciding the issue on the basis of this ambiguous doctrine and instead reach a decision based on an analysis of the disciplinary rules expressly promulgated to regulate former client conflicts.

Defense counsel should ask the court to require the People to come forward with facts showing that the confidentiality interests of the former client will be compromised by the current representation.[30] If the ADA knew (or should have known) about the purportedly disqualifying conflict well before the start of trial, defense counsel should ask the court to deny the motion because of the moving party's laches.[31]

Conclusion

Undue attention to the vague appearances principle too often distracts judges from paying careful attention to DR 5-108, the rule expressly designed to regulate lawyer conduct where a former client emerges as an adverse witness or party.

Remember that in life appearances can be deceiving. And so may be the appearance of impropriety.

Endnotes

1. S*ee* DR 5-108.
2. *Id*.
3. DR 5-108(A)(1).
4. DR 5-108(A)(2).
5. *See Jamaica Public Service Co. v. AIU Insurance Co.*, 92 N.Y.2d 631, 684 N.Y.S.2d 459, 461 ("The Code of Professional Responsibility does not in all circumstances bar attorneys from representing parties in litigation against former clients.").
6. DR 5-108(A)(1).
7. 2001 WL 504876 (S.D.N.Y. 2001).
8. *Id*. at *1.
9. *Id*. at *4.
10. *Id*.
11. *Skidmore* at *4.
12. *See* DR 5-108(A)(2).
13. *See Jamaica Public Service*, 684 N.Y.S.2d at 462 (finding no such probability where counsel's work for the former client was not related to the case at bar).
14. *Solow v. W.R. Grace & Co.*, 83 N.Y.2d 303, 610 N.Y.S.2d 128 (1994).
15. *Id*. at 133.
16. *Id*.
17. *See* DR 5-108(C) (limiting the impact of the DR 5-105(D) vicarious disqualification rule; *U.S. v. Reynoso*, 6 F. Supp. 2d 269 (S.D.N.Y. 1998) (denying the government's disqualification motion and finding the DR 5-105(D) vicarious disqualification rule inapplicable to public defender organizations).
18. In re T'Challa D., 196 Misc. 2d 636, 766 N.Y.S.2d 500 (Family Ct., Kings Co. 2003), aff'd, 3 A.D.3d 569, 770 N.Y.S.2d 649 (2d Dep't 2004).
19. 766 N.Y.S.2d at 508.
20. *Id*.
21. *See Cummin v. Cummin*, 264 A.D.2d 637, 695 N.Y.S.2d 346 (1st Dep't 1999) (disqualification denied where the lawyer professed no memory of brief consultation six years before and the firm's records consisted only of a billing document).
22. *See Leber Associates LLC v. The Entertainment Group Fund*, 2001 WL 1568780 (S.D.N.Y. 2001) (noting that "Canon 9 does not confer a roving moral commission to disqualify attorneys based on conduct specifically treated in other Canons.").
23. *See Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979).
24. C. Wolfram, "Former Client Conflicts," 10 Georgetown Journal of Legal Ethics 677, Summer 1997 at 686.
25. 43 N.Y.2d 288, 401 N.Y.S.2d 191, 195 (1977).
26. *See Mulhern v. Calder*, 196 Misc. 2d 818, 763 N.Y.S.2d 741 (Sup. Ct., Albany Co. 2003) (noting that while the Court of Appeals "has not specifically overruled *Cardinale's* harsh and mechanical approach," the Court has more recently "established that more than the mere possibility of conflict is required for disqualification of attorneys.").
27. *See The Restatement (Third) of Law Governing Lawyers*, American Law Institute: 2001 § 121, Comment (c)(iv) at 250 (disapproving the appearances principle because of its application to "situations that might appear improper to an uninformed observer or even an interested party.").
28. C. Wolfram, *Modern Legal Ethics*, West: 1986 at 320–321.
29. R. Rotunda & J. Dzienkowski, *Legal Ethics*, West: 2005 at 444, fn. 4.
30. *See Aryeh v. Aryeh*, 14 A.D.3d 634, 788 N.Y.S.2d 622 (2d Dep't 2005) ("The party seeking to disqualify a law firm or an attorney bears the burden on the motion.").
31. *See St. Barnabas Hospital v. NYC Health & Hospitals Corp.*, 7 A.D.3d 83, 775 N.Y.S.2d 9 (1st Dep't 2004) (laches is a relevant issue because "inordinate delay" suggests the moving party's intent to seek a tactical advantage).

Brad Rudin, a former supervising attorney with the Criminal Defense Division of The Legal Aid Society (NYC), is a staff attorney with Prisoners' Legal Services of New York in Ithaca. Betsy Hutchings, previously a staff attorney at the Criminal Appeals Bureau of Legal Aid, is the managing attorney of the Ithaca office of PLS. Together, they have contributed articles on legal ethics to the New York Professional Responsibility Report, the New York Law Journal and the newsletter published by the Tompkins County Bar Association. Mr. Rudin was the co-chair of the 2005 NYSBA Criminal Law CLE. Mr. Rudin and Ms. Hutchings can be reached at hutchings.rudin@juno.com.

This article originally appeared in the Winter 2006 issue of the New York Criminal Law Newsletter, *Vol. 4, No. 1, published by the Criminal Justice Section of the New York State Bar Association.*

Late Notice to Malpractice Carrier

By Martin Minkowitz

A recent front page article from the *New York Law Journal* caught my attention when I read "a professional liability insurer need not defend a law firm that failed to provide advance notice of a malpractice claim that "any reasonable" attorney would have foreseen, a New York judge has ruled."[1]

Looking at the decision itself, I thought it was worthwhile to get a better understanding of what caused a Supreme Court Judge in New York County to make such a ruling. It turns out that the decision arises out of a workers' compensation claim before the Workers' Compensation Board, which further piqued my interest when I began to read the entire 13-page decision to see what constituted foreseeability by a reasonable attorney. The judge is a well-respected jurist on the bench for many years and so it was interesting to read his analysis and interpretation of the law as it applied to the facts of this case.

The plaintiffs, a law firm and a partner of that firm, had a workers' compensation case representing the claimant before the Workers' Compensation Board. The testimony of the treating physician was not given because the physician failed to appear, as did the claimant. The physician's testimony was precluded, which was sustained on appeal to the Board.

A second physician was scheduled to appear and also failed to do so on two occasions. When the second doctor failed to appear again, plaintiff's counsel advised the claimant to accept a settlement offer by the employer, which the claimant rejected. The second doctor's testimony was then also precluded and it was noted that the unavailability of the second doctor was not filed with the Board in advance of the hearing. The employer's doctor testified and was not cross-examined. As a result, the Board found no further causally related disability and ruled in favor of the employer. The Board on appeal sustained a finding of no-further disability, noting that there was no indication in the record that plaintiffs had requested cross-examination of the employer's doctor. Therefore, the employer's doctor's medical report was uncontradicted.

Claimant, a month later, obtained new counsel and 4 months later served a summons and complaint alleging legal malpractice. In her complaint, claimant alleged a failure to give notice to the Workers' Compensation Board Judge of the anticipated non-appearance of the witness, failure to notify claimant of the hearings, and failure to cross-examine the employer's medical witness. The plaintiffs notified their malpractice carrier. The carrier disclaimed based on a provision in the policy, which read as follows:

> The Insured, as a condition precedent to this policy, shall *immediately* provide Notice to the Company if any Insured has any basis to believe that any Insured has breached a professional duty or to foresee that any such act or omission might reasonably be expected to be the basis of a Claim. (emphasis added)

In the decision by the Workers' Compensation Board, plaintiffs were criticized for failing to explain why the letter from the second doctor was not mailed to the Workers' Compensation Board in advance of the hearing and for failing to cross-examine the employer's doctor, leaving the report unchallenged. The insurance company alleged that no reasonable attorney upon reviewing the criticisms leveled by the Board could have ignored the potential of a claim for malpractice being asserted.

It did seem at this point that the plaintiffs, who allege that they did not believe that any malpractice had been committed, which needed to be reported to their malpractice carrier, should have been given some benefit of the doubt.

In the decision, the Court states that

> The issue is not whether or not plaintiffs actually committed malpractice, or whether they subjectively believed that there was no conduct which could give rise to a claim, but whether a reasonable attorney would have expected a malpractice claim under the circumstances.

The Court therefore makes the distinction between whether malpractice was actually committed or

whether a claim should be expected notwithstanding. The court then concluded that plaintiffs did have a reasonable belief of non-liability and noted that

> [t]he test for determining whether the notice provision has been triggered is whether the circumstances known to the insured at that time would have suggested to a reasonable person the possibility of a claim.

It therefore found that the filing of notice was untimely and awarded summary judgment to the insurance company, finding it has no duty to defend and idemnify the plaintiff in the underlying action.

I am guessing that this decision will be the subject of further review, but I have no information with regard to it. It would appear at first blush that counsel is being held under these facts, which occur often in the Workers' Compensation Board arena, to a very high duty and obligation to report even if it does not believe it has committed malpractice. It may be that the controlling consideration was the determination which was included in the Workers' Compensation Board appeal decision criticizing the attorneys.

Does this mean in every case where the Court makes a determination with a reference to omissions or actions of counsel, and where client obtains new counsel, that should make the attorney aware that he should put his malpractice carrier on notice, or risk losing both counsel and indemnity, even if no prejudice is shown?

Love to hear from our readers on this one, particularly the workers' compensation practitioners.

Endnote

1. *Cass et anno v. American Guaranty and Liability Insurance Company, et anno*, Supreme Court, New York County, N.Y.L.J., 11/1/06.

Martin Minkowitz is a partner at the New York City law firm of Stroock & Stroock & Lavan, LLP.

Ethics Opinion No. 798

Committee on Professional Ethics of the New York State Bar Association

9/28/06

Topic: Practice of criminal law by legislator/lawyer

Digest: A lawyer/county legislator may not represent criminal defendants in cases involving members of a police department or district attorney's office over which the legislature has budget or appointment authority. It is irrelevant whether the county or the budget is large or the representation involves only plea bargaining. If the lawyer/legislator is employed by a law firm, other lawyers in the firm are not *per se* vicariously disqualified, but imputed disqualification may be appropriate where members of the public are likely to suspect that the lawyer/legislator's influence will have an effect on the prosecution of the case.

Code: DR 1-102(A)(5), DR 5-101(A), DR 5-105(A) and (B), DR 5-105(D), DR 5-108(A) and (B), DR 8-101(A), Canon 9, DR 9-101, DR 9-101(B)(1)(a).

Question

1. May a lawyer who is also a member of a county legislature practice criminal law in the county where he/she is a legislator if the legislature has budget authority over the police department or district attorney's office? If the lawyer is personally disqualified from representing a client, and the lawyer is associated with a law firm, are the other lawyers in the firm vicariously disqualified?

Discussion

2. N.Y. State 692 (1997) and 702 (1998) prohibit a legislator/lawyer from participating in a matter that requires the legislator to cross-examine a police officer, or to be adverse to a prosecutor, who works for the county where the legislature has the authority to approve the budget of the county. Thus a legislator/lawyer could represent defendants in federal criminal cases or criminal cases brought by the attorney general of New York, but could not undertake representations in any court in the county in which the budget for the prosecutors or law enforcement witnesses must be approved by the legislative body on which the lawyer/legislator sits. We have been asked a number of questions pertaining to the practice of criminal law by a county legislator:

   (1) Whether N.Y. State 692 and 702 may be distinguished where the county in which the legislator serves is large and has a large budget;

   (2) Whether the lawyer/legislator may, with the advance consent of the client, handle criminal work in that county if the work involved only plea bargaining, on the understanding that if more were required, the lawyer/legislator would pass the case to another lawyer; and

   (3) Whether the lawyer/legislator may take a position in a criminal defense firm in a nearby county that represents criminal-defense clients in the county where the lawyer is a legislator, if the lawyer/legislator is screened from those matters.

Size of County or Budget

3. As we noted in N.Y. State 692, this Committee has been addressing the limits of the private law practice that may ethically be maintained by a part-time legislator for more than 30 years. The purpose of ethical restrictions on the practice of criminal law by legislators is to prevent private clients from retaining a part-time public official in the hope of gaining an improper advantage as a result of the lawyer's public office. DR 8-101(A). They also are designed to prevent public suspicion that the client may be gaining some improper advantage by retaining the public official. *Id*. For example, if the lawyer/legislator would be adverse to law enforcement authorities (*e.g.*, because he or she would have to cross-examine them) or prosecutors over whom the legislature has budgetary control or influence, we believe that the lawyer/legislator should be disqualified because of the possibility that the law enforcement officers or prosecutors would exercise undue caution in handling the case.

4. In N.Y. State 431 (1976), we distinguished between whether the legislature had line item approval over members of the prosecutor's office or rather appropriated a lump sum for the entire office, leaving it to the district attorney to set the salaries of his or her assistants. We allowed the

lawyer-legislator to be adverse to a prosecutor or law enforcement officer in the latter case. In N.Y. State 692, however, we rejected that distinction. Although one of the reasons for this rejection was that an appearance of impropriety might exist where a small legislature, small DA's office or small police department was involved in a lump sum budget approval, we did not limit disqualification to these instances. Rather, we stated that a lawyer-legislator should not take on a matter that will require the lawyer to cross-examine a police officer from a police department over which the legislature exercises budgetary or appointment authority or be adverse to a prosecutor whose office is similarly affected. We believe the concerns that motivate this prohibition apply regardless of the size of the legislature at issue. Accordingly, the fact that the legislator's county is large and has a large budget is irrelevant to whether he or she may practice criminal law in the county.

Representation Involving Solely Plea Bargaining

5. This Committee has a series of opinions dealing with the issue of whether a lawyer may limit the scope of representation of a client. For example, in N.Y. State 604 (1989), we held that a lawyer whose client is the subject of a grand jury investigation that could result in serious felony charges and does not have sufficient funds to pay for the lawyer's services beyond the grand jury stage may enter into a limited-scope retainer, provided that the limitation is consistent with competent representation under the Lawyer's Code of Professional Responsibility (the "Code") and provided that the lawyer makes certain disclosures to the client. We express no opinion as to whether a representation limited to post-indictment plea bargaining would be consistent with competent representation under the Code.

6. Even assuming that limiting the scope of the representation to plea bargaining were appropriate under other circumstances, however, we do not believe that a limited representation would circumvent the conflicts described above. In plea bargaining, the lawyer/legislator still would have to conduct an investigation and interview members of the police force, and would be bargaining with the members of the county prosecutor's office. Consequently, all of the policy reasons for our earlier positions apply in this case.

Vicarious Disqualification of Other Lawyers in the Legislator's Firm

7. The third question is whether the lawyer/legislator may take a position as associate, partner or "of counsel" lawyer in a criminal defense firm in a nearby county, without affecting the ability of other lawyers in that firm to represent criminal-defense clients in the county court of the county where the lawyer/legislator is a legislator. In particular, the inquirer asks whether any vicarious disqualification of the other lawyers in the firm can be avoided by the creation of a screening mechanism within the firm.

8. Prior to 1990, our opinions applied vicarious disqualification to the partners or associates of a lawyer-legislator. *See, e.g.*, N.Y. 415 (1975). At that time, DR 5-105(D) of the Code provided that, if one lawyer in a law firm was disqualified from representation, then all were disqualified. In 1990, however, the Code was amended so that such vicarious disqualification applies only when the primary lawyer was prohibited from undertaking the representation under DR 5-101(A), DR 5-105(A) or (B), DR 5-108(A) or (B) or DR 9-101.

9. In N.Y. State 692, the basis of the disqualification of the lawyer/legislator is stated to be DR 1-102(A)(5) (lawyer shall not "engage in conduct prejudicial to the administration of justice"), which is not one of the Code sections for which vicarious disqualification applies under the current text of DR 5-105(D). The ban on a lawyer-public officer appearing before or adverse to entities over which the public officer has some control might also be said to arise out of rules relating to the appearance of impropriety or improper influence. Canon 9, DR 8-101(A). None of these Code sections are sections to which automatic vicarious disqualification applies under DR 5-105(D).

10. In N.Y. State 773 (2004), we discussed whether a lawyer public official could be "of counsel" to a law firm without resulting in disqualification of the law firm from a private representation. We identified two different situations in which vicarious disqualification might apply: (1) Where the lawyer/public official was disqualified under one of the Code sections enumerated in DR 5-105(D), in which case the entire firm is disqualified. This includes a case where the bar against the lawyer/public official arises because the public official's duties might conflict with

the lawyer's duties to a client, in which case the disqualification arises out of DR 5-101(A), and other lawyers in the firm are subject to automatic imputation under DR 5-101(D). (2) Where the lawyer/public official was disqualified under a Code section other than one of the enumerated ones, in which case there is no *per se* imputed disqualification of the other lawyers in the firm, although, depending upon the circumstances of the proposed representations, disqualification might be appropriate.

11. Where the lawyer/legislator is a partner or associate of a law firm (including being associated as an "of counsel" lawyer) but does not undertake representations involving questioning of police or taking positions adverse to district attorneys, and does not undertake representations that might conflict with his or her duties as a public official (*e.g.*, lobbying for or against matters being considered by the legislature), we believe the other lawyers in the lawyer/legislator's firm should not be *per se* disqualified from undertaking representations that the lawyer/legislator cannot undertake. A representation by another lawyer in the firm may, however, involve facts and circumstances where the lawyer/legislator's disqualification should be imputed to everyone in the firm.

12. Because the purpose of disqualifying the lawyer/legislator is to avoid the public perception that the lawyer/legislator is misusing his or her influence over police and prosecutors, the circumstances in which others in the firm should be disqualified are those in which the public is likely to suspect that the lawyer/legislator's influence will still have an effect. This is most likely to occur where the lawyer/legislator is particularly prominent, *e.g.*, a party leader, or where the case is particularly prominent, even if the lawyer/legislator is not personally working on the case.

Screening

13. Formal screening may be used as a mechanism to ensure that the lawyer/legislator does not participate in the representation where the lawyer/legislator is personally disqualified. But if the facts and circumstances were such that the disqualification of the lawyer/legislator were imputed to others in the firm, screening would not prevent the imputation. The Code in New York does not generally recognize the efficacy of screening. The only instance where the Code allows screening is in the case of a former government employee who was personally and substantially involved in a matter as a public employee and who later joins the private sector. DR 9-101(B)(1)(a). That is not the case here.

Conclusion

14. A lawyer who is a member of a county legislature may not undertake criminal representation in cases involving members of a police department or district attorney's office over which the legislature has budget or appointment authority. The size of the county or budget is not relevant. The lawyer/legislator may not undertake such a criminal representation that involves only plea bargaining, since the plea bargaining would be with the members of the same prosecutor's office. If the lawyer/legislator is employed by a law firm, the lawyers in the firm are not automatically disqualified from undertaking cases that the lawyer/legislator could not accept, but imputed disqualification may be appropriate where members of the public are likely to suspect that the lawyer/legislator's influence will have an effect on the prosecution of the case.

(35-05)

Ethics Opinion No. 799

Committee on Professional Ethics of the New York State Bar Association

Explains: N.Y. State 779 (2004)

9/29/06

Topic: Advertising and solicitation; internet website directory

Digest: Lawyer may not participate in website that charges lawyer a fee to provide information about potential clients whom lawyer will then contact, where the website purports to analyze the prospective client's problem and selects which of its subscribing lawyers should respond, nor may the lawyer contact the prospective client by telephone unless the prospective client has expressly requested a telephone contact.

Code: DR 1-102(A), DR 2-101(A),(K), DR 2-103(A), (B), (D), DR 3-101 (A)

Question

1. May a lawyer use the services of a website that forwards inquiries from potential clients to subscribing lawyers, where the subscribing lawyers pay a fee to participate in the service and the service purports to analyze the prospective client's problem and select an appropriate lawyer for the matter?

Opinion

2. An increasing number of websites and internet services offer to put lawyers in touch with persons seeking representation. In this opinion, we address some of the ways in which the New York Code of Professional Responsibility (the "Code") applies to the use of such services.

3. The websites typically ask potential clients to identify themselves and state the nature of their legal problem. Using such information, the website contacts those lawyers who have subscribed to their service and indicated an interest in undertaking matters of the kind described by the prospect. One or more of the lawyers notified by the website may then contact the prospective client directly by return e-mail and/or by telephone, to ask whether the prospective client wants to retain that lawyer.

4. The extent to which the websites review and evaluate the potential client's statement of the legal problem varies. Some of the websites represent that a staff attorney will screen the requests submitted by the prospective client and screen the prospective attorneys. Others represent that they are not a referral service and do not review the prospective client's submission. Rather they forward the submission automatically to the law firms selected by the client. These sites may provide prospective clients with various tools to limit the attorneys listed, including filters for geographical area or practice area of the subscribing lawyers.

5. The services generally charge the lawyer a fee that is either refunded or discounted if the service does not provide an economic benefit to the subscribing lawyer. The websites the Committee has reviewed are run from locations outside New York.

6. Because of the wide variation in the structure and function of the many web-based services operating in this area, this opinion does not attempt to address every factual permutation. It is only a general guide to the ethical obligations of New York lawyers who make use of web-based matching services.

7. We discuss first two questions raised by the operation of these websites: (a) whether a lawyer who participates in the service is paying for a recommendation in violation of DR 2-103(B); and (b) whether a lawyer who contacts a client referred by the website is soliciting employment from a prospective client in violation of DR 2-103(A). We also provide guidelines regarding such services that arise out of other provisions of the Code.

Paying for a Recommendation in Violation of DR 2-103(B)

8. DR 2-103(B) provides, with exceptions not applicable here, "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. . . ." The question is whether the services "recommend or obtain employment."

9. We begin with the observation that a traditional advertising directory in paper form, such as the "yellow pages," is not recommending or ob-

taining employment within the meaning of DR 2-103(B). The question is at what point an online "directory" website becomes a referral service for purposes of DR 2-103(B). For example, an online yellow pages that provides tools by which a potential client can filter a list of attorneys by geography and/or practice area (*e.g.*, to create a list of attorneys in "Albany" who do "personal injury" work) does not violate the rule.

10. We find that the line is crossed, however, when a website purports to recommend a particular lawyer or lawyers for the prospective client's problem, *based on an analysis of that problem*. For example, if a potential client describes a slip-and-fall incident on an intake form and the website determines that the problem calls for a personal injury lawyer and then recommends one or more attorneys in that area, the website is "recommending" those lawyers.[1] This conclusion applies whether the website's selection of counsel is the result of human intelligence or a computer program designed to respond to certain key words (*e.g.*, if the potential client uses the words "injury", "doctor" or "fell" on an intake form, the program would characterize the problem as one of "personal injury" in order to recommend lawyers). Such activity is prohibited by other than a qualified lawyer referral service. DR 2-103(D).[2]

Improper Solicitation in Violation of DR 2-103(A)

11. We turn next to whether a lawyer using a website under the circumstances described above is engaged in improper solicitation if the lawyer contacts the prospective client by telephone. DR 2-103(A) provides:

> A lawyer shall not solicit professional employment from a prospective client:
>
> 1. By in-person or telephone contact, except that a lawyer may solicit professional employment from a close friend, relative, former client or current client.

12. While the Code clearly prohibits solicitation of clients by telephone contact, the question here is whether a lawyer responding to a prospective client's posting inviting such contact is engaged in "solicitation." We agree with the New York City Bar[3] that in such situations the client has invited the contact, and that an invited contact is not a "solicitation" within the meaning of the Code (the term is not currently defined). In view of the Code's express prohibition on telephone solicitation, however, we believe that follow-up contacts by phone must be preceded by a clear and unambiguous request from the potential client for telephone contact. For example, it generally would *not* be sufficient that the website contains a statement that by using the website the prospective client thereby consents to having one or more lawyers telephone the client. It generally *would* be sufficient if the potential client is specifically asked to check a box in order to authorize telephone contact.

Guidelines for Permissible Website Matching Services

13. In addition to the prohibitions contained in DR 2-103, the Code contains other relevant restrictions and rules, which we do not attempt to completely address here. A lawyer's public communications—including directory listings—may not be "false, deceptive or misleading," for example, and must include the name, office address and telephone number of the attorney or law firm whose services are being offered. DR 2-101(A); DR 2-101(K); N.Y. State 756 (2002) ("we believe the use of a web site or e-mail address as the sole identifier of a firm's office address does not satisfy the requirement of DR 2-101[K]").

14. Based on these rules and the foregoing discussion of DR 2-103, we suggest the following guidelines with respect to a website service in which a New York lawyer may pay to participate:

- refrains from recommending its subscribing lawyers or otherwise making claims about the competence or character of its subscribing lawyers;
- refrains from claims that it will analyze the prospect's legal problem in order to find a suitable lawyer;
- explains that its subscribing lawyers have paid to be listed with the service;
- states the office address and telephone number of each lawyer participating in the service;
- specifies the means of communication that its subscribing lawyers may employ when responding to the prospective client's posting and provides for telephone contact only if the prospective client clearly and unambiguously authorizes the service to forward the request and telephone number to the selected attorneys; and
- advises users that the services of the website do not constitute legal representation or the practice of law.

15. In addition, lawyers using such a website should take reasonable measures to prevent the inadvertent disclosure by the prospective client of privileged information.[4] Depending on circumstances, such measures may include some or all of the following:

    - the website service should afford the prospective client an opportunity to screen the list of lawyers who will be shown the prospective client's posting and remove lawyers from the list;
    - the service should only reveal the prospective client's identity to those subscribing lawyers that the prospect requested;
    - the service and the lawyer should minimize the communication of confidential information between the subscribing lawyer and the prospective client until the lawyer has been retained and has completed an appropriate conflicts check;
    - the service should caution the prospective client that the information provided to the service may not be protected by the attorney-client privilege, where that statement is applicable.

16. As in any other contact with a current or potential client, when following up the prospective client's posting, the subscribing lawyer should avoid any statements that are "false, deceptive or misleading" under DR 2-101(A); should not engage in any form of "coercion, duress or harassment" under DR 2-103(A)(2)(c); and should otherwise treat the prospective client with the courtesy and integrity expected of all lawyers. *See* DR 1-102(A)(7). Generally, where the prospect indicates an unwillingness to engage the lawyer, the lawyer should refrain from further retention discussions with such party. *Cf*. N.Y. State 481 (1978) (if client indicates hesitancy about designating the client's lawyer as executor, lawyer should "immediately desist and expressly withdraw his suggestion.").

Conclusion

17. For the reasons stated, the question posed is answered in the negative. While websites may be used for advertising purposes, they can not, in exchange for a fee, carry out activities that in a non-web setting would constitute prohibited solicitation or referral.

(22-05)

Endnotes

1. We express no opinion as to whether the website may be operating in violation of Section 495(1)(d) of the Judiciary Law ("No corporation . . . shall . . . furnish attorneys or counsel"). If the website were to be operating in violation of the Judiciary Law or found to be otherwise engaged in the unauthorized practice of law, it would be unethical for a lawyer to participate in its operations. DR 3-101(A).

2. In N.Y. State 779 (2004), we found a violation of DR 2-103(B) where a lawyer pays a marketing organization to furnish the lawyer with "leads" to potential clients. We there explained:

   The payment by an attorney . . . for a bundle of "leads" to prospective clients would violate DR 2-103(B) because neither of the exceptions in sub-paragraphs (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.

   This language is susceptible to an interpretation that any payment made to a third party for information which enables a lawyer to "obtain" a client is prohibited by DR 2-103(B) unless the circumstances of the payment fall within one of the stated exceptions to the rule. Such an interpretation, which might be deemed to bar participation even in an "electronic yellow pages" service, overstates our conclusion in N.Y. State 779. That opinion should be understood to apply only to those situations in which the organization is effectively making referrals or where it may be deemed to have actively solicited and obtained potential clients for its participating lawyers. In N.Y. State 779, the marketing organization caused its customers to sign a power of attorney form, as well as a retainer agreement, and actually collected a fee for the lawyer to whom the matter would eventually be forwarded. The prospective client was thus effectively committed before the lawyer had agreed to undertake the representation. In every meaningful sense, like the classic "runner," the marketing organization had "obtained" a client and, for a fee, had agreed to forward the client to the lawyer. To the same effect is a recent opinion of the Committee on Professional Ethics of the State Bar of Texas, wherein that body prohibited lawyers from participating in an internet matching service on the grounds that the service was effectively "soliciting or referring prospective clients." Texas Op. 561 (2005). Texas Op. 573 (2006) clarified that Texas Op. 561 was not prohibiting *all* internet matching services, but rather only those services that exercise "discretion" in selecting lawyers.

3. In N.Y. City 2000-1, the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York considered whether a lawyer's response to a website posting by a person seeking legal counsel should be deemed solicitation. The City Bar committee concluded that a lawyer's response did not constitute "advertising" or "solicitation" as those terms are used in the Code. Rather, the City Bar committee reasoned that it was the prospective clients who "in effect, have 'solicited' [the responding] attorneys." Because the method of communication there employed was electronic posting, however, the City Bar did not have to address the issue of whether a participating lawyer could contact the prospect by telephone.

4. EC 4-1 ("Both the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer.").

Ethics Opinion No. 800

Committee on Professional Ethics of the New York State Bar Association

11/3/06

Topic: Conflicts of interest, appearance of impropriety; part-time prosecutor serving as appointed counsel for indigent respondents in Family Court proceedings.

Digest: A part-time prosecutor is not precluded from accepting all assignments as court-appointed counsel in Family Court. In specific types of cases and specific situations, including cases in which law enforcement personnel with whom the prosecutor works as a prosecutor are involved, and cases that are quasi-criminal in nature, the prosecutor is barred from accepting assignments. In other cases, the part-time prosecutor must carefully consider whether conflicts or the appearance of impropriety would preclude the assignment. Any doubt must be resolved against accepting an assignment.

Code: DR 2-110, DR 5-101, DR 5-105, DR 9-101, EC 5-15, EC 9-1

Question

1. May a part-time prosecutor accept assignment to represent indigent persons in Family Court proceedings of a neighboring county?

Opinion

2. A part-time prosecutor seeks appointment to a panel authorized to accept assignment of cases on behalf of indigent respondents in the Family Court in a neighboring county. Attorneys appointed to serve on the assigned counsel program in the Family Court can be assigned to represent either petitioners or respondents (except in child protective proceedings, proceedings involving allegations of willful failure to pay court-ordered support, and paternity proceedings, in which program attorneys are only assigned to represent respondents).

3. The Family Court hears matters involving children and families, including child protective proceedings, adoption, custody and visitation, support, family offense, guardianship, delinquency, paternity, persons in need of supervision (PINS), and foster care approval and review. While certain Family Court matters are more likely to involve related criminal matters, virtually all types of proceedings heard by the Family Court are likely to have some involvement of law enforcement agencies or similar governmental entities. In neglect and abuse cases, for example, multiple government entities are often involved. The local child protective service[1] investigates allegations and the county attorneys present ("prosecute") the case in the Family Court. Family offense cases by their nature pose a great risk of criminal charges being brought. In custody and visitation cases, the practices may vary by county, but many Family Courts request reports from probation departments, in addition to (or instead of) reports from local child welfare officials. Child support cases, too, could involve law enforcement and/or prosecution. In these and other cases, the Family Court may also request reports from other governmental agencies, including the probation department.

4. Whether a part-time prosecutor from a neighboring county can accept assignments to represent indigent people in a Family Court depends on all the relevant facts and circumstances. No *per se* rule prohibits all such assignments. Nonetheless, the attorney seeking appointment must carefully consider a number of factors in each type of proceeding and in each individual matter. The attorney must avoid all conflicts of interest, ensuring that neither the attorney's own interests[2] nor the attorney's simultaneous work as a prosecutor[3] preclude the attorney from exercising independent judgment on behalf of his or her clients. In many cases, a conflict might not be apparent at the outset of the case. For this reason, the attorney must be careful to avoid those cases where a conflict is likely to occur. *Cf.* EC 5-15 ("the lawyer should resolve all doubts against the propriety of representation").

5. In at least three situations, the attorney, in our view, would be barred from accepting any assigned cases: matters in which officers or other law enforcement personnel with whom the prosecutor works (or has worked) as a prosecutor are involved; juvenile delinquency proceedings; and Persons in Need of Supervision (PINS) proceedings.

6. As we have previously noted, a part-time prosecutor should not accept defense work in any proceeding in which "investigating officers and law enforcement personnel are those with whom the attorney associates as prosecutor." NY State 544 (1982). We perceive no difference in the Family Court setting.

7. We have previously held that a part-time prosecutor is barred from representing defendants in juvenile delinquency proceedings. N.Y. State 171 (1970). The defense function in juvenile delinquency proceedings, although not categorized as "criminal," is indistinguishable from defense in an adult criminal proceeding. *See* N.Y. State 544 (1982) ("an attorney who has prosecutorial

responsibilities as an incident of part-time employment by a local governmental unit is disqualified from the private practice of criminal law in all courts of the state");[4] N.Y. State 427 (1976) (private criminal defense work by a part-time prosecutor is improper).

8. We believe PINS proceedings are functionally indistinguishable from juvenile delinquency proceedings and the same rule should apply. PINS proceedings bear most, if not all, of the hallmarks of defense work. The child is being "charged" with specific conduct, law enforcement personnel are inextricably involved in the proceeding, and the child has a liberty interest in the outcome of the proceeding. Also, the charges must be sustained by proof beyond a reasonable doubt. Although locked detention is no longer a permissible disposition in a PINS proceeding, children adjudicated to be PINS can be removed from their home and placed in facilities where their liberty is severely constricted.

9. Representation of respondent parents in child protective proceedings (Family Court Article X, neglect and abuse) bears special mention. In child protective proceedings, respondent parents are answering to charges from the government regarding their parenting. Ultimately, the parent could temporarily or permanently lose custody of the child as a result of this proceeding. Here, too, even if the government personnel charging the parents are not those with which the part-time prosecutor would be involved, a part-time prosecutor must be particularly sensitive to the appearance of impropriety that may arise from his or her attempting to appear adverse to authorities conducting proceedings very similar to those of a prosecutor.

10. In all cases, the attorney must carefully evaluate the individual facts and circumstances prior to accepting appointment and, consistent with DR 2-110, will often need to withdraw if a conflict arises during the course of the representation.[5] Assigned clients ordinarily have no choice in the assignment. Moreover, clients are likely to be prejudiced if counsel must be substituted during the course of a proceeding. Therefore, the attorney must resolve any doubt against accepting an assignment.[6]

11. The attorney must also strive to ensure that dual roles—part-time prosecutor and part-time advocate for poor people in Family Court—do not give rise to an appearance of impropriety. DR 9-101; EC 9-1. In addition to issues relating to conflicts, the part-time prosecutor would need to ensure that the assigned counsel plan's clients and the public at large do not perceive the attorney's dual roles to be improper.[7]

Conclusion

12. While a part-time prosecutor from a neighboring county may accept assignment to represent indigent people in certain Family Court proceedings, careful analysis must be undertaken in each case. No appointment can be accepted where the appointment would lead to a conflict of interest or create the appearance of impropriety.

(8-06)

Endnotes

1. In some situations, local police departments may also be involved in child protective investigations.
2. DR 5-101 of the New York Lawyer's Code of Professional Responsibility (the "Code") provides:

   > A. 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.
3. DR 5-105 of the Code provides, in relevant part:

   > A. A lawyer shall decline proffered employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR 5-105(c) (C) [regarding consent].
   >
   > B. A lawyer shall not continue multiple employment if the exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing differing interests, except to the extent permitted under DR5-105(c) (C).
4. N.Y. State 544 rests on DR 5-105 and DR 9-101:

   > The theory is that "since a prosecutor represents the people of the state, it is improper for him [or her] to represent individual clients charged with criminal violations." And "[a]cting as a prosecutor on one case one day, and appearing the next day even in a different court representing a private citizen who had been charged with a criminal act or violation or law would give rise to an appearance of improper conflict of interest."

   Quoting N.Y. State 184 (1971).
5. Client consent, in a case where a conflict is consentable, is often not possible. Consent can only be sought where the prospective client would be empowered to withhold consent freely. Assuming *arguendo* that the prosecutor's office would consent, it would be difficult to obtain voluntary consent from an assigned client. *See, e.g.*, N.Y. State 490 (1978) (When seeking consent, the attorney "should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and, such requests should be made only under circumstances where the [attorney] is satisfied that [his or her] clients could refuse to consent without any sense of guilt or embarrassment.").
6. Because of the high likelihood that conflicts will arise even in cases in which a part-time prosecutor may take on the representation, it may be administratively impractical for the part-time prosecutor to serve on the assigned counsel panel. The administrative burden that would be entailed might lead the panel administrator to establish a policy to exclude part-time prosecutors from the assigned counsel panel.
7. Of course, the attorney cannot suggest that his or her status as a part-time prosecutor would enable the attorney to influence the court or obtain better results for an assigned client. *See* DR 9-101(C).

Section Committees & Chairs

Committee on Business Law
Jeffrey M. Fetter
507 Plum Street, Suite 300
Syracuse, NY 13204

A. David Fuster
89-00 Sutphin Boulevard, Suite 407
Jamaica, NY 11435

Committee on Family Law
Jennifer H. Goody
1400 Old Country Road, Suite 416
Westbury, NY 11590

Willard H. DaSilva
585 Stewart Avenue
Garden City, NY 11530

Committee on Legislation
Howard M. Adelsberg
445 Central Avenue, Suite 306
Cedarhurst, NY 11516

Thomas J. Mitchell
88 Pine Street
New York, NY 10005

Committee on Membership and Member Service Issues
Frank G. D'Angelo
999 Franklin Avenue, Suite 100
Garden City, NY 11530

Committee on Publications
Martin Minkowitz
180 Maiden Lane
New York, NY 10038

Committee on Real Estate Issues
Joel E. Abramson
60 East 42nd Street, Suite 953
New York, NY 10165

Vinson J. Friedman
100 Garden City Plaza
Garden City, NY 11530

Committee on Regulation of the Profession
Frank R. Rosiny
345 West 58th Street
New York, NY 10019

James E. Reid
173 Intrepid Lane
Syracuse, NY 13205

Committee on Trusts and Estates Law
Lorraine Coyle
5911 Riverdale Avenue
Bronx, NY 10471

Valorie J. Promisel
1860 Commerce Street
Yorktown Heights, NY 10598

Editor

Martin Minkowitz
180 Maiden Lane
New York, NY 10038

ONEONONE

Section Officers

Chair
Linda U. Margolin
One Suffolk Square, Suite 300
Islandia, NY 11749

Chair-Elect
Harriette M. Steinberg
1400 Old Country Road, Suite 416
Westbury, NY 11590

Secretary
Paul J. O'Neill, Jr.
1065 Lexington Avenue
New York, NY 10021

Treasurer
Martin Minkowitz
180 Maiden Lane
New York, NY 10038

ISSN 0733-639X

NEW YORK STATE BAR ASSOCIATION
GENERAL PRACTICE SECTION
One Elk Street, Albany, New York 12207-1002

ADDRESS SERVICE REQUESTED

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155