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ONEONONE

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

Message from the Chair

Perhaps there is some truth to that old adage that says time flies when you're having fun: it seems like just the other week that my term as Chair of the General Practice Section started—and here this is, my last message to you as Chair! This has been a great year for the GP Section, and I am proud to have had the opportunity to serve as its Chair. The successes of this past year would not have been possible without the dedicated team of leaders who volunteer their time and expertise on the Section's Executive Committee, and without you—the members.

In the sometimes volatile climate of our times, it is gratifying to see that the membership of the GP Section is going strong. We've had several successful outreaches to newly admitted attorneys in recent years, and we continue to draw on the collective experience of attorneys in all corners of the State, and beyond.


Lewis Tesser

The financial state of the Section is robust, with ample funds for day-to-day operations, and with a healthy reserve for expanding the Section's reach both to members and into the community. The Section this year established a restricted fund through the New York Bar Foundation with a $10,000 donation dedicated to the purpose of

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supporting pro bono legal services in general practice. I am delighted by the amount of interest that has been expressed in the fund so far, and by the worthy causes represented. While perhaps no one of us is able to make such a substantial contribution individually, together we are making a difference for the public good—the legal community of our one Section giving back to the community at large.

As you may have heard, the Section now has Chapters located in each of the State's four judicial departments. I am very excited about this new development, and anticipate that this will be a great way for our members to connect with fellow practitioners in a meaningful and professionally rewarding way. If you have not yet joined your local GP Section Chapter, I encourage you to do so. Just email GeneralPractice@nysba.org and indicate the Chapter you would like to join. For more details on GP Chapters, please visit www.nysba.org/GPChapters.

In other news, the Section has held several interesting and timely programs this year. Our program at Annual Meeting gave the latest updates in traditional areas of legal practice, and was held in conjunction with the Committee on Professional Discipline; an ethics program was held in Buffalo and co-sponsored by the Minority Bar Association of Western New York, emphasizing issues faced by solo and small-firm practitioners; and a program on legal blogging was produced in conjunction with the Law Practice Management Committee. The blogging CLE program served as the first step in kicking off the Section's innovative "mentoring blog," which will pair mentors and mentees tasked with creating content for online publication on a Section-sponsored blog. The Election Law and Government Affairs Committee is also co-sponsoring a 3-location MCLE program with a live webcast option in conjunction with the NYSBA Committee on Continuing Legal Education. Further, I am pleased to announce that plans are under way for a Section weekend getaway in Saratoga Springs in the fall. Stay tuned for details!

At Annual Meeting this year, we were also pleased to recognize a particular member who has contributed substantially to the Section over the years: Leonard Sienko of Hancock, NY. The Section has instituted the General Practice Section Award in order to honor those who are "outstanding, innovative, and [have] made significant contributions to improve the daily practice of law for general practitioners in New York State." The award's first recipient, Lenny has served the Section for many years through his dedicated and resourceful work on the Section's blog and wEbrief email newsletters, which are distributed to members on a weekly basis. Congratulations, Lenny!

Another exciting and significant development is the rollout of NYSBA's new private, online professional communities. Communities have the ability to function just like the basic listserve we have now; but with far greater additional technical capabilities (don't worry—it's easy to use, and you can use it through email like the current listserve, if you like)! We will be distributing further information about our own GP Section Community soon! In the meantime, I encourage you to go to www.nysba.org/HowDoI to check out more information about Communities. Our listserve continues to be an extremely active and valuable resource for our members, and the GP Community will be a terrific platform for keeping this going, and with even greater possibilities.

In closing, I would like to thank each one of you for your membership and support of this Section of ours. Many of us are in solo or small firm practice, but even for large firm or corporate practitioners, it is so important to reach outside of the four walls of our practice, whatever it may be, and connect with other members of our profession; learn from each other; encourage each other in our professional development; and make some great friends along the way. For your participation in this, I thank you. I look forward to continuing my involvement in the General Practice Section for a long time to come, not just as an "extra" tacked onto my already busy life as an attorney—but as an integral part of it.

My congratulations to Richard Klass on his recent appointment as the new Chair of our Section. As you may know, Rich has served as co-editor of this publication for some time, and he has much to offer the Section. Also recently elected as Chair-Elect is Emily Franchina. I am looking forward to great things to come under their very capable leadership!

Lewis Tesser

From the Co-Editors

Richard Klass

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

Workers' Compensation Law: *One on One*'s co-editor Martin Minkowitz discusses the ramifications of incarceration for a crime committed by an injured worker who is claiming or receiving workers' compensation benefits.

Alternative Dispute Resolution: Arbitrator and mediator Irwin Kahn provides an overview of the various methods of resolving disputes aside from a trial in court. These methods include arbitration, mediation, mini-trials and other variations.

Elder Law: An article by Anthony J. Enea, Immediate Past Chair of the Elder Law Section, outlines the factors to be considered when deciding whether to transfer a residence as part of an overall estate plan.

Information Technology Law: The authors of the article "Information or Deception?," Brooke Erdos Singer and Celia R. Muller, identify the problems associated with internet advertising. Sometimes, advertising is presented as news, or there is a blending of advertising and news. The article discusses the efforts of different government agencies to regulate this area.

Social Media: A leading legal industry copywriter and analyst, Ari Kaplan, details seven strategic ways to use LinkedIn to reinvent the way attorneys use this social network.

Martin Minkowitz

Family Law: Considerations of religious doctrine in custody determinations is the subject of an article by Allyson D. Burger. In the article, she discusses the standards the courts will apply when parents ascribe to different religions or sects within a religion.

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

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

Sincerely,
Martin Minkowitz
Richard Klass
Co-Editors

Incarceration and Suspension of Workers' Compensation Benefits

By Martin Minkowitz

The Workers' Compensation Law, unlike the Disability Benefits Law,[1] does not contain a statutory provision that excludes benefits when a crime is committed.

An injury which is found to arise out of and in the course of employment, even if it happened during the commission of a crime by the injured worker, is compensable. However, in 2007 the Workers' Compensation Law was amended to provide that benefits for workers' compensation should not be paid in cases where a claimant is convicted of a felony and has been sentenced to prison as punishment for the commission of the crime.[2] This statutory language was added to codify what was existing case law. Therefore, when a claimant who has received an award for benefits is subsequently convicted of a felony and is incarcerated, benefits will cease, as the claimant is no longer in the labor market. However, on release from custody, the claimant can apply to the Board for benefits again.

A claimant is also required by Workers' Compensation Board Regulation to have a C4 form submitted by a treating physician to the Board every 90 days to report on continuing disability.[3] A recent case tested the interaction of these provisions based on an unusual factual situation.[4]

Claimant, a legal permanent resident of New York, had a work related injury to his head and neck and received an award for a total disability from the Board. Thereafter, he was convicted of the crime of sexual abuse in the first degree. That was a felony conviction for which he was sentenced to ten years of probation. However, while serving the probation sentence, he was detained in Texas by the United States Bureau of Immigration and Customs Enforcement, pending a deportation hearing. He remained in custody for approximately two years. During that period of detention by the USBICE, he did not provide updated medical progress reports, and his compensation benefits were suspended. After his release from detention, he was back in New York and examined by his physician. The physician filed an updated C4 medical report, indicating that he was still totally disabled from his work related injuries. The Board awarded benefits, not only prospectively, but retroactively for the period of time his benefits were suspended while he was detained by the USBICE.

On appeal to the Appellate Division, Third Department, the Board's decision and award was sustained.

Recognizing that incarceration for a felony conviction would make the claimant ineligible for benefits, the court distinguished the federal detention from incarceration from the felony conviction. Using a strict interpretation of the statute, it reasoned that the detention which followed the conviction for the felony was not an incarceration for the felony as contemplated by the law. It was a separate process, even if the felony conviction might have been an issue at the deportation hearing. In this case, the only punishment directly attributed to the felony conviction was a ten-year probation sentence, not incarceration.

Returning to the issue of the failure to file continuing medical reports, the employer argued that since there is no presumption of continuing disability, which is why the C4 forms are required to be submitted by the claimant's physician, the claimant should not get benefits during the period of detention when his failed to file such reports. The court disagreed. If the Board wished to excuse the failure to file the medical progress reports, it was within its statutory authority to do so, in the interest of justice. It found sufficient proof that there was a continuing disability during the period of detention, sufficient to conclude that the claimant was entitled to the retroactive benefits even though there was not strict compliance with the Regulation requiring a C4 to be filed every 90 days. It appears the Court deferred to the Board's discretion in not requiring the strict adherence to the C4 filing regulation.

Endnotes

1. Article 9 Workers' Compensation Law.
2. Section 10(4) WCL; *DERR v. VIP Structure*, 294 AD2d 793 (2002).
3. 12 NYCRR 325-1.3 (formerly 45 days).
4. *Islam v. BD Construction & Building*, __ AD3d __ (2014).

Martin Minkowitz is counsel to Stroock & Stroock & Lavan LLP and practices in the area of Insurance and Workers' Compensation regulation.

Alternative Dispute Resolution: A Win for All

By Irwin Kahn

As practicing attorneys, we know that a large percentage of civil cases are ultimately settled before trial. Alternative Dispute Resolution (ADR) enhances this result.

With regard to mediation, there is no downside to sitting down and discussing your case before a trained neutral. In most situations, it makes sense from a business viewpoint to dispose of a matter without having to invest additional time, energy and money. Getting prompt payment is a plus for the claimant. Defendants can benefit by capping the potential exposure to claims. That is why mediation is "win-win" situation.

Arbitration can result in ending a matter that could linger in the court system for a long time. This saves not only time but also energy and money for fees.

For any aspect of ADR to be successful, both sides should evaluate the liability, damages and potential verdict in the venue in which the action is pending. For a successful mediation, both sides must agree to enter into good-faith negotiations before a skilled neutral acting as an agent of reality. On should approach ADR in the same way one prepares for trial. A memorandum should be prepared for both mediation and arbitration.

There are many tools under the umbrella of Alternative Dispute Resolution. They can include mediation, arbitration, mini-trials, fact or coverage determination, and many other variations of the same, subject to the imagination and creativity of the participants.

In the securities industry, FINRA has instituted both mediation and arbitration programs. The American Arbitration Association has programs such as in the

commercial, insurance and labor areas. In the federal courts, ADR is in effect in both the Southern and Eastern Districts. Participants in these programs have benefited from expedited discovery and the narrowing of issues.

There are a number of programs available in New York State court system, including Family Court, Community Dispute Resolution Centers, the New York County Commercial Division, and other County Commercial Division programs. Matrimonial mediation and tort mediation are also available in some counties.

Commercial providers supply skilled neutrals at a reasonable cost and aid the parties to agree to participate and decide which modality would be most beneficial.

Statistics show that utilizing ADR as a case management tool will often result in speeding up the turnover of cases and enhance client satisfaction. Thus, ADR is a winning proposition for all concerned.

Irwin Kahn is the founding Senior Partner of the Law Firm of Kahn & Horwitz, P.C., a general practice firm which includes practice in the fields of mediation and arbitration, personal injury, commercial law, real estate, litigation, and estate practice.

Factors to Consider When Transferring a Residence for Elder Law and Estate Planning Purposes: A Primer

By Anthony J. Enea

The decision to transfer one's residence raises a number of significant and complex issues and concerns for both the attorney and client—for example, every potential transfer raises estate and gift tax, capital gains tax as well as Medicaid eligibility issues for the client, particularly a senior. A complete and thorough review of all available options should be made prior to making the transfer. The following is a review of the types of transfers of a residence that can be made and their consequences:

(a) Outright Transfer of the Residence Without the Reservation of a Life Estate

This is perhaps the least desirable option available, as the transferee of the property will receive the transferor's original cost basis in the property (original purchase price plus amount of any capital improvements made), and the outright transfer is a completed gift subject to gift taxes. Thus, a gift tax return will need to be filed and utilization of one's lifetime gift and estate tax credit ($5.34 million per person for 2014) may need to be used. For Medicaid eligibility purposes, the outright transfer of the residence would be subject to a 60-month look-back period (subject to exempt transfer rules), thus disqualifying the transferor and his or her spouse for nursing home Medicaid (not Medicaid home care) for 60 months.

If Medicaid is needed within the 60 month look back period, the period of ineligibility on the transfer would not commence until the applicant was receiving institutional care (in a nursing home), had applied for Medicaid and would have been approved but for the transfer made.

Additionally, from a tax perspective the use of an outright transfer of the residence results in the transferor losing the Internal Revenue Code ("IRC") §121(a) principal residence exclusion for capital gains (income tax) purposes of $250,000 (single person) or $500,000 (married couple). With the federal capital gains tax rate with the Medicare surtax being approximately 24%, the income tax impact could be significant. For some clients the combined state and federal income tax with the 3.8% Medicare surtax can exceed any applicable estate tax rates. Cost basis must be strongly considered before making an outright transfer of the residence. However, if after the transfer is made the transferee owns and resides in the premises for two out of the five years, he or she will be able to use said principal residence exclusion. Any Veteran's, STAR and Senior Citizen's exemptions would also be lost with an outright transfer. It will also be necessary to obtain a fair market value appraisal of the premises gifted for purposes of calculating the federal gift tax credit utilized by the transfer. As can be seen from the above, the consequences can be financially significant.

(b) Transfer of the Residence with the Reservation of a Life Estate

If the transfer was made within an existing Medicaid look back period (60 months), the period of ineligibility would not commence until the applicant was receiving institutional care in a nursing home and was otherwise eligible for Medicaid, but for the transfer made. Thus, a transfer of real property by deed with a retained life estate will also require that the transferor not apply for Medicaid within the look back period to avoid a significantly onerous period of ineligibility for nursing home Medicaid.

Pursuant to §2036(a) of the IRC, the transfer of a residence with a retained life estate permits the transferee of the residence to receive a full step-up in his or her cost basis in the premises upon the death of the transferor, to its fair market value on the transferor's date of death. This occurs because the residence is includible in the gross taxable estate of the transferor upon his or her demise. This, of course, presumes the existence of an estate tax upon the death of the transferor. A "life estate," pursuant to IRC §2036(a), is the possession or enjoyment of, or a right to the income from the property, or the right either alone or in conjunction with another to designate the persons who shall possess or enjoy the property or income thereof.

The most significant problem resulting from utilization of a deed with the reservation of a life estate occurs if the premises are sold during the lifetime of the transferor. A sale during the transferor's lifetime will result in (a) a loss of the step-up in cost basis, thus, subjecting the transferee to a capital gains tax on the sale with respect to the value of the remainder interest being sold (difference between transferor's original cost basis, including capital improvements, and the sale price), and (b) the life tenant pursuant to Medicaid rules is entitled to a portion of the proceeds of sale based on the value of his or her life estate. This portion of the

proceeds may be significant and will be considered an available resource for Medicaid eligibility purposes, thus impacting the transferor's eligibility for Medicaid. The existence of the possibility that the premises may be sold prior to the death of the transferor(s) poses a significant detrimental risk that needs to be explored in great detail with the client if a deed with the reservation of a life estate is contemplated.

It may be advisable to make the gift an "incomplete gift" for gift tax and capital gains tax purposes; the reservation of a limited testamentary power of appointment by the Grantor should be considered.

It should be remembered that IRC §2702 values the transfer of the remainder interest to a family member at its full value without any discount for the life estate retained. Retention of a life estate falls within one of the exceptions of IRC §2702.

If the transfer does not fall within IRC §2702 or if one of the available exceptions applies (e.g., treated as a transfer in trust to or for the benefit of), calculation of the life estate is performed pursuant to IRC §7520, and the tables for the month in issue need to be consulted to determine the correct tax value of the remainder interest. For Medicaid eligibility purposes, the Social Security Life Expectancy table is used to value the life estate and remainder interest.

Pursuant to IRC §2702, if the homestead is transferred to a non-family member the use of a traditional life estate will result in a completed gift of the remainder interest. It should also be remembered that the gift of a future interest (remainder or reversionary interest) is not subject to the annual exclusion of $14,000 per donee for the year 2014.

(c) Transfer to a Medicaid Asset Protection Trust a/k/a an Irrevocable Income Only Trust

From a purely Medicaid planning perspective, the use of the Medicaid Asset Protection (MAP) in my opinion is the most logical option. As previously explained, irrespective of the fair market value of the residence transferred to the Trust, the period of ineligibility will effectively be five years (60 months). However, the properly drafted MAP will allow the residence to be sold during the lifetime of the transferor with little or no capital gains tax consequences, as the transferee can utilize the transferor's personal residence exclusion of $500,000, if married, and $250,000 if single. This can be accomplished by reserving in the trust instrument the power to the Grantor(s) in a non-fiduciary capacity and without the approval and consent of a fiduciary to reacquire all or any part of the trust corpus by substituting property in the trust with property of equivalent value. The Grantor(s) will be considered the owner of the trust corpus for income tax purposes. See IRC §675(4). Additionally, the transfer to the Trust can be structured to allow the transferee to receive the premises with a stepped-up cost basis upon the death of the transferor, through the reservation of a life income interest (life estate) to the Grantor. IRC §2036(a).

The tax advantages and the continued flexibility of being able to sell the premises during the transferor's lifetime without income tax consequences, in my opinion, makes the MAP an ideal option in most circumstances.

The transfer of the residence to the MAP is a taxable gift of a future interest, and no annual exclusion is available. The full value of the premises is reported on the gift tax return.

If a limited power of appointment is retained, the gift to the trust is incomplete. Treasury Reg. 25.2511-2(b). No gift tax return is technically required; however, it is advisable to review with an accountant the filing of a gift tax return for informational purposes.

On the death of the Grantor of the Trust, the date-of-death value of all assets in the trust will be included in the Grantor's taxable estate pursuant to §2036(a) of the IRC, as a result of the life income interest retained by the Grantor.

Inclusion in Grantor's estate will result in a full step-up in cost basis for all trust assets pursuant to §1014(e) of IRC, assuming an estate tax is still in existence at the time of the Grantor's demise.

In conclusion, it is most important that all of the aforestated options and their consequences be thoroughly reviewed with the client prior to a transfer of real property being made. Just saying to the client "Let's do a quitclaim deed to your kids" without a thorough explanation of the ramifications will inevitably lead to future problems.

Anthony J. Enea, Esq. is the managing member of the firm of Enea, Scanlan & Sirignano, LLP of White Plains, New York. His office is centrally located in White Plains and he has a home office in Somers, New York. Mr. Enea is the Immediate Past Chair of the Elder Law Section of the New York State Bar Association, and a Past President and a Founding Member of the New York Chapter of the National Academy of Elder Law Attorneys (NAELA). He is also a member of the Council of Advanced Practitioners of NAELA, a Past President of the Westchester County Bar Association, a Vice President of the Westchester County Bar Foundationm and the Vice President of the Columbian Lawyers Association of Westchester County. Mr. Enea focuses his practice on Elder Law, Wealth Preservation, Guardianships, Medicaid Planning and Applications, Wills, Trusts and Estates.

Information or Deception? Recent Regulatory Efforts to Help Consumers Identify Advertising in the Digital World

By Brooke Erdos Singer and Celia R. Muller

I. Introduction

Building upon its previous initiatives to "help ensure that consumers can identify advertisements wherever they appear," the Federal Trade Commission (FTC) recently announced it would be conducting a workshop in December 2013 to explore "native advertising" (defined as "the practice of blending advertisements with news, entertainment, and other content in digital media") and the boundaries between digital advertising and digital content.[1] The following week, the New York Attorney General's Office issued a press release stating that, following a year-long sting operation, it had entered into "Assurances of Discontinuance" with nineteen search engine optimization companies and small businesses which it found had engaged in "astroturfing" by posting and soliciting false third-party reviews on sites like Yelp and Citysearch.[2]

Two weeks, two major developments in online advertising policy and policing. One of these actions focused on propriety in a site's own advertising and the other on acceptable use of third-party social media. Each action was taken with an eye to preserving honesty in the increasingly complex world of online content. This article reviews these and other recent steps taken by government and industry authorities to clarify the lines between advertising and other content on the Internet and the impetus and authority for their actions.

II. The FTC

The FTC has emphasized repeatedly that truthfulness, substantiation, and fairness govern advertising practices in the online realm as well as in traditional media.[3] The FTC is guided in these principles and is authorized to act by the FTC Act which, in section 5, prohibits "unfair or deceptive acts or practices in or affecting commerce."[4] In its *.com Disclosures*, published in March 2013 to ensure "effective disclosures in online advertising," the FTC affirmed that basic ad principles apply online. Specifically: "(1) Advertising must be truthful and not misleading; (2) Advertisers must have evidence to back up their claims ('substantiation'); and (3) Advertisements cannot be unfair."[5]

The *.com Disclosures* highlighted the breadth of the FTC's authority and its relevance to the Internet. Its interest in native advertising indicates it is taking that role seriously.[6] Although the FTC has not indicated whether it will be developing any new formal guidelines, it is actively seeking commentary and information on various aspects of native advertising. The points on which it compiled research and recommendations for its December 4, 2013 workshop included: (1) the purpose of native advertising; (2) its use in mobile applications; (3) monetization of native content; and (4) consumer perception research related to native advertising.[7] No legislation appears imminent, but the agency's interest in these topics has begun to prompt increased scrutiny of the mechanics and perception of native advertising as such advertising increases in prominence and popularity.[8]

III. The NAD

Commentators have linked the FTC's interest in native advertising to that of the National Advertising Division (NAD) of the Better Business Bureau, another major player in advertising regulation.[9] While the NAD most frequently oversees challenges brought by one advertiser against another (on grounds similar to those outlawed by the FTC Act—misrepresentation, lack of substantiation, and unfairness),[10] it also can institute challenges on its own. It usually does so when it identifies particularly bad actors or when it wishes to highlight and provide guidance on a particular issue.[11]

The NAD recently acted on its own initiative in examining the scope of advertiser Qualcomm's disclosure obligations with respect to a series of posts it sponsored on Mashable.com. Mashable, a news and content aggregator, had been engaged to select, gather, and post preexisting articles on technology in a series titled "What's Inside?" intended to aid promotion of Qualcomm's Snapdragon microprocessors. These posts were initially labeled as sponsored content but were kept on Mashable after the fixed sponsorship period, with the "sponsor" label removed (and without the Snapdragon advertising that had accompanied the sponsored page).[12]

In discussing its general concern with native advertising and teasing out particular issues raised by the Qualcomm-backed articles, the NAD's decision harked back to the basic principles promulgated by the FTC:

> It is a *well-accepted principle that advertising must identify itself as such*—in a 1968 Advisory Opinion, the Federal Trade

> Commission ("FTC") reminded advertisers that a sponsored news column that "uses the format and has the general appearance of a news feature and/or article for public information which purports to give an independent, impartial and unbiased view…[must] clearly and conspicuously disclose that it is an advertisement."[13]

After examining this set of "sponsored" articles, the NAD found that Qualcomm and Mashable had made it sufficiently clear that the Qualcomm posts, which explored the technology behind products other than Snapdragon, were connected with a sponsor. Although the "What's Inside" articles remained on Mashable even after Qualcomm's sponsorship period expired with the original "Sponsored Content" label removed, the NAD found that this did not create any potential for deception. When the sponsor's advertising and promotional intent were stripped away, the articles went back to being neutral, news-based content.[14] The NAD's analysis illustrates how, in the online environment, the same piece of content may be deceptive in one context or at one time and innocuous at another.

IV. The New York Attorney General

The New York astroturfing settlements represent an increase in online enforcement in relation to another problem that predates the Internet, and they are also based on general, well-codified principles of honesty in advertising. "Astroturfing" refers broadly to faux grass-roots efforts, from reviews to lobbying.[15] The FTC also targeted such activity in 2010 in connection with increased interest in online disclosures and with enforcement of the *Endorsements and Testimonials Guides* promulgated in 2009.[16] In addition to the practices targeted by the New York Attorney General during "Operation Clean Turf" (as the year-long investigation that led to the recent settlements was called), false review campaigns have been organized on **Amazon.com** and numerous other online forums.[17]

Operation Clean Turf, however, was apparently born of concern over evidence that a wave of false posts was (and is) overwhelming sites like Yelp on which consumers rely.[18] The attorney general's office targeted astroturfers by posing as a Brooklyn yogurt shop and contacting search engine optimization ("SEO") companies to request assistance in counteracting negative ratings on consumer review sites. Representatives of multiple SEO companies offered to post false reviews on Yelp, Citysearch, and other sites. In the course of its investigation, the Attorney General found that false reviews (posted, among others, by employees or "freelancers") had been used to boost the ratings of businesses ranging from laser hair removal clinics to the adult club Scores to coach buses.[19]

The Attorney General's investigation and actions were authorized by New York General Business Law §§ 349 and 350, which prohibit, respectively, deceptive business practices and false advertising. New York's consumer protection law empowers the Attorney General to enforce these laws in the public interest.[20] The state's actions reflect its determination that these false posts pose a threat to consumers. Astroturfing has been common—both online and offline—for several decades, but the Attorney General seems to have been prompted to act by a study (cited in the press release on the astroturfing settlements) indicating that consumers rely heavily on online reviews and that by 2014, "between 10% and 15% of social media reviews will be fake."[21]

As Attorney General Schneiderman explained, "This investigation into large-scale, intentional deceit across the Internet tells us that we should approach online reviews with caution. And companies that continue to engage in these practices should take note: 'Astroturfing' is the 21st century's version of false advertising, and prosecutors have many tools at their disposal to put an end to it."[22]

V. Why Enforce? Common Concerns

The actions discussed above reflect increased concern on the part of agencies and regulatory bodies over the implications for consumer protection of longtime deceptive practices being implemented online. In particular, these enforcement efforts reflect concern over the ease with which advertisers can present themselves online as something other than what they are—and over the ways in which this ambiguity hinders the ability of consumers to effectively make purchasing decisions. This concern with advertiser self-presentation predates the Internet,[23] but it has become especially pressing in light of the opportunities online interactions present for individual or corporate actors to obscure their identities (whether intentionally or not). It is one thing for an individual to "catfish"[24] someone and another thing for a corporation to hide its involvement in online content. The latter opens up special and unique opportunities for "unfair or deceptive acts or practices in or affecting commerce."

New York, federal, and industry authorities all have expressed concern over the extent to which and how consumers are swayed by online content. The New York Attorney General's Operation Clean Turf press release, for example, noted that "90% of consumers say that online reviews influence their buying decisions."[25] False reviews are obvious lies; these harmful untruths, however, are not properly addressed by private plaintiffs under the New York consumer protection statute empowering private suits because such suits require a showing of injury.[26] While dissatisfaction may result from obtaining goods or services

from a business with falsely inflated reviews, mere deception does not establish injury under N.Y. Gen. Bus. Law § 349.[27] The Attorney General evidently concluded that the harm of companies' false reviewing practices warranted action on behalf of consumers who lacked the means to protect themselves adequately against such direct deception. As the Attorney General's action reflects, the harm inheres not in any single fake review but in the overall weakening of consumers' ability to trust online sources of information.

Deception is less obvious in the context of native advertising and sponsored content, where the information contained in a given post or article may technically be truthful. In these areas, online advertising has added new dimensions to traditional issues like consumer perception and claim substantiation. As the NAD noted, for example, in discussing the challenges of online content, deception may relate to a consumer's desire to have a full picture of a given piece of information as well as to the pure content of an advertisement. "Even when the advertiser's commercial interest does not change the information presented," the NAD stated in its Qualcomm decision, "a consumer may be interested in knowing who created the content and the reason it was created as such information may shape consumers' views of and interest in the content."[28] These new dimensions raise broad concerns—not just whether a single purchasing decision is swayed by a false advertisement (the way it would be, for example, by a literally false claim about a product's performance), but whether consumers generally can trust information available online.

VI. Outlook/Takeaways

Agencies appear to be attempting to combat the vagaries of online advertising and content by solidifying the boundaries and increasing the space between acceptable and unacceptable advertising behavior. As regulatory bodies continue to probe the fabric of online information-sharing, it is essential to keep in mind, as the NAD's Qualcomm decision did, the basic principle of consumer perception. While the information shared at the FTC's December workshop will surely guide the conversation surrounding online advertising, advertisers and content providers continue to draw lines and address issues of online honesty independently. Yelp, for example, has been known to use contract law to pursue parties who persistently and obviously engage in astroturfing.[29] Although this article covers only two areas with potential for online deception, the principles the FTC, NAD, and state apply to reviews, sponsored articles, and endorsements are just as relevant to other types of advertising content, from "prankvertising" and stunt ads to content distributed through more informal channels like Twitter and Vine.

Endnotes

1. FTC Press Release: "FTC Native Advertising Workshop on December 4, 2013 Will Explore the Blurring of Digital Ads With Digital Content" (Sept. 16, 2013), http://www.ftc.gov/opa/2013/09/nativeads.shtm ("Native Ad Release").
2. New York Attorney General's Office Press Release: "A.G. Schneiderman Announces Agreement With 19 Companies To Stop Writing Fake Online Reviews And Pay More Than $350,000 In Fines" (Sept. 23, 2013), http://www.ag.ny.gov/press-**release/ag**-schneiderman-announces-agreement-19-companies-stop-writing-fake-online-reviews-and ("Attorney General Press Release").
3. *See* FTC Search Engine Advertising Guidance (June 25, 2013), http://www.ftc.gov/opa/2013/06/searchengine.shtm; FTC .Com Disclosures (March 12, 2013), http://www.ftc.gov/os/2013/03/130312dotcomdisclosures.pdf; and FTC Endorsements and Testimonials Guides (October 5, 2009), http://ftc.gov/os/2009/10/091005revisedendorsementguides.pdf.
4. 15 U.S.C. § 45.
5. .*Com Disclosures*, note 3, at 4, *citing* FTC Policy Statement on Deception, appended to Cliffdale Associates, Inc., 103 F.T.C. 110, 174; FTC Act, 15 U.S.C. § 45(n); FTC's Unfairness Policy Statement.
6. *See* Native Ad Release, note 1.
7. *Id*.
8. Business and technology news sources indicate the prevalence of native advertising is rising rapidly. *See, e.g.*, Cooper Smith, "The Native Ad Rush Is On: Here's Why Social Media Budgets Are Pouring Into In-Stream Ads," *Business Insider* (Oct. 15, 2013), http://www.businessinsider.com/the-rise-of-social-native-advertising-2013-10; David Taintor, "Forbes Estimates BrandVoice Will Generate 20 Percent of Total Ad Revenue This Year," *AdWeek* (Oct. 10, 2013), http://www.adweek.com/news/press/forbes-estimates-brandvoice-will-generate-20-percent-total-ad-revenue-year-153041.
9. Michael Sebastian, "Advertising Watchdog Concerned About Native Advertising," *Ad Age* (Sept. 30, 2013), http://adage.com/article/media/ad-watchdog-reveals-inquiry-sponsored-content/244468/.
10. The NAD is the investigative and adjudicatory unit of the advertising industry's system of voluntary self-regulation. *See* The Advertising Industry's Process of Voluntary Self-Regulation: Policies and Procedures by the Advertising Self-Regulatory Council (Sept. 24, 2012) at Sec. 2.1.A, http://www.asrcreviews.org/wp-content/uploads/2012/10/NAD-CARU-NARB-Procedures-Updated-10-9-12.pdf ("NAD Procedures").
11. NAD Procedures at Sec. 2.1.D; *see, e.g.*, *Fiore RX, LLC (Antifungal Nail Lacquer)*, NAD Report No. 5600 (June 4, 2013) (NAD referred an antifungal nail polish manufacturer to the FTC after the manufacturer failed to respond to the NAD's request for claim substantiation).
12. *QUALCOMM, INC. (Snapdragon Processors)*, Case Report # 5633 (Sept. 20, 2013) ("Qualcomm Decision").
13. *Id*., quoting FTC Advisory Opinion No. 191, 73 FTC 1307 (File No. 6693 7080, released February 16, 1968) (emphasis added).
14. *Id*.; *see also* NAD Press Release "Native Advertising Review: NAD Examines Qualcomm/Mashable Sponsored Series" (Sept. 30, 2013).
15. The term was coined in 1985 by former U.S. Senator Lloyd Bentsen to describe the heaps of letters and postcards he would get advocating for private interests: "A fellow from Texas can tell the difference between grass roots and Astroturf," he put it colorfully, "this is generated mail." Ryan Sager, "Keep Off the

Astroturf," *The New York Times* (Aug. 18, 2009), http://www.nytimes.com/2009/08/19/opinion/19sager.html?_r=0.

16. FTC Press Release "Public Relations Firm to Settle FTC Charges That It Advertised Clients' Gaming Apps Through Misleading Online Endorsements" (Aug. 26, 2010), http://www.ftc.gov/opa/2010/08/reverb.shtm.
17. TechDirt, "Telco Astroturfing Tries To Bring Down Reviews Of Susan Crawford's Book" (July 29, 2013), http://www.techdirt.com/articles/20130722/17503523891/telco-astroturfing-tries-to-bring-down-reviews-susan-crawfords-book.shtml; March Communications, "Astroturfing: A PR No-No That Gave Samsung a Public Black Eye" (Aug. 6, 2013), http://www.marchpr.com/pr/2013/08/astroturfing-a-pr-no-no-that-gave-samsung-a-public-black-eye/; *see supra* note 13.
18. *See* Attorney General Press Release at note 2.
19. *Id.*
20. N.Y. Gen. Bus. Law § 349(b).
21. *See* Attorney General Press Release, note 2.
22. *Id*.
23. It was present, for example, in the original FTC's endorsement guidelines, first published in 1972. *See* 73 Fed. Reg. 72374, 72376 (Nov. 28, 2008).
24. This term is generally used to refer to creation of a false social media profile—often to deceive or seduce someone.
25. *See* Attorney General Press Release, note 2.
26. N.Y. Gen. Bus. Law § 349(h); *see also Stutman v. Chemical Bank*, 95 N.Y.2d 24 (N.Y. 2000) ("A plaintiff under section 349 must prove three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act.").
27. *See, e.g., Bildstein v. MasterCard Int'l Inc.*, 329 F. Supp. 2d 410 (S.D.N.Y. 2004) (finding mere payment of a deceptive credit card fee did not constitute injury).
28. Qualcomm Decision at 3.
29. Complaint, *Yelp, Inc. v. McMillan Law Group*, No. CGC 13-533654 (Sup. Ct. Cal. Aug. 16, 2013).

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Identity Theft—Know the Law

By Clifford S. Weber

Identity theft pervades our personal and professional lives. Consumer groups warn about its perils and vendors hawk their products' defenses against it, while the Federal Trade Commission reports that in 2012, identity theft topped the list for the 13th consecutive year in its annual compilation of consumer complaints.

Bankers know about identity theft from both actual experience, as well as regulators' alerts about its financial and reputational risks. While they typically know about the operational and technological aspects of identity theft, bankers may be unfamiliar with the governing laws and regulations. To make well-informed decisions about their human and financial investment in identity theft detection and prevention, compliance officers should understand the basic legal framework, especially the extent to which it favors consumers.

Account Hijacking

Identity theft takes many forms. Account hijacking is a kind of identity theft to which financial institutions are particularly vulnerable because they house mountains of deposit and loan account data. Hijackers get account information by penetrating security measures through the telephone, email or other electronic media. Once the information is acquired, the hijacker accesses account funds and, through one device or another, steals them. A recent case shows how the law treats the victim bank and customer.

A husband and wife maintained a checking account and a $150,000 home equity line of credit at a community financial institution. The accounts were linked in a typical arrangement so that the customers could draw down HELOC funds and transfer them to the checking account. They could access the account by telephone with a pre-set voice activated code.

On a Thursday before a holiday weekend, a thief acquired the depositors' phone access code and penetrated into the linked accounts through the phone system. Before this security breach, the depositors had only drawn about $6,000 in HELOC funds, leaving a $144,000 balance available and they had only transferred funds between the accounts once, when they moved the $6,000 to the checking account to pay a bill. They had never used the telephone access system.

The hijackers worked fast. By the close of business on Friday, they had tested the bank's security features with 16 transfers back and forth between the checking account and the HELOC. No alarm sounded, no wires tripped, so they emptied the HELOC balance into the checking account. The following Tuesday, the bank received a fax from the thief, instructing it to wire the $144,000 to a South Korean bank account. The depositors had never before wired funds from the account to anywhere, let alone South Korea. Without inquiry or notification to the customers, the bank complied with the imposter's directions. Later that day, an employee notified the depositors of the account transfers and the wire. By that time, of course, the money was long gone, beyond recall.

"To make well-informed decisions about their human and financial investment in identity theft detection and prevention, compliance officers should understand the basic legal framework, especially the extent to which it favors consumers."

The Law

Even in a world without federal consumer protection laws, this bank would have been in trouble. Numerous intra-account transfers in previously quiet accounts, poor voice/code security and reliance on an unverified fax to wire the entire HELOC balance to Korea, all add up to plain old negligence. But of course we do have a federal consumer protection law that covers the case, and that is the Electronic Funds Transfer Act ("EFTA")[1] and its implementing Regulation E.[2]

EFTA/Regulation E

Congress enacted EFTA in 1968 to "provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund and remittance transfer systems."[3] As noted in Regulation E, EFTA's primary purpose is "the protection of individual consumers engaging in electronic funds transfers…."[4]

EFTA provides that an electronic funds transfer is any transfer of funds initiated through an electronic terminal, telephone, computer or magnetic tape for the purpose of ordering, instructing or authorizing a financial institution to debit or credit a consumer account.[5] Even though telephone transfers are included in the general language, EFTA and Reg. E specifically exclude them from coverage as an electronic funds transfer, unless they take place under a written plan in which pe-

riodic or recurring transfers are contemplated.[6] Unfortunately for banks, the Official Interpretations of EFTA (formerly administered by the Federal Reserve, now transferred to the Consumer Financial Protection Bureau under the Dodd-Frank Act) define a written plan quite broadly to include written statements available to the account holder that describe a telephone transfer initiation system, for example, a "brochure or material included with periodic statements."[7]

The husband and wife depositors in this case had received just such a brochure in the form of a booklet that described a telephonic audio response access service for their accounts. Since the brochure amounted to a written plan, the 16 transfers between the HELOC and the checking account qualified as electronic funds transfers. More importantly, each transfer was an "unauthorized electronic funds transfer" because it was made by a person without actual authority to initiate the transfer, the customers received no benefit from the transfer, and they did not furnish the hijacker with an access code or card.[8] Since they were unauthorized electronic funds transfers, the bank was liable for all but $50.00 of the loss resulting from the drawdown of HELOC funds to the checking account, from which the money was wired to Korea.

UCC

Article 4-A of the Uniform Commercial Code governs wire transfers. The UCC generally imposes liability on the bank for unauthorized transfers ("interloper fraud," in the words of a federal court decision).[9] Liability shifts to the customer where the bank and the customer have agreed to an authentication security procedure that is commercially reasonable and the bank accepts the payment order (i.e., the fax) in good faith and in compliance with the procedure.[10]

In this case, the bank hadn't agreed to *any* security procedures with the customers, so the question of commercial reasonableness never arose. The bank was liable to the customers for the full amount of the funds wired from the checking account to Korea.

Thoughts

The facts here were extreme: in fact they were so one-sidedly in favor of the customers under the UCC and the EFTA that the bank settled with them by refunding the full amount of the wired funds. The customers just had to furnish forgery affidavits in support of the bank's claim for insurance coverage.

Most banks have much better security controls and procedures to deter identity theft. Still, this case is instructive because it shows what happens when systems fail or don't exist: the law takes over, and that law is designed to protect consumers, not banks. That's the real takeaway.

Endnotes

1. 15 U.S.C § 1693 (2013).
2. *See* 12 C.F.R. pt. 1005 (2013).
3. 15 U.S.C § 1693(b).
4. 12 C.F.R. § 1005.1(b).
5. 15 U.S.C § 1693a(7) (2013).
6. 15 U.S.C § 1693a(7)(E); 12 C.F.R. § 1005.3(b)(6)(ii).
7. Official Staff Interpretation 3(c)(6), http://www.bankersonline.com/regs/205/regecomm.html.
8. 15 U.S.C § 1693a(12); 12 C.F.R. § 1005.2(m).
9. *Regatos v. North Fork Bank and New Commercial Bank of New York*, 257 F. Supp. 2d 632, 640–41, n. 16 (S.D.N.Y. 2003).
10. U.C.C. §§ 4-A-202, 4-A-204.

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Do Employers Have the Right to Demand Social Media Passwords from Job Applicants and Employees? If So, Is It Good Practice—and How May the Accessed Information Be Used?

By Denine K. Carr

I. Introduction

With more than one billion people worldwide active on Facebook, it should not be a surprise that many employers are using Facebook as a tool to vet job applicants and check up on current employees. The question is whether requiring an employee to provide her Facebook or other social network password account information to a prospective or current employer is legal. If legal, the question becomes whether it's good practice, and in what manner an employer may legally use the accessed information.

II. State Legislation to Prohibit Employer Access

Public sentiment appears to disfavor allowing employers and schools the ability to access social media content that social media users consider private. Since 2012, many states have been proposing and enacting legislation that would prohibit employer access to employee social media sites. Six states enacted legislation in 2012 alone that makes it illegal for current or prospective employers and schools to force employees and students to provide access to their social network accounts. See http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords.aspx. California, Michigan, Delaware and New Jersey laws apply to employers and academic institutions, while Illinois and Maryland laws currently apply to employers only. Pending legislation in 2013 would amend the Illinois and Maryland laws to apply to schools as well.

Fourteen states, including New York, introduced legislation in 2012 that would restrict employers from requesting access to social networking usernames and passwords of applicants, students or employees. As of May 31, 2013, similar legislation has been introduced or is pending in at least 36 states, including New York, and legislation has been passed in seven states so far this year. See http://www.ncsl.org/issues-research/telecom/employer-access-to-social-media-passwords-2013.aspx. New York's 2013 proposed legislation would prohibit an employer from requesting that an employee or applicant disclose any means for accessing an electronic personal account or service.

III. Status of Pending Federal Legislation

In addition to the legislation that more than half of the states have either proposed or enacted that prohibits employer and academic institutions from requesting employee passwords to social media accounts, in April 2012, the Social Networking Online Protection Act (SNOPA), a bill addressing this subject, was introduced in Congress. SNOPA would apply to schools and universities as well as employers, and would protect e-mail as well as social media. Similarly, one month later, in May 2012, federal legislation known as the Password Protection Act of 2012 was introduced in Congress which would have made it illegal for employers to force current or potential employees to provide employers access to their social network accounts. This legislation would have prohibited employers from discriminating or retaliating against prospective or current employees if an employee refused to provide access to password protected accounts. Both bills died when Congress adjourned at the year's end, but SNOPA, the more comprehensive bill, was reintroduced in February 2013 and is currently awaiting action. The Password Protection Act of 2013 was referred to committee in May 2013, but it has not been sent to the House or Senate.

If federal legislation is passed and/or New York State passes legislation prohibiting employers from requiring prospective or current employees to provide their passwords to social media accounts, whether an employer may be allowed to access employees' or prospective employees' social media content will no longer be an issue.

IV. Existing Legislation: The Stored Communications Act

As we await the status of the pending New York State and federal legislation, what guidance exists regarding an employer's rights?

The most common cause of action for social media and related claims has been via The Stored Communications Act, 18 U.S.C. § 2701, *et seq*. (SCA) (part of the Wiretap Act) that prohibits the knowing or intentional unauthorized access to "a facility through which an electronic communication services is provided." In the

cases that address unauthorized access to a password protected e-mail account or social networking group, federal district courts in the Southern District of New York and New Jersey have held that the employers in question violated the SCA.

A. Employer's Request for Employees' Social Medial Passwords Is Unauthorized

Despite the fact that employees provided their employer with their social media passwords when requested, a jury found that the employer's access was unauthorized and violated the SCA, and a federal district court in New Jersey upheld the jury's verdict. In the case of *Pietrylo v. Hillstone Restaurant Group*, 2009 U.S. Dist. LEXIS 88702 (D.N.J. 2009), the issue was whether a jury properly found that the defendant violated the SCA when it repeatedly accessed plaintiffs' MySpace chat room accounts after requesting their login information. One plaintiff testified that she felt she had to give her password to defendant because it was her employer and that she would not have given her password if the person who requested it from her had not been a manager. She testified that she would not have given her information to co-workers and that she believed she "probably would have gotten in trouble" if she had not given it to her manager. *Id.* at *8. The court found that the jury could have reasonably inferred that the plaintiff's authorization was coerced or "provided under pressure."

When deciding whether the jury's findings were reasonable, the court took into consideration the fact that the MySpace site clearly stated that it was intended to be private and was only accessible to invited members. The *Pietrylo* court found that the jury could have reasonably inferred that defendant's managers acted with knowledge or intent when they accessed MySpace repeatedly and that the managers knew they were not authorized to access the contents using the "manner and means" they did to obtain the passwords. *Id.* at *9. One of the managers testified that he knew that a plaintiff was "very uneasy" with the fact that she had given him and the rest of the managers her password and that she was worried about the consequences of having provided this information. Based upon these facts, the court found there was sufficient evidence for the jury to find that defendant unlawfully accessed plaintiffs' social media site five separate times, that the access was without authorization and was not by mistake or accident. *Id.* at *11.

B. Application of *Pietrylo*

Employers who ask their employees for social media passwords do so at their own risk. Although it does not appear that an employment policy related to the use of social media was an issue the jury addressed in *Pietrylo*, it is likely that such a policy would not have made any difference, given that the MySpace policy stated that the site was intended to be private and only accessible to invited members.

Facebook's Statement of Rights and Responsibilities requires its users to agree that they will not solicit login information or access an account belonging to someone else. It also requires its users to agree not to share their passwords or let anyone else access their accounts or "do anything else that might jeopardize the security" of their accounts. http://www.facebook.com/legal/terms. If an employer's social media policy states that the employer has a right to access employees' social media content when an employee uses the employer's computer system to access the sites, a jury could find that this policy alone does not provide an employer with authorized access because the social media site states that it is private and/or that passwords are not to be shared. A jury could find that an employee still has a reasonable expectation of privacy to her social media sites and that the employer's access was unauthorized. Employers should be very wary of accessing their employees' social media sites even if their policies give them the right to do so.

C. Employer's Access to Employee's Personal E-Mail Accounts Unauthorized

Similarly, in *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp*, LLC, 587 F. Supp. 2d 548, 552 (S.D.N.Y. 2008), the District Court for the Southern District of New York addressed the issue of whether an employer accessed defendant's third party server e-mails without authorization. In that case, plaintiff sought an injunction and claimed breach of restrictive covenant, alleging among other things that defendant stole trade secrets and proprietary information while still employed by plaintiff. After defendant left plaintiff's employment to set up a competing business, plaintiff accessed defendant's personal (non-work) e-mail service providers: Gmail, Hotmail, and defendant's new business e-mail account. Plaintiff was able to access defendant's e-mail accounts because the password to defendant's Hotmail account was saved to defendant's work computer. Plaintiff gained access to defendant's Gmail account by using the same user name and password as his Hotmail account and plaintiff made a "lucky guess" at defendant's new work mail password, which was the same password he used for his personal accounts. Defendant sought to preclude the e-mails from evidence and compel their return.

Plaintiff had an employee handbook that addressed its e-mail policy and limited its employees' expectation of privacy in company e-mails, granting

the company full access to review all e-mail sent via *the company system*. *Id.* at 559. The court was clear that this was "not a situation in which an employer [was] attempting to use e-mails obtained from the employer's own computers or systems," noting that the e-mails at issue were "**stored and accessed directly from accounts maintained by outside electronic communication service providers**" (emphasis added). *Id.* at 554. The court found that plaintiff accessed three separate electronic communication services, obtaining defendant's e-mails while they were in storage on those service providers' systems, and stated that either of those actions, if done without authorization, would be a violation of the SCA. *Id.* at 556.

Plaintiff argued that it was authorized to access defendant's e-mails since defendant was on notice by way of plaintiff's e-mail policy that plaintiff might view his e-mails, and even if he had no expectation of privacy, by leaving his username and password on plaintiff's computers, he gave implied consent.

The court found that defendant had a subjective belief that his personal e-mail accounts, stored on third-party computer systems, protected by passwords, would be private, and further found that this expectation was reasonable, since plaintiff's policy did not suggest it could extend beyond plaintiff's own systems and beyond the employment relationship. *Id.* at 561. With regard to the issue of implied consent, the court found that defendant did not provide implied consent to search his Hotmail account simply by leaving his password on the company computer "absent clear knowledge of the extent of what could be searched and the opportunity to refuse or withdraw his consent." *Id.* at 561. Because it found that defendant's access to plaintiff's e-mails accounts was unauthorized, the court therefore found defendant violated the SCA.

The same reasoning that the *Pure Power Boot Camp* court, *supra,* applied to e-mail accounts is also applicable to social media accounts. Employers should be very careful before deciding to access employee social media sites that employees may have accessed on employer computer systems. The social media sites are stored and accessed directly from accounts maintained by outside electronic communication service providers, much like the e-mail accounts that the Pure Power Boot Camp, Inc. plaintiff accessed. The user name and password may be stored on the employer's computer system and, as a result, would be easy to access. The question is whether the employee has an expectation of privacy, and if so, whether the employee authorized access to the account. A sound social media policy is helpful, but does not address the larger issue of whether an employer policy that gives the employer the right to access social media sites used by employees during work hours on the employer's computer system constitutes consent. Based upon the decisions in *Pietrylo* and *Pure Power Boot Camp*, arguably, the employer's access would be unauthorized.

V. Another Perspective

And if the possibility of being found to have violated the SCA is not enough to dissuade employers, consider the following from Jeanne Meister, who posts a blog on www.forbes.com. She says that employees who are the best and the brightest will not agree to give up their privacy, and the companies demanding password access to social media sites will lose talented employees. Meister points out that employers requiring social media passwords is bad public relations, suggesting that job hunters will spread the word of the requirement, which will result in fewer applicants. She also points out that a majority of college students and young professionals already "friend" their colleagues and superiors on Facebook. Meister says, "Enlightened recruiters at companies know that building personal and professional networks is a sign of a high-performing professional, not an infantile practice that puts the company at risk." Finally, she points out that requiring social media passwords is a losing battle, since job seekers/employees will simply come up with another way to deal with the issue by, for example, by setting up two accounts: one that's "scrubbed" under their own name and another that uses a pseudonym. See http://www.forbes.com/sites/jeannemeister/2012/04/09/facebook-and-the-job-interview-what-employers-should-be-doing/.

Nicole Black, an attorney, author and blogger, has also weighed in on this subject. She argues that the practice of requiring employees to provide their social media passwords to their employers is not only a privacy violation of the employees, but a violation of the privacy rights of the third parties with whom the employees have communicated via social media sites. Black points out that many social media users limit public access to their social media profiles for the very purpose of maintaining more privacy. She does not believe employers should engage in the practice of requiring social media passwords, since that practice undermines the privacy rights of "innocent, unsuspecting third parties who happen to be friends with, and correspond with, job applicants." See http://nylawblog.typepad.com/suigeneris/2012/08/states-pass-laws-that-ban-requesting-passwords.html.

Gary Saunders, a blogger for CoVerica, a nationwide insurance agency, recommends against employers asking employees for user names and passwords to their social media accounts and opines that managers should not become online "friends" with employees, nor should employers have a social media "policeman"

at the company who monitors comments/complaints that employees make online. http://www.coverica.com/social-media-employee-policy/. Saunders' advice is based upon various court and National Labor Relations Board (NLRB) rulings that have found employee online complaints and comments were protected activity, as discussed in VI.B. below.

In her March 5, 2013 article entitled "SNOPA and the PPA: Do You Know What it Means for You?," which was published in the Barry University Law School law review, Angela Goodrum argues that social media networks are fraught with fraudulent information; that is, information posted may not be accurate because it may have been posted by someone who created a fake profile and is holding himself out to be another person. Ms. Goodrum refers to the quarterly report filed by Facebook to the Securities Exchange Commission which reports that it estimates that over 14 million user accounts may be fraudulent. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245911. Accordingly, employers who access their employees' social media sites may obtain false and inaccurate information, which may be negative and misleading.

VI. What to Do with the Information Once You've Accessed It

A. Gathering the Information and Using It

If an employer makes the decision to access applicants' or employees' social media sites to aid in its hiring decisions and/or to determine whether its employees are posting derogatory and potentially defamatory statements about it online, in what manner is it allowed to use this information? The difficulty with using social media in making a hiring/firing decision is that information which may be otherwise unavailable to an employer is now accessible, yet employers may not legally use certain information to make hiring/firing decisions (e.g., information about a disability, sexual orientation, age, etc.). Further, off-duty conduct such as political activity is protected by New York Labor Law § 201-d and may not be used to make employment-based decisions. When vetting job applicants online, employers should: 1) limit inquiries to publicly available information; 2) know the legal limitations; and 3) consider only information that relates to legitimate business needs. To ensure that hiring/firing decisions are not made on the basis of protected information about which it would be illegal to base a decision, when conducting an investigation, it is advisable to delegate a person who is not a part of the decision-making process and who will maintain the privacy of ("scrub") the information that cannot legally be considered. This "neutral" will then be able to disseminate only information that may legally be considered by the hiring/firing decision makers.

B. Beware of Running Afoul of the NLRA

If an employer is ready to fire an employee for posting online comments complaining about working conditions or a supervisor, the posting will likely be considered concerted activity if other employees participate in making similar complaints. An employee who posts information about the terms and conditions of his employment is covered by § 7 of the National Labor Relations Act (NLRA) regardless of whether the employer is unionized. Concerted activity includes: 1) two or more employees addressing their employer about improving their working conditions and pay; 2) an employee speaking to his employer on behalf of himself and one or more co-workers about improving workplace conditions; and 3) two or more employees discussing pay or other work-related issues with each other. An employee's speech is not protected, however, if it is openly disloyal, including situations where the employee: 1) breached protected confidentiality, 2) maliciously or recklessly made false statement, or 3) disparaged the employer's products.

C. Ensuring an Employer's Social Media Policy Does Not Violate the NLRA

More often than not, it appears that employment social media policies reviewed by the NLRB violate § 7 of the NLRA because they: 1) tend to restrict employees from discussing protected subjects, 2) may be so vague that employees could interpret the policy to prohibit their posting about subjects involving their working conditions, 3) may discourage employees from "friending" or communicating with their co-workers, and/or 4) may prohibit social media complaining. The NLRB reviews not only whether a social media policy is used to suppress § 7 rights, but also whether the existence of an overly broad social media policy in and of itself can interfere with § 7 rights.

On May 30, 2012, Acting General Counsel for the NLRB issued a report that addressed the application of the NLRA to social media. The Acting General Counsel's opinions and advice memoranda are not binding on the NLRB or any court, but are guidance nonetheless. The report reviews six employer policies that were construed in part as overbroad and violating the NLRA, but the Acting General Counsel determined that the last policy he reviewed was entirely lawful. That policy serves as a good sample social media policy. The report may be viewed at www.jdsupra.com/legalnews/nlrb-report-of-the-acting-general-counse-61410.

D. Retaliation

If an employee does violate an employer's social media policy or use of the company network, retaliation against the employee as a result of making a com-

plaint against the employer is illegal, and may include covert monitoring of an employee's personal Internet use at work. *Zakrzewska v. The New School*, 543 F. Supp. 2d 185, 187 (S.D.N.Y. 2008).

VII. Conclusion

Employers who choose to ask employees or applicants for their social media passwords run the risk of violating the Stored Communications Act as well as state and/or federal anti-discrimination laws if they use the accessed information improperly. While it is a good idea to maintain a social media policy in the workplace, a good policy does not necessitate accessing employees' social media accounts. Moreover, requiring that applicants/employees provide their social media passwords may result in decreased morale in the workplace, as employees feel a sense of distrust and loss of privacy, and may turn away good potential employees. The best advice? Don't ask your employees or applicants for social media passwords.

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Seven Strategic Ways to Use LinkedIn

By Ari Kaplan

Whenever I ask lawyers about their use of LinkedIn, many often respond: "I do have a LinkedIn account but have done nothing with it," or "I still have not figured out how to effectively use LinkedIn."

Here are seven simple techniques for reinventing the way you use the social network.

Updates Are Easy

One of the reasons that LinkedIn offers so much potential is that everyone who uses it has generally opted in to receiving notifications about what everyone else in his or her network is doing, who they are meeting, and where they are going, among other details. As such, it is an effective, yet subtle form of broadcasting your schedule and activities.

Each time you have something of note to share (e.g., a new article, a public presentation, or a blog post), provide an update that the site will then distribute to all of your connections. You may not receive an instant response, but you can be certain that others are aware of your activity.

Study Status Updates and Share Resources

Just as your contacts are often quietly reading about you, take note of what they are doing as well. In fact, the current market may offer opportunities for you to help those facing economic challenges.

For instance, you might see a contact's status change from employed to independent. Consider reaching out and giving that person access to your network. Offer potential introductions and share resources. Even if he or she does not secure a job because of your effort, the gesture is one for which social networking is meant—communicating, collaborating, and connecting.

Eventually, that person will be employed and you will have permanently transitioned from simply being a contact to a supportive colleague. More importantly, everyone needs encouragement in those moments when it is in shortest supply.

You Probably Don't Know Who You Know

What you probably have in large supply are direct contacts related to your business development initiatives. The next time you visit a new city, or even have some time at home, conduct a LinkedIn search for relevant connections in your network.

Most of us cannot track the changes in status or new developments for most of the people with whom we are connected. As such, this exercise will help you see how your contacts are doing, but also give you a chance to reestablish communication. Since you are already related on LinkedIn, there is some context and your visit is the catalyst.

Study Those Looking for You

It may surprise you to know that savvy professionals are already doing this, which is one of the reasons that LinkedIn created the "Who's Viewed Your Profile?" feature. It identifies those individuals who are interested in you, what you do, and where you work. Think of these inquiries as leads for your career and business.

You may recognize some of the "viewers" giving you a seamless opportunity to reconnect. Others may simply provide hints that your latest marketing campaign has generated curiosity, or that a new contact received a cold e-mail and is in the process of following up. Over time, you are likely to gain interesting insight from this feature.

Explain Why You Are Connecting

One of the biggest complaints I read about LinkedIn is that users make random requests to connect with each other and provide no explanation in the note other than: "I'd like to add you to my professional network." Avoid this initial interaction.

Aside from being impersonal, it is a wasted chance to set the foundation for a relationship and follow-up conversation. It is also generally unpersuasive.

Take an extra minute and explain why you are connecting. Did you meet at a recent event? Read an article by that individual? Have a mutual friend? Most people are more likely to reply (and do so promptly) when there is a reason to do so. Also, do not indicate that you are a "friend" of the person if you are not. It poses more questions than answers.

Send a Follow-Up Note After Connecting

Just like the invitation, the response to that query is critical. Unfortunately, most people who receive LinkedIn connection requests from individuals with whom they are familiar, whether current contacts or long-lost friends, simply accept the invite and move on. This is a lost chance to create forward momentum.

Each time you receive a request, send a reply (the site actually provides a convenient link to send a message after you officially connect). Think of the request as someone saying "hello" and your message as the reply. It does not need to be complicated, but it should prompt a dialogue.

Depending on the nature of the contact, thank the person for his or her message and then ask how he or she is doing. This almost always sparks follow-up. It is the essence of creating opportunity.

View Profiles to Get Profile Views

Speaking of opportunity, in preparation for a recent trip I conducted a LinkedIn search for alumni of my law school (this is a proven technique that you should employ to organically expand your network locally, nationally, and internationally). I clicked on a few profiles in the search results prior to making contact directly by e-mail.

I met with a remarkable partner at a large firm, with whom I am certain I will stay in touch. What I noticed, however, was that another lawyer reviewed my profile simply because I reviewed his. We weren't able to meet, but I could have easily called him soon after he reviewed my background and there is a strong likelihood that he would have recognized my name.

Technology has made it much easier to add context to what was otherwise a cold call or e-mail just a few years ago. Take advantage of that new level of familiarity. LinkedIn makes networking universally accessible since it is both practical and strategic without requiring you to be bold or outgoing.

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Faith in the System: The Court's Role in Determining Custody with Religious Considerations

By Allyson D. Burger

It has long been held that the Bench should refrain from placing itself in a position of interpreting religious texts. The landmark case of *Avitzur v. Avitzur* stands for the principle that in adjudication of matters touching upon religious concerns, courts "should not resolve such controversies in a manner requiring consideration of religious doctrine."[1] The Court of Appeals informs that judicial involvement is permitted, but only to the extent that it can be accomplished in purely objective, secular terms. What then are the present limitations as to the Court's ability to bridge the divide between Church and State in the context of custody determinations?

Preference for Custodial Arrangements That Promote Religious Exposure

Generally, Courts do consider a parent's religiousness as a factor in rendering an appropriate legal custody determination. Historically, religion has been considered "so closely interwoven in the lives of most people that it is difficult to say whether good moral character could be molded in a child without some religious training."[2] When faced with a custody battle between a devout parent and a parent who does not believe in organized religion, the Courts lean in favor of religious exposure until "there will come a time when the infant will be able to choose for himself which, if any, religion he wishes to pursue."[3]

In *C.C.W. v. J.S.W.*, the Court directed that the plaintiff-mother would have decision-making authority in the area of religion when her testimony discussed taking the children to church regularly, while the extent of the father's participation in the religious upbringing of the children was unclear. The mother was cautioned that her right to exercise religious decision-making was not intended to prevent the father from exposing his religion, if any, to the children.[4] Additionally, the Second Department has intervened and modified a visitation agreement of parties in order to allow for a child to participate in Hebrew School, opining that the "best interests of the children would be served by permitting them to attend religious instruction with other children of their own age and to allow them to participate in the activities that the religious school provides."[5]

Issuing a Custody Determination When Parents Ascribe to Two Conflicting Religions

The New York State Courts appear consistent in their rendering of custody determinations that suggest a child's exposure to religion is generally consistent with their best interests, over non-exposure. However, when conflicting religions are at the forefront of a custody battle, how deep must the Court's inquiry delve into the parents' respective religions in determining the best interests of the child?

"It has long been held that the Bench should refrain from placing itself in a position of interpreting religious texts.… What then are the present limitations as to the Court's ability to bridge the divide between Church and State in the context of custody determinations?"

In *Aldous v. Aldous*, the Appellate Division, Third Department affirmed an Order of the Family Court, Otsego County, which awarded custody of the parties' eight- and ten-year-old daughters to the plaintiff-mother, an Episcopalian. In rendering its decision after a hearing, the Family Court opined that the father's newfound lifestyle choice to be completely immersed in the Greater Glen Falls Bible Church was "not what the children want or need at this stage," and concluded that "if he were to be awarded custody, their entire lifestyle would have to change to suit him and his new beliefs."[6]

On appeal, the father alleged that the Family Court had inappropriately and unconstitutionally conducted an inquiry into religious doctrine and made an evaluation of the parties' respective religious activities in rendering a determination as to the best interests of the children. The Court opined that while religion alone may not be the only determinative factor in adjudging the best interest of a child, religion may well be considered a factor in a custody dispute when a religious belief poses a threat to a child's well-being.[7] In affirming the lower court's determination of custody, the Third Department actually acknowledged that the Family Court's consideration of religion might well have been impermissible. However, the Court excused this possible impropriety by stating that additional factors found in the record *negated* the "implication that

religion, as an issue, tainted the final determination of custody or caused an abuse of discretion by the court."

The New York County Family Court was faced with the rare question of how to reconcile a custodial parent's right to determine the child's religious upbringing with the non-custodial parent's right to free exercise of his religion during visitation periods. In *Matter of S.E.L. v. J.W.W.*, the parties' Stipulation of Settlement and subsequent Judgment of Divorce determined that the mother, S.E.L., would have exclusive custody of the parties' daughter, Natalie. Defendant-father made an application to modify the custody arrangement, which in part asserted that the existing schedule impinged upon his First Amendment right to expose the child to his Jehovah's Witness training. The Family Court held that Constitutional rights can be freely waived, and that J.W.W. essentially waived his right to "free exercise" once he acquiesced that custody would be with S.E.L. In its decision, the Court reiterated "the right to free exercise of religion guarantees that a court will not make, *inter alia*, a custody decision, based on its view of the respective merits of two religions. [The Court] further guarantees that a non-custodial parent's right to practice his or her religion will not be abrogated when the child visits except to the extent necessary to prevent any harm to the child."

In denying the father's application, the Court ordered that the father may be permitted to take Natalie to Jehovah's Witness services on Sunday but that he may not involve her any further other than to answer casual questions which she might ask him. The Court specifically directed the father not to expose Natalie to any additional Jehovah's Witness doctrine and activities, because it would amount to a "harm" of strain and conflict to the child. The father failed to demonstrate that allowing him to expose Natalie to his religion would not be harmful to her, after the Court found credible testimony indicating that the father did not want the child to study her mother's Catholicism (despite testimony offered by the father that he would welcome the child's exposure to both religions).[8]

Issuing a Custody Determination When Parents Ascribe to Two Different Sects of the Same Religion

The ability of the Court to essentially render a decision as to the children's religion in accordance with the best interest standard is the same with regard to custody matters when parents share the same religion but ascribe to different sects. The Court may intervene and choose one sect, in order to protect the children from confusion and upset brought about by virtue of their parents' religious disagreement.

In *Marjorie G. v. Stephen G.*, the New York County Supreme Court held that the *de facto* custodial parent (the mother) could enroll the children at a Reform Jewish school against the wishes of the non-custodial father, a passionate and involved Conservative Jew. In recognizing this sectarian dispute among parties of the same religion and sympathizing with the father's sincere desire for the children to learn his religious practices, Justice Saxe determined that the mother has the right to determine the place and manner of the children's religious training, but the father should be permitted (during his visitation periods) to engage in the traditional and cultural observances associated with Conservative Judaism. In citing *S.E.L.*, the Court did caution that the father may not attempt to indoctrinate the children with any theological or ideological principles that are unacceptable to the Reform movement. Justice Saxe wrote, "as the Court has no desire to enmesh itself in or even to create an artificial tension between the parties' respective religious beliefs, by recognizing the *de facto* custodial parent's absolute right to raise the children as Reform Jews, while further permitting the non-custodial parent to freely and comfortably practice Conservative Jewish religious and cultural traditions with the children, the best interests of the children are amply served."[9]

Has the Court's Inquiry into Religious Upbringing of Children Stepped Too Far Beyond the Principles of *Avitzur*?

Unquestionably, the Courts seek to ameliorate the harm caused to children by virtue of being inserted in their parents' ideological conflicts. But at what price will the Courts prioritize the need for a child's religious consistency?

A recent decision rendered by the Rockland County Family Court has caused a great deal of public controversy, with various publications attacking the Court for overstepping in the analysis of three young boys' religious needs. In *Matter of Gribeluk v. Gribeluk*,[10] the subject family had been living in the Satmar enclave, a Chasidic community in upstate Monsey, for the duration of the children's lives. The mother raised various allegations of physical and sexual abuse of the parties' three boys, throughout the course of much contested custody litigation. The mother vowed to remove the three boys out of the Satmar community and raise them in a secular Jewish community elsewhere. The father maintained that all such allegations were false and that the mother was simply engaging in a continued course of conduct to alienate the children from him and the Satmar community, the only home the children had ever known. Mr. Gribeluk additionally claimed that the mother was flaunting an ongoing extra-marital affair with his nephew in front of the children.

Despite the children's (ages five, seven and eight) articulated desire to remain in their mother's care, the Court ruled that the best interests of the parties' children would be to remain at Satmar. The Court

opined that, "if the Mother were to ignore the rules and requirements that the children are forced to follow to remain in their current [religious] community and school while with the children, it could lead to catastrophic consequences for children who are already clearly struggling with a multitude of issues."

Curiously, the *Gribeluk* decision has seemingly disappeared from all publication following the onset of the media frenzy. *The Jewish Week* reports that the Gribeluk children are presently living in foster care in their Chasidic Community pending a Rockland County Child Protective Services investigation.[11] An outpour of sympathizers have started campaigns to help restore custody of the Gribeluk children to their mother.

Perhaps the Court has stepped too far beyond the secular bounds prescribed by *Avitzur* in its attempts to determine the best interests of these children. Did the Family Court err in deciding that maintaining the children's religious consistency at Satmar would be in their best interest, amid abuse allegations and over the stability consistent with remaining in their mother's care? The matter is now pending on appeal in the Appellate Division, Second Department.[12]

Conclusion

Since *Avitzur*, when presented with questions that are entirely interwoven with religion, the Courts have looked for secular justifications for intervention, even where issues of constitutionality are raised. This trend has had far-reaching effects into other areas of the law beyond Family and Matrimonial Law, when questions of law are predicated on religiosity.[13]

Without assessing the relative merits of *Gribeluk* and its predecessors, it appears as though the Court is authorized to favor the religion of one parent over the other where the conflict of dueling ideologies present a "harm" to the subject child. Although the Courts are charged with upholding a standard of the best interests of the child, the line between Church and State is blurred when a Court is instilled with the authority to choose a child's religion, even when equipped with a secular justification.

It may appear that there are a limited number of cases referenced on the subject of the Court's role in determining custody matters when faced with a question of religion. To date, there has been very little Appellate guidance post-*Avitzur* to practitioners as to how to navigate religious conflicts within custody matters. Accordingly, it is incumbent upon counsel to be creative in representing clients through relatively uncharted territory, and raise constitutional challenges when applicable. Be aware, however, that in order to preserve the ability to raise a constitutional challenge, notice of the anticipated challenge to the Office of the Attorney General must be provided.[14]

Endnotes

1. *Avitzur v. Avitzur,* 58 N.Y.2d 108 (1983).
2. *Robert O. v. Judy E.*, 90 Misc. 2d 439 (Family Court, Erie County 1977).
3. *Id*.
4. *C.C.W. v. J.S.W.,* 15 Misc. 3d 1140[A], 2006 NY Slip Op. 52593 (Sup. Court, Monroe County 2006).
5. *Manos v. Manos*, 282 A.D.2d 749 (2d Dept. 2001).
6. *Aldous v. Aldous,* 99 A.D.2d 197 (3d Dept. 1984).
7. Citing also *Spring v. Glawon*, 89 A.D.2d 980 (2d Dept. 1982), *Matter of Weberman*, 198 Misc. 1055 (Sup. Court, Kings County 1950). *See also Matter of Stevens,* 17 Misc. 3d 1121(A) (Sur. Court, New York County 2007), Court determined that a mother was the appropriate guardian for a mentally retarded person despite her religious identification as a Jehovah's Witness which eschews blood transfusions. The Court determined that if the blood transfusion issue were to arise in an "end of life" context, the mother's religious objections would be overridden when necessary and appropriate.
8. *Matter of S.E.L. v. J.W.W.*, 143 Misc. 2d 455 (Family Court, New York County 1989).
9. *Majorie G. v. Stephen G.*, 156 Misc. 2d 198 (Sup. Court, New York County 1992); *see also Ervin R. v. Phina R.,* 186 Misc. 2d 384 (Family Court, Kings County 2000).
10. *Matter of Gribeluk v. Gribeluk* (Rockland County Family Court Docket Nos. V-177-12, V-178-12, V-179-12), decided April 22, 2013.
11. Orli Santo, *Satmar Custody Case Hinges On Value of Religious Community,* The Jewish Week, June 5, 2013, at 1, 18-19.
12. *Matter of Gribeluk v. Gribeluk,* 2013 NY Slip Op. 73582(U).
13. *Passionist Communications, Inc. v. Arnold*, 23 Misc. 3d 1130(A) (Sup. Court, Westchester County 2009). (In an action for constructive trust and accounting, the Court denied Defendants' motion to preclude evidence of canon law on grounds of constitutionality and permitted such evidence for purposes of demonstrating the nature of the relationship between the Passionists and Father Gorman, but directed the Jury not to consider whether any religious principle is valid or truthful.) *See also Church of Our Lady of Vilna v. Archbishopric of New York,* 15 Misc. 3d 1143 (A) (Sup. Court, New York County 2007). In a real property action relating to the property upon which a Church was built, the profits realized from its sale, and the Church's assets and personalty within, the Supreme Court enforced the Church's by-laws and granted Defendant Archbishop custody and control over the disposition of the Church's property, ruling that the issues were of hierarchical controversy rather than truly of religious interpretation.)
14. CPLR 1012(b), 22 NYCRR § 500.9, NY Executive Law § 71, FRCP § 5.1(a)(2).

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To Challenge or Not to Challenge? Recent Developments Dealing with Pre-nuptial and Post-nuptial Agreements

By Robert S. Grossman

As many people get married later in life,[1] or decide to marry for a second or even a third time, considerations increasingly include the protection and preservation of assets and income in the event of a divorce, as well as avoiding issues that may have arisen in a prior divorce. After even a brief review of recent case law, most practitioners are sure to be left with many questions as to how to best protect a client and avoid a time-consuming and costly challenge to the agreement in the event of a divorce. There are many issues that should be considered when drafting or litigating pre-nuptial and post-nuptial agreements which would require volumes to discuss in detail. This article is limited to discussing some of the recent cases regarding such agreements, and to bring some of the issues that should be considered to the attention of practitioners.

On a separate note, it also bears mentioning that with increasing frequency people try the "do it yourself" route and use forms, from the Internet or otherwise, to prepare pre-nuptial and post-nuptial agreements without the benefit of advice from counsel. Such agreements are not "one size fits all" and must be tailored to fit the individual needs and concerns of each client. The individuals who read this article with the "do it yourself" agreement in mind would be best served by seeking advice of competent and *independent* counsel before entering into any such agreements. Otherwise, while they may save in the short run, in the event of a divorce they are likely to spend substantially more, whether in the form of counsel fees, support, or other relief that may be awarded in a matrimonial proceeding.

That being said, New York generally has a "strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements."[2] Although a pre-nuptial or post-nuptial agreement may seem like any other contract between two consenting adults, it is quite different in many respects and involves fiduciary relationships which require the "utmost of good faith."[3] There are limits and "in numerous contexts, agreements addressing matrimonial issues have been subjected to limitations and scrutiny beyond that afforded contracts in general."[4]

Courts have held that "an agreement between spouses or prospective spouses may be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable conduct."[5] In reviewing the agreements, courts may consider the terms of the agreement to determine if there is even an inference or negative inference of overreaching in the execution of the agreement.[6] "'[C]ourts have thrown their cloak of protection' over post-nuptial agreements, 'and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity…'"[7] Unlike issues that arise in arm's length contracts, proof of actual fraud is not required, because "relief will be granted if the [agreement] is manifestly unfair to a spouse because of the other's overreaching."[8]

The party seeking to set aside the agreement has the initial burden of demonstrating the facts that support the claims to set aside the agreement.[9] Conclusory claims alone will be insufficient. However, if the burden is satisfied, the burden then shifts, and the "proponent of a postnuptial agreement 'suffers the shift in burden to disprove fraud or overreaching' (*Matter of Greiff*, 92 N.Y.2d at 346, 680 N.Y.S.2d 894, 703 N.E.2d 752; *see Matter of Barabash*, 84 A.D.3d at 1364, 924 N.Y.S.2d 544; *D'Elia v. D'Elia*, 14 A.D.3d at 478–479, 788 N.Y.S.2d 156)."[10]

The Court of Appeals long ago held in *Christian v. Christian*,[11] that "over the years, an unconscionable bargain has been regarded as one 'such as no (person) in his (or her) senses and not under delusion would make on the one hand, and as no honest and fair (person) would accept on the other'" (*Hume v. United States*, 132 U.S. 406, 411, 10 S.Ct. 134, 136, 33 L.Ed. 393), the inequality being "'so strong and manifest as to shock the conscience and confound the judgment of any (person) of common sense'" (*Mandel v. Liebman*, 303 N.Y. 88, 94, 100 N.E.2d 149, 152)." Yet, what seems "'to shock the conscience and confound the judgment of any (person) of common sense'" has increasingly become more of a grey area.

The Appellate Division, First Department, in *Cohen v. Cohen*,[12] noted various factors that it found insufficient to even warrant a hearing as follows:

> The motion to vacate or set aside the parties' prenuptial agreement was properly denied without a hearing, as defendant failed to meet her burden of presenting evidence of fraud, duress or overreaching with respect to the agreement, which was executed in France and written in defendant's native tongue (*see Stawski v. Stawski*, 43 A.D.3d 776, 777, 843 N.Y.S.2d 544 [2007]; *Forsberg v. Forsberg*, 219 A.D.2d 615, 616, 631 N.Y.S.2d 709 [1995]). Defendant's contradictory affidavit and her doctor's letter do not support her suggestion that, because of her pregnancy, she lacked the mental capacity to understand or execute the agreement. Further, plaintiff's alleged threat to cancel the wedding if defendant refused to sign the agreement does not constitute duress (*Colello v. Colello*, 9 A.D.3d 855, 858, 780 N.Y.S.2d 450 [2004], *lv. denied* 11 A.D.3d 1053, 783 N.Y.S.2d 896 [2004]). Nor does the absence of legal representation establish overreaching or require an automatic nullification of the agreement (*see id*.), especially as the evidence shows that the agreement was prepared by an independent public official unaligned with either party. Plaintiff's alleged failure to fully disclose his financial situation is also insufficient to vitiate the prenuptial agreement (*Strong v. Dubin*, 48 A.D.3d 232, 233, 851 N.Y.S.2d 428 [2008]). Indeed, there is no evidence that plaintiff concealed or misrepresented any financial information or the terms of the agreement (*id*.).

Courts have repeatedly held that presenting an agreement for signature shortly before an impending wedding alone is insufficient to constitute a basis to set aside an agreement,[13] and that lack of independent counsel alone is insufficient to set aside a duly executed agreement.[14] Together with other evidence, however, such facts may be sufficient to set aside an agreement.[15]

In other recent decisions, viewing the totality of the circumstances, courts have set aside agreements using what some may consider as more "flexible" considerations of what is "shocking." In February, 2013, the Appellate Division, Second Department upheld a trial court's decision setting aside a prenuptial agreement in *Cioffi–Petrakis v. Petrakis*.[16] Referred to by some as a "landmark" ruling,[17] the decision creates more uncertainty for both the parties to such agreements, and the attorneys preparing the agreements. In *Cioffi–Petrakis*, it was reported that Ms. Cioffi–Petrakis believed her then-fiance "when he told her orally that his lawyers had made him get a prenuptial agreement signed to protect his business and promised to destroy the document once they had children and put her name on the deed to the house."[18] She further stated that her then-fiance "gave her an ultimatum four days before the wedding for which her father had already paid $40,000, telling her to sign the document or it wouldn't occur."[19] Although courts have held that the pressure of an impending wedding and the possibility of it being cancelled are insufficient to substantiate a claim of duress, the totality of the circumstance in *Cioffi–Petrakis*, including issues of credibility, were sufficient for that court to set aside the agreement. Similarly, in *Petracca v. Petracca*,[20] the court held that the wife established that the terms of the agreement were "manifestly unfair" to her because of, among other things, her relinquishment of rights in the marital residence, waiver of inheritance rights, and also in part based upon the disparity in the net worth and income of the parties. The court held that this resulted in an inference of overreaching, further supported by the circumstances surrounding the execution of the agreement.

Another recent case sets forth a concept that may possibly be used to discourage attempts to challenge pre-nuptial and post-nuptial agreements. In the recent "high net worth" [21] case of *Lennox v. Weberman*,[22] the Appellate Division, First Department upheld a decision that pendente lite payments made to a spouse who was not to receive any support under a prenuptial agreement should be charged against the assets the recipient spouse was to receive in equitable distribution.[23] However, it does not appear that the court would have taken, or could have taken, the same position in a case where the assets were not as substantial.

Even if an agreement limits the exposure of the monied party to claims for support and counsel fees, as the Appellate Division, First Department held in *Vinik v. Lee*,[24] such a limitation does not necessarily preclude an award of temporary support or interim counsel fees.[25] The court noted the adage that "'[t]he best remedy for any perceived inequities [in the amount of the pendente lite award] is a prompt trial.…'"[26] Furthermore, as the parties apparently did not address the issues of custody or child support in the prenuptial agreement, the Court held that award of counsel fees for custody and child support related issues was not be barred by the agreement.[27] Similarly, in *Abramson v. Gavares*,[28] the Second Department awarded counsel fees

in excess of the fees set forth in the parties' prenuptial agreement and held that

> Because of a strong public policy favoring the resolution of matrimonial matters on a level playing field (*see Kessler v. Kessler,* 33 A.D.3d 42, 47, 818 N.Y.S.2d 571; *see also Prichep v. Prichep*, 52 A.D.3d 61, 65, 858 N.Y.S.2d 667), the determination of whether to enforce an agreement waiving the right of either spouse to seek an award of an attorney's fee is to be made "on a case-by-case basis after weighing the competing public policy interests in light of all relevant facts and circumstances both at the time the agreement was entered and at the time it is to be enforced" (*Kessler v. Kessler,* 33 A.D.3d at 48, 818 N.Y.S.2d 571). Here, the parties are involved in extensive litigation concerning child custody, a matter not expressly addressed in their prenuptial agreement. Moreover, the plaintiff's net worth is more than $13 million and his monthly gross income exceeds $45,000, while the defendant has no income other than what she is receiving pursuant to the agreement. Under these circumstances, the Supreme Court providently exercised its discretion in awarding the defendant $15,000 in interim counsel fees (*see Vinik v. Lee*, 96 A.D. 3d at 523, 947 N.Y.S.2d 424*; Witter v. Daire,* 81 A.D.3d 719, 917 N.Y.S.2d 870) which, contrary to the plaintiff's contention, properly included, as a component thereof, counsel fees that the defendant incurred defending against a petition for a writ of habeas corpus that the plaintiff filed during the pendency of this divorce action (*see* Domestic Relations Law § 237[b]).

The recent cases do not give a clear direction as to how an attorney preparing an agreement can best protect a client and set forth disincentives to challenges to an agreement. In a recent decision setting aside an agreement in Nassau County, Justice Leonard D. Steinman noted as follows in *C.S. v. L.S.*[29]:

> Thus, this Court finds that the Agreement is to be set aside. In so holding, this Court does not mean to imply that Husband was wrong to desire to enter into an agreement that would clearly spell out the parties' rights upon a termination of the marriage or his death. Such agreements are commonplace and serve understandable and laudable goals, particularly where as here the marriage is not the parties' first. Nonetheless, there are right ways and wrong ways to go about such things. To those who fear that setting aside agreements such as the one in this case will lead to uncertainty in the law and an inability to confidently manage one's affairs, one need only look to the multitude of decisions upholding marital agreements. One can predict with confidence that if each spouse retains a lawyer of his or her own choosing, is provided with a proposed agreement with sufficient time to give due consideration to the serious consequences of the proposed terms, is given fair and adequate disclosure, and is presented with an agreement that does not scream inequity or will leave one party practically destitute, it will be upheld. Unfortunately, that was not the case here and this court cannot turn back the clock and make it so.

Both practitioners and parties would be well served by considering such suggestions. Indeed, the more one-sided and inequitable an agreement is, the more incentive the "non-monied" party has to seek to set it aside. This is especially so if that party can seek and receive an award of temporary support and interim counsel fees, and the best remedy for the "monied party" is a "speedy trial" which is often unlikely based upon the sheer volume of cases before our already overburdened courts. Further complicating this issue is the lack of the ability of the "monied" spouse to "recoup" certain pendente lite payments in excess of the amount awarded after trial.[30] Whether or not a provision in an agreement memorializing the holding in *Lennox v. Weberman,* or something similar thereto, would be enforced remains to be seen. Depending on the circumstances, other considerations may include adding written allocution language, attesting affidavits from witnesses present (other than a notary public) during the signing, or video statements from the parties and/or witnesses. Perhaps even a provision setting forth a disincentive to a challenge should be considered, such as an *in terrorem* clause[31] (more often used in a Last Will and Testament). Overall, the practitioner can best assist a client by considering the cases mentioned herein and the totality of the circumstances to reach a fair and negotiated agreement.

Endnotes

1. Based upon data from the U.S. Census Bureau, the median age at first marriage in 1970 was 23.2 for men, and 20.8 for women, and in 1990 was 26.2 for men and 23.8 for women, and in 2012 was 28.6 for men and 26.6 for women.
2. *Cioffi–Petrakis v. Petrakis*, 103 A.D.3d 766 (2d Dep't 2013).
3. *Petracca v. Petracca*, 101 A.D.3d 695 (2d Dep't 2012).
4. *Cioffi–Petrakis v. Petrakis*, *supra.*
5. *Id.*
6. *Petracca v. Petracca*, *supra.*
7. *Id.*, citing *Christian v. Christian,* 42 N.Y.2d 63, 72 (1977); *Infante v. Infante,* 76 A.D.3d 1048, 1049 (2nd Dep't 2010).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Christian v. Christian*, 42 N.Y.2d 63 (1977).
12. 93 A.D.3d 506 (1st Dep't 2012).
13. *See, e.g., Barocas v. Barocas*, 94 A.D.3d 551 (1st Dep't 2012); *Leighton v. Leighton*, 46 A.D.3d 264 (1st Dep't 2007).
14. *Id.*
15. *Siclari v. Siclari*, 291 A.D.2d 392 (2d Dep't 2002).
16. *Cioffi–Petrakis v. Petrakis*, *supra*.
17. "Landmark" N.Y. appeals court ruling voids prenup due to millionaire's oral promises to wife-to-be, posted Mar. 11, 2013, 2:20 PM CDT, by Martha Neil, ABA Journal (online).
18. *Id.*
19. *Id.*
20. *Petracca v. Petracca, supra.*
21. The Court also noted that the case involved assets valued somewhere in the range of $77 million - $90 million.
22. 109 A.D.3d 703, 2013 WL 4711539 (1st Dep't 2013).
23. *Lennox v. Weberman*, *supra* note 22.
24. *Vinik v. Lee*, 96 A.D.3d 522 (1st Dep't 2012).
25. *Id.*; *see also Solomon v. Solomon*, 224 A.D.2d 331 (1st Dep't 1996); *Tregellas v. Tregellas*, 169 A.D.2d 553 (1st Dep't 1991).
26. *Vinik v. Lee, supra.*
27. *Id.*
28. 2013 WL 5225047 (2d Dep't 2013).
29. *C.S. v. L.S.,* Slip Copy, 2013 WL 5526048 (Table) (Sup Ct., Nassau Co. 2013).
30. *See, e.g., Johnson v. Chapin*, 12 N.Y.3d 461 (2009*); Rader v. Rader*, 54 A.D.3d 919 (2d Dep't 2008) (noting that "there is a strong public policy against recoupment of both pendente lite and permanent maintenance paid pursuant to a court order or judgment which is subsequently set aside on appeal").
31. *Kromberg v. Kromberg*, 56 A.D.2d 910 (2d Dep't 1977) (declining to set aside an in terrorem clause indirectly by noting that it was not set aside in a prior proceeding and holding it res judicata in a subsequent proceeding).

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Climate Change Adaptation and Mitigation: A Local Solution to a Global Problem

By Sarah Adams-Schoen

"Adapt or perish, now as ever, is Nature's inexorable imperative."[1]

Introduction

Natural disasters like Super Storm Sandy bring the confluence of environmental and municipal law into sharp focus. Although natural disasters almost inevitably take us by surprise, the fact that they will occur and recur is in fact foreseeable. Global temperatures are increasing and the rate of increase is accelerating—with accelerating increases in sea levels, acidification of oceans, and losses of flood-mitigating wetlands. Storms and other extreme weather events are increasing in frequency and severity. We can predict that New York's future holds more massive storm surges, heavy rains and winds, major heat waves, and other extreme weather conditions.

Nor are environmental disasters simply uncontrollable acts of nature. Rather, they are at least in part attributable to failures of the legal system to effectively assess and mitigate risks. As Berkeley Law Professor Daniel Farber observes, "environmental disasters stem from gaps in environmental regulation: weak protection of wetlands, badly planned infrastructure, and, above all, climate change."[2]

As a result, state and local governments must continue to work toward a more resilient[3] future by implementing climate change[4] mitigation[5] and adaptation[6] measures. Local decision makers, resource managers, planners, and attorneys must evaluate the most current data and ask themselves whether their municipalities are doing enough to mitigate and adapt to climate change. Failure to do so will continue to be costly in terms of property and lives.

Super Storm Sandy

New York is experiencing the impacts of climate variability and change in the form of increasing annual air temperature, more frequent and intense flooding events, and more frequent and intense coastal storms. Almost one year ago today, "Super Storm Sandy" combined with a storm that was traveling west to east, striking the East Coast at high tide. The barometric pressure in Sandy was one of the lowest ever recorded. The storm completely devastated the coastline from Cape May, New Jersey, to New York Harbor, Seagate and Staten Island, and the coastline from New York to Connecticut.

The impact on New York was devastating. Forty-three New Yorkers lost their lives. The tidal surge from Super Storm Sandy flooded the New York Port Authority Trans-Hudson subway tunnels, the New York subways, and the Brooklyn Battery Tunnel. The storm shut down access to New York City by highway, rail and air for almost a week; related power outages lasted for weeks in some areas. Sandy was the most expensive storm in U.S. history, estimated to cost approximately $71 billion in damages.[7]

These and other climate-related impacts are expected to continue to manifest and increase in intensity as a result of the accumulation of greenhouse gases in the atmosphere.

Climate Change: The New Normal

Although scientists debate whether climate change *caused* Super Storm Sandy, scientists tend to agree that climate change contributes to the severity of storms and will lead to more extreme storms in the future. Columbia University Professor Cynthia Rosenzweig, a noted climate scientist, and co-chairwoman of the New York City Panel on Climate Change (NPCC),[8] identified compelling areas of linkage between Super Storm Sandy and climate change, including rising sea levels that made storm surges higher.[9] According to the IPCC,[10] "it is likely that future tropical cyclones (typhoons and hurricanes) will become more intense, with larger peak wind speeds and more heavy precipitation associated with ongoing increases of tropical sea surface temperatures."[11] In a recent study, researchers, including NASA climatologist James Hansen, explained, "[w]e can state, with a high degree of confidence, that extreme anomalies were a consequence of global warming because their likelihood in the absence of global warming was exceedingly small."[12] In 2006, underwriters at Lloyd's of London issued a report entitled "Climate Change: Adapt or Bust," in which they concluded that "[f]ailure to take climate change into account will put companies

at risk of future legal actions from their own shareholders, their investors and clients." According to a United Nations Environment Program Finance Initiative report, climate-change-driven natural disasters may lead to economic losses of $150 billion per year within the next decade.

Thus, not surprisingly, former New York City Mayor Michael Bloomberg recently lamented, "we are sobered by the 'new normal' that climate change is producing in our city, including more frequent and intense summer heat waves and more destructive coastal storms like Hurricane Sandy."[13] And, these sobering predictions are backed up by the most recent scientific assessments. The Fourth Assessment Report of the IPCC concluded that evidence of global warming is "unequivocal" and is caused primarily by human activities.[14] The Fifth Assessment Report of the IPCC (AR5) closely examined the uncertainties in the science. Despite numerous recognized uncertainties, AR5 confirmed that:

> Warming of the climate system is *unequivocal*, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, sea level has risen, and the concentrations of greenhouse gases have increased.[15]

Specifically, AR5 reported that there is "unequivocal" evidence of increased atmospheric concentrations of greenhouse gases including carbon dioxide (CO_2), methane (CH_4), and nitrous oxide (N_2O);[16] that it is "certain" global surface temperatures have increased since the late 19th century and are steadily increasing, with each successive decade being the warmest on record;[17] and, the evidence provides "very high confidence" that sea ice, ice sheets and glaciers are "persistently shrinking."[18]

Local data is equally alarming. According to the NPCC, sea level in New York City has risen 1.1 feet since 1900, and we can predict that it will continue to rise, at an increasing pace.[19] According to the most recent projections, higher sea levels are "extremely likely," with projected sea-level rises of as much as 2.5 feet by 2050.[20] In addition to increasing the height of storm surges, sea-level rise also causes dramatic losses in coastal wetlands, which buffer storm surges, thereby increasing exposure to flood damage as well as other harms such as saltwater intrusion into estuaries and drinking-water supplies.[21] Severe storms also result in further loss of coastal lands.[22]

By the 2050s, the middle-range projections suggest that coastal flood levels that currently occur an average of once per decade may occur once every three to six years. With the high-range projections, today's 1-in-100 year flood may occur approximately 5 times more often by the 2050s.[23] For New York City and other low-lying municipalities, if sea levels continue to rise as predicted, another storm like Sandy will result in more lost lives, more evacuations, more lost homes and businesses, and greater disruptions of critical infrastructure.[24] In economic terms, former-Mayor Bloomberg recently predicted that "while Sandy caused about $19 billion in [economic] losses for [New York City], rising sea levels and ocean temperatures mean that by the 2050s, a storm like Sandy could cause an estimated $90 billion in losses (in current dollars)— almost five times as much."[25] And, this estimate may be conservative.[26]

The data also strongly suggests that New York's future will include increasing annual air temperatures, heavier rains and stronger winds, more major heat waves, more frequent and intense coastal storms, and other more frequent and extreme weather conditions.[27] For example, the most recent NPCC report predicts that, by 2050, New York City could have as many days at or above 90 degrees annually as Birmingham, Alabama currently has. Heat waves are also predicted to more than triple in frequency and last on average one and a half times longer than they do today. Compounding this, "heat indices are very likely to increase, both directly due to higher temperatures and because warmer air can hold more moisture. The combination of high temperatures and high humidity can produce severe additive effects by restricting the human body's ability to cool itself and thereby induce heat stress."[28] Given that heat waves kill more Americans each year than all other natural disasters combined, the need to address the causes of increasing temperatures and heat indices is great.[29] The predictions certainly are sobering.

The Role of Municipalities: "Adapt or Perish"

Climate-induced weather extremes pose serious considerations for the core responsibilities of municipalities. According to some researchers, Sandy revealed how poor land-use decisions can exacerbate already destructive coastal storms.[30]

With global temperatures increasing—and resulting increases in sea levels, acidification of oceans, and losses of flood-mitigating wetlands—intense storms and other extreme weather events are increasing in frequency and severity. Nor are environmental disasters simply uncontrollable acts of nature. Rather, they are at least in part attributable to failures of the legal system to effectively assess and mitigate risks.

Local land use planning and development controls offer one of the most powerful tools for achieving natu-

ral-disaster resilient communities as well as communities that contribute to a decreased incidence of natural disasters.[31] As Touro Law Center Dean Patricia Salkin explains, local governments are on the "front line":

> Across the country, local governments maintain day-to-day responsibility and control over the use of the vast majority of lands that abut the nation's edge and other environmentally sensitive areas. Land use patterns are determined, infrastructure is designed and provided, and many other development issues are decided at the local level, where natural hazards are experienced and losses are suffered most directly.[32]

Pace Law Professor and Director of the Pace Land Use Law Center John Nolan echoes these sentiments, observing that "[l]ocal land use authority is the foundation of the planning that determines how communities and natural resources are developed and preserved, and how disaster resilient communities are created."[33] Local governments have an array of tools in their toolbox that can mitigate against and adapt their communities to climate change-related conditions—including building codes; land use, zoning, and subdivision regulations; comprehensive, capital improvement, transportation, floodplain management, stormwater management, and open space plans; facilities needs studies; population growth and future development studies; and economic development plans.[34]

Some Examples of Local Mitigation and Adaptation

Adopting a Local Hazard Mitigation Plan—Local hazard mitigation plans enable local governments to, among other things, secure hazard mitigation project grants. The local plans represent "the jurisdiction's commitment to reduce risks from natural hazards, serv[e] as a guide for decision makers as they commit resources to reducing the effects of natural hazards [, and]…serve as the basis for the State to provide technical assistance and to prioritize project funding."[35] The Disaster Mitigation Act of 2000 provides that, in order to qualify for federal hazard mitigation grants, state and local governments must "develop and submit for approval to the President a mitigation plan that outlines processes for identifying the natural hazards, risks, and vulnerabilities of the area under the jurisdiction of the government."[36]

Among other things, a local plan must include documentation of the planning process, including how the public was involved, and a risk assessment with "sufficient information to enable the jurisdiction to identify and prioritize appropriate mitigation actions to reduce losses from identified hazards." Moreover, the risk assessment must identify: (1) the type, location, and extent of all natural hazards that can affect the jurisdiction; (2) information on previous occurrences of hazard events and on the probability of future hazard events; (3) the jurisdiction's vulnerability to the hazards; and, (4) National Flood Insurance Program insured structures that have been repetitively damaged by floods. In identifying vulnerabilities, the plan must, among other things, describe land uses and development trends within the community so that mitigation options can be considered in future land use decisions.[37]

In January 2014, the New York City Office of Emergency Management (OEM), in partnership with the Department of City Planning, released the draft 2014 New York City Hazard Mitigation Plan (HMP). The HMP identifies the range of hazards facing the City and strategies to reduce the effects of these hazards. The 2014 draft HMP serves as an update to the 2009 New York City Natural Hazard Mitigation Plan. The public comment period for the draft HMP closed on January 15, 2014. The draft HMP is now awaiting review by New York State Division of Homeland Security and Emergency Services and approval by FEMA.[38]

Other municipalities that have incorporated climate-change-related hazards into their local HMPs include the City of New Rochelle, New York, and the Village of Larchmont, New York.[39] The Disaster Mitigation Act also provides for the creation of multi-jurisdictional HMPs, such as Nassau County's HMP.[40]

Setting Clear GHG Emission Reduction Targets—One significant step localities can take is to set quantifiable greenhouse gas emission reductions targets. Lewis & Clark Law Professor Melissa Powers argues that city climate action plans that fail to require *quantifiable* emissions reductions exalt the concept of "sustainability" over the governmental accountability necessary to have any hope of decreasing global CO_2 concentrations to 350 parts per million (ppm) or below, a level arguably necessary to avoid catastrophic temperature increases.[41]

Both the State of New York and New York City have set quantifiable emissions reductions targets.[42] In 2007, the New York City Mayor's Office laid out the city's climate change mitigation and adaptation goals, including reducing the city's greenhouse gas emissions by more than 30 percent by 2030.[43] The city recently reported that, in the last six years, the city's annual greenhouse gas emissions have dropped 16%.[44] The city's recent progress report attributes this success in part to the integration of sustainability goals into all the city's agencies and their operations. According to the progress report, the city "now spend[s] 10% of [its] annual energy budget—approximately $80 million—on funding energy efficiency measures in City government buildings."[45]

Revising Zoning, Building and Construction Codes to Prioritize Climate-Change Mitigation and Adaptation—Protecting residents from natural disasters is a fundamental value and goal of local land use control.[46] As discussed above, many local land use zoning tools can protect communities from the effects of climate change and decrease communities' contributions of greenhouse gases, including land use, zoning, and subdivision regulations; comprehensive, capital improvement, transportation, floodplain management, stormwater management, and open space plans; facilities needs studies; population growth and future development studies; and economic development plans.[47]

The design and construction of buildings also plays a major role in resiliency. For example, in New York City, buildings account for nearly 75% of the city's total greenhouse gas emissions, 94% of the city's electrical consumption, 85% of its water usage, and much of the city's rainwater catchment area.[48] In response to this, Mayor Bloomberg and City Council Speaker Christine Quinn asked the New York Chapter of the U.S. Green Building Council to convene the NYC Green Codes Task Force to review current building and construction codes and make recommendations on how they could be amended to promote more sustainable practices, including specifically: (1) examining construction, fire, water and sewer, and zoning codes; (2) identifying impediments to incorporation of green technologies, (3) identifying opportunities to promote energy efficiency and other sustainable practices, and (4) recommending ways to incorporate climate adaptation measures into the codes.[49]

The Task Force responded with 111 proposed code additions or revisions.[50] The proposals primarily affect new buildings under construction and existing buildings that are being renovated; but, in some cases, the Task Force also proposed targeting upgrades to existing buildings to correct widespread problems.[51]

Currently, 48 of the 111 proposals have been enacted.[52] The enacted codes include new laws or amendments to existing law that: (1) add environmental protection as a fundamental principle of construction codes,[53] (2) streamline approvals for green technologies and projects,[54] (3) increase resiliency of buildings to natural disasters,[55] (4) increase energy efficiency[56] and decrease carbon emissions,[57] (5) remove impediments to alternative energy,[58] (6) increase indoor health and safety,[59] (7) increase resource conservation,[60] (8) manage stormwater more sustainably,[61] (9) promote sustainable urban ecological practices,[62] and (10) enhance water efficiency.[63] A list of enacted proposals, corresponding legal language, and detailed proposals is available at http://www.nyc.gov/html/gbee/html/codes/enacted.shtml.

Integrating Climate-Change Resiliency and Adaptation Priorities into Comprehensive Plans and Other Related Plans and Programs—Integration is a key challenge for local governments facing climate change risks. Because the impacts of climate change and the strategies to adapt to those impacts do not happen in isolation, municipalities must take care that a particular adaptation strategy, which may reduce vulnerability in one area, does not increase risk and vulnerability in another area. For example, as municipalities consider smart growth (efforts to create more compact communities in order to minimize carbon emissions from transportation), they must consider whether increased population densities increase vulnerability to disasters. Similarly, municipalities considering infill development (efforts to channel growth into existing cities), must consider the potential for increased disaster risks, given the locations of some cities and the tendency for redevelopment to favor waterfront locations.[64]

One way to facilitate integration is to address climate change resiliency and adaptation in local comprehensive plans and other overarching plans and programs. The American Planning Association's (APA's) 2002 Growing Smart Legislative Guidebook provides a list of recommended, required, and optional elements of a local comprehensive plan, including a natural hazards element, explaining:

> States and communities across the country are slowly, but increasingly, realizing that simply responding to natural disasters, without addressing ways to minimize their potential effect, is no longer an adequate role for government. Striving to prevent unnecessary damage from natural disasters through proactive planning that characterizes the hazard, assesses the community's vulnerability, and designs appropriate land use policies and building code requirements is a more effective and fiscally sound approach to achieving public safety goals related to natural hazards.[65]

In June 2013, New York City published its most recent comprehensive coastal protection plan—incorporating into the new plan climate change mitigation and adaptation as a primary focus.[66] The plan proposes a broad, diverse range of discrete coastal protection measures.[67]

> Some of the proposed measures mimic existing coastal features that performed well during Sandy. Others have been proven to be successful elsewhere. Where possible, the City has derived inspiration from the historic natural features that once protected the coastline throughout the city. Elsewhere, both traditional and newly

developed technologies have been considered.[68]

For example, the plan proposes the use of augmented wetlands, reefs and living shorelines in some areas,[69] and the use of protective infrastructures, including local storm surge barriers, in other areas.[70] The array of proposed coastal measures are intended to be both complementary and capable of independent implementation over time.[71] Although the report notes that "ultimately the City will be best served by implementing the entire suite of options," the report claims that implementation of the 37 "Phase I" measures could reduce expected losses in a Sandy-like storm in the 2050s by up to 25 percent, or more than $22 billion.[72]

New York City is also in the process of updating its Waterfront Revitalization Program (WRP) to include climate change resiliency and adaptation as primary objectives.[73] The WRP is the city's "principal coastal zone management tool"; it "establishes the city's policies for development and use of the waterfront."[74] Despite this, nowhere in the current 46-page program was climate change or sea-level rise even mentioned. Addressing this deficiency, on October 30, 2013, the city approved a series of revisions to the WRP in order to advance the long-term goals laid out in *Vision 2020: the New York City Comprehensive Waterfront Plan*.[75] *Vision 2020* is organized around eight goals, one of which is climate resilience.[76] Specifically, *Vision 2020* proposes to use stormwater management and protection and restoration of wetlands, beaches, and natural shorelines to improve the ecological health of the city's water bodies. The plan recognizes the connection between these measures and protection of coastal neighborhoods from flooding and storm surges.[77] The revised WRP is now pending state and federal approval.[78]

Keeping Abreast of Current Scientific Analyses and Projections—Simply reviewing the vast quantity of data and analyses currently available can be a formidable task unto itself. However, municipalities cannot mitigate and adapt to risks if they do not understand the risks. Thus, municipalities must have a plan for continuing to evaluate and understand the available current scientific information on climate change.

To facilitate this, New York City convened the New York City Panel on Climate Change (NPCC) in 2008 and, in 2012, passed Local Law 42, which established the NPCC as an ongoing body.[79] In doing this, New York City became the first city to scale down the United Nation's IPCC global climate models to develop climate-related projections specific to a municipality.[80] Local Law 42 requires the NPCC to meet at least twice a year to review scientific data on climate change; recommend projections for the 2020s, 2050s, and 2080s within one year of the publication of the IPCC Assessment Reports, or, at a minimum once every three years; recommend a framework for stakeholders to incorporate climate change projections into their planning processes; and, advise the City's Office of Long-Term Planning and Sustainability on a communications strategy related to climate science.[81]

Local Law 42 also established a New York City climate change adaptation task force "consisting of city, state and federal agencies and private organizations and entities responsible for developing, maintaining, operating or overseeing the city's public health, natural systems, critical infrastructure, buildings and economy."[82] Local Law 42 requires the task force to create an inventory of potential climate-change-related risks to the city's communities, vulnerable populations, public health, natural systems, critical infrastructure, buildings and economy; develop adaptation strategies to address the risks; and, identify issues for further study.[83]

Conclusion

Notwithstanding municipalities' many impressive efforts, only a handful of which are discussed above, local land use laws are not yet being utilized sufficiently to create disaster-resilient or disaster-adaptive communities.[84] New York City has done substantially more than many other cities, including, critically, setting specific CO_2 emissions reduction targets and amending zoning and building codes. But, in light of the evidence of climate change and its impacts, local decision makers, resource managers, and planners throughout the state must ask whether we are doing enough. Failure to do so will continue to be costly in terms of property and public health, including lives.

Endnotes

1. Alejandro E. Camacho, *A Learning Collaboratory: Improving Federal Climate Change Adaptation Planning*, 2011 B.Y.U. L. Rev. 1821, 1821 (2011) (quoting Herbert George Wells, Mind at the End of Its Tether 19 (1945)).
2. Daniel Farber, *Symposium Introduction: Navigating the Intersection of Environmental Law and Disaster Law*, 2011 B.Y.U. L. Rev. 1783, 1786 (2011). Professor Farber is Co-Director of Berkeley Law's Center for Law, Energy & the Environment. *See* Daniel A. Farber, Faculty Profile, http://www.law.berkeley.edu/php-programs/faculty/facultyProfile.php?facID=1141 (last visited Feb. 3, 2014).
3. "Resilience" refers to "[t]he capacity of a system, community or society potentially exposed to hazards to adapt, by resisting or changing in order to reach and maintain an acceptable level of functioning and structure. This is determined by the degree to which the social system is capable of organizing itself to increase its capacity for learning from past disasters for better future protection and to improve risk reduction measures." United Nations International Strategy for Disaster Reduction, Terminology: Basic Terms of Disaster Risk Reduction, http://www.unisdr.org/eng/library/lib-terminology-eng%20home.htm (last visited Feb. 3, 2014).
4. Some definitions of "climate change" focus on changes in climate caused by human activities only, while others include all changes in climate, whether caused by human activity

or natural variability in climate. *See, e.g.,* Intergovernmental Panel on Climate Change (IPCC), Climate Change 2007 Impacts, Adaptation And Vulnerability: Contribution Of Working Group II To The Fourth Assessment Report Of The Intergovernmental Panel On Climate Change 6 (Martin Parry et al. eds., 2007) ("IPCC usage refers to any change in climate over time, whether due to natural variability or as a result of human activity. This usage differs from that in the Framework Convention on Climate Change, where climate change refers to a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods." (emphasis omitted)), *available at* https://www.ipcc.ch/publications_and_data/ar4/wg2/en/contents.html.

5. The IPCC defines "mitigation" as "[a]n anthropogenic intervention to reduce the sources or enhance the sinks of greenhouse gases." *Id.* at ch. 18.1.2.
6. The IPCC defines "adaptation" as "the adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities." *Id.* at 6.
7. Insurance Coverage for Natural and Man-Made Disasters § 13:5 (WL Cat Claims database).
8. To help respond to climate change in New York City, the Mayor's Office convened the First New York City Panel on Climate Change in 2008. In January 2013, the Mayor's Office convened the Second New York City Panel on Climate Change (NPCC2). NPCC2 published a report in June 2013, which provided new climate change projections and future coastal flood risk maps for New York City. New York City Panel on Climate Change, Climate Risk Information 2013: Observations, Climate Change Projections, and Maps (C. Rosenzweig and W. Solecki eds., June 2013) (hereinafter "NPCC2"), *available at* http://www.nyc.gov/html/planyc2030/downloads/pdf/npcc_climate_risk_information_2013_report.pdf.
9. *Id.* at 7 ("While it is not possible to attribute any single extreme event such as Hurricane Sandy to climate change, sea level rise already occurring in the New York City area, in part related to climate change, increased the extent, and magnitude of coastal flooding during the storm.").
10. IPCC is the international advisory body on climate change, which was formed in 1988 by the World Meteorological Organization and the United Nations Environment Programme.
11. IPCC, Climate Change 2007: The Physical Science Basis: Contribution of Working Group I to the Fourth Assessment Report of the IPCC 15 (Susan D. Solomon et al. eds., 2007), *available at* https://www.ipcc.ch/publications_and_data/ar4/wg1/en/contents.html.
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13. Mayor's Office of Long-Term Planning and Sustainability, City Hall, City of New York, PlaNYC Progress Report 2013: A Greener, Greater New York (June 2013) (hereinafter "Greener, Greater 2013 Progress Report"), *available at* http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/planyc_progress_report_2013.pdf.
14. Union of Concerned Scientists: Citizens and Scientists for Environmental Solutions, "Findings of the IPCC Fourth Assessment Report: Climate change Mitigation" (2007).
15. IPCC, Climate Change 2013: The Physical Science Basis: Working Group I Contribution to the Fifth Assessment Report of the IPCC 2 (T.F. Stocker et al. eds. 2013), *available at* http://www.climatechange2013.org/images/report/WG1AR5_ALL_FINAL.pdf.
16. *Id.* at 121.
17. *Id.* at 37 ("Each of the past three decades has been successively warmer at the Earth's surface than any the previous decades in the instrumental record, and the decade of the 2000's has been the warmest.").
18. *Id.* at 40-41.
19. NPCC2, *supra* n. 8, at 4.
20. *Id.* at 4.
21. *See* Farber, *supra* n. 2, at 1801 & nn.86-90; Cat Lazaroff, *Climate Change Could Devastate U.S. Wetlands*, Env't News Serv., Jan. 29, 2002, http://www.ens-newswire.com/ens/jan2002/2002-01-29-06.asp.
22. Farber, *supra* n. 2, at 1803. Hurricane Katrina, for example, resulted in the loss of over two hundred square miles of wetlands. *Id.*
23. NPCC2, *supra* n. 8, at 20.
24. With only a 1.5 feet sea level rise, another storm like Sandy could require New York City to evacuate as many as 3 million people. With a 3-foot rise in sea level, major storms would inundate low-lying shore communities in Brooklyn, Queens, Staten Island, and Long Island, shut down the City's transportation system, flood the highways, and render the tunnels into the City impassable. An even greater sea-level rise, which appears possible by mid- to late-century given the continued pace of greenhouse gas emissions, "would place much of the city underwater—and beyond the reach of any protective measures." Bruce Stutz, *New York City Girds Itself for Heat and Rising Seas*, Yale Environment 360, Sept. 10, 2009, http://e360.yale.edu/content/feature.msp?id=2187 (discussing the results of the first NPCC report). The NPCC2 future flood maps illustrate how projected sea-level rises will expose additional areas of New York City to flooding during extreme storm events. *See* NPCC2, *supra* n. 8, at 27.
25. Greener, Greater 2013 Progress Report, *supra* n. 13.
26. The $90 billion estimate does not account for any damage to new construction because it assumes no further development in flood-prone areas. Mayor's Office of Long-Term Planning and Sustainability, City Hall, City of New York, PlaNYC: A Stronger, More Resilient New York 34 (June 2013) (hereinafter "Stronger, More Resilient 2013"), *available at* http://www.nyc.gov/html/sirr/html/report/report.shtml.
27. NPCC2, *supra* n. 8, at 4-5 & 18-21.
28. *Id.* at 22.
29. *See* Stronger, More Resilient 2013, *supra* n. 26, at 26 (reporting that a 2006 heat wave caused 140 deaths in New York).
30. *See, e.g.,* Maxine Burkett, *Duty and Breach in an Era of Uncertainty: Local Government Liability for Failure to Adapt to Climate Change*, 20 Geo. Mason L. Rev. 775, 780-81 (2013).
31. A national survey of public and private emergency managers, code specialists, and engineers found that building codes and land use planning ranked as the *most effective tool* to achieve hazards vulnerability reduction. Patricia Salkin, *Sustainability at the Edge: The Opportunity and Responsibility of Local Governments to Most Effectively Plan for Natural Disaster Mitigation*, 38 Envt'l L.R. 10158, 10158 & n.3 (July 8, 2008), *available at* SSRN: http://ssrn.com/abstract=1157153.
32. *Id.* at 10159.
33. John R. Nolon, *Disaster Mitigation Through Land Use Strategies*, 23 Pace Envtl. L. Rev. 959, 976-77 (2006).
34. *See* Salkin, *supra* n. 31, at 10162-69 (discussing sustainability tools in local government toolbox).
35. 44 C.F.R. § 201.6.
36. Disaster Mitigation Act of 2000, P.L. 106-390 (Oct. 30, 2000), *codified at* 42 U.S.C. § 5165(a).
37. 44 C.F.R. § 201.6(c). The rules provide an exception for some small, impoverished communities, *id.* § 201.6(a)(3), and also allows for the use of multi-jurisdictional plans (for example,

watershed plans) "as long as each jurisdiction has participated in the process and has officially adopted the plan," *id.* § 201.6(a)(4).

38. New York City Office of Emergency Management, Emergency Planning: Hazard Mititgation Plan, http://www.nyc.gov/html/oem/html/planning_response/planning_hazard_mitigation_2014.shtml (last visited Feb. 7, 2014).
39. *See* City of New Rochelle Multi-Hazard Mitigation Plan (Sept. 2010), http://www.newrochelleny.com/DocumentCenter/Home/View/707; Village of Larchmont Hazard Mitigation Plan (Sept. 2013) (revised), http://villageoflarchmont.org/wp-content/uploads/2013/09/Hazard-Mitigation-Plan-0913-pdf.pdf.
40. Nassau Hazard Mitigation Plan (2007), http://www.nassaucountyny.gov/agencies/oem/hazmit/hazmitNHMP.html.
41. *See* Michael Burger et al., *Rethinking Sustainability to Meet the Climate Change Challenge*, 43 ENVTL. L. REP. NEWS & ANALYSIS 10342, 10346 (2013).
42. The New York State Department of Environmental Conservation (DEC) provides resources for local communities to decrease greenhouse gas emissions. *See* Climate Smart Communities Summary for Local Officials, *available at* http://www.dec.ny.gov/energy/50851.html (last visited Feb. 10, 2014).
43. Numerous related New York City publications, including the 2007 and 2011 *Greener, Greater New York* reports and annual progress reports, are available at http://www.nyc.gov/html/planyc2030/html/publications/publications.shtml.
44. GREENER, GREATER 2013 PROGRESS REPORT, *supra* n. 13, at 6.
45. *Id.*
46. *See* Salkin, *supra* n. 31, at 10162 nn.58-60 (citing cases).
47. *See* Salkin, *supra* n. 31, at 10162-69 (discussing sustainability tools in local government toolbox).
48. CITY OF NEW YORK, PLANYC: NEW YORK CITY LOCAL LAW 84 BENCHMARKING REPORT 5 (Sept. 2013), http://nytelecom.vo.llnwd.net/o15/agencies/planyc2030/pdf/ll84_year_two_report.pdf.
49. Letter from Michael Bloomberg, Mayor, and Christine Quinn, Speaker of the Council of the City of New York, to Russell Unger, USGBC New York, July 8, 2008, in Executive Summary, NYC GREEN CODES TASK FORCE: A REPORT TO MAYOR MICHAEL R. BLOOMBERG & SPEAKER CHRISTINE C. QUINN (Feb. 2010), *available at* http://www.nyc.gov/html/gbee/downloads/pdf/gctf_executive_summary.pdf.
50. Each proposal includes statutory language, a detailed explanation of the issues, an analysis of costs and savings, precedents from other jurisdictions, a comparison of the proposal to any related LEED credits, and information on implementation.
51. *See* NYC Local Law 85 of 2009.
52. PlaNYC, Green Buildings & Energy Efficiency, GCTF Enacted Proposals website, http://www.nyc.gov/html/gbee/html/codes/enacted.shtml (last visited Mar. 14, 2014); *see also* Sarah Adams-Schoen, *On the Waterfront: New York City's Climate Change Adaptation and Mitigation Challenge, Part 1*, 25 ENVTL. L. IN N.Y. 81, 87–89 (Apr. 2014).
53. NYC Local Law 49 (2010).
54. NYC Local Law 5 (2010).
55. *See, e.g.,* NYC Building Code Appendix G and NYC Local Law 143 (safeguard toxic materials stored in flood zones); NYC Local Law 81 (2013) (forecast non-flood climatic hazards to 2080); NYC Local Law 79 (2013) (ensure toilets and sinks can operate during blackouts).
56. *See, e.g.,* NYC Local Law 52 of 2010 (lighting efficiency in apartment buildings); NYC Local Law 48 of 2010 (manual on-automatic off lighting); NYC Local Law 47 of 2010 (reduction of artificial lighting in sunlit lobbies and hallways).
57. *See, e.g.,* NYC Local Law 21 of 2011 (reduce summer heat with cool roofs); NYC Local Law 141 of 2013 (reduce CO2 emissions from specialized concrete); 2010 ECCCNYS, Ch. 5 and ASHRAE 90.1 2010 Ch. 5 (minimize air leakage building exteriors); NYC Rules, Title 1, Ch. 5000 (ensure lighting systems function properly).
58. *See, e.g.,* NYC Rules, Title 63, Ch. 1 (LPC) (remove landmarks impediments to alternative energy); NYC Local Law 20 of 2011 (allow large solar rooftop installations); NYC Local Law 28 of 2012 (increase allowable size of solar shades); NYC Local Law 43 of 2010 (allow use of biofuels).
59. *See, e.g.,* NYC Local Law 2 of 2012 (limit harmful emissions from carpets); Federal Formaldehyde Standards for Composite Wood Products Act (restrict cancer-causing formaldehyde in building materials); NYC Local Law 72 of 2011 (filter soot from incoming air); NYC Rules, Title 15, Ch.2 (phase out dirty boiler fuels); NYC LL 43 of 2010 (DEP) (phase out dirty boiler fuels); NYC Local Law 70 of 2011 (treat corrosive concrete wastewater); NYC Rules, Title 15, Chapter 1 (DEP) (reduce "red tape" for asbestos removal); NYC Local Law 55 of 2010 (increase availability of drinking fountains).
60. *See, e.g.,* NYC Local Law 60 of 2012 (provide recycling areas in apartment buildings); NYC Local Law 71 of 2011 (use recycled asphalt).
61. *See, e.g.,* NYC Rules, Title 15, Chapter 31 (DEP) (reduce stormwater runoff from new developments); NYC Rules, Title 15, Chapter 31 (DEP) (send rainwater to waterways); NYC Rules, Title 15, Chapter 31 (DEP) (encourage innovative stormwater practices); NYC Rules, Title 15, Chapter 31 (DEP) (maintain site-based stormwater detention systems).
62. *See, e.g.,* NYC Local Law 80 of 2013 (construct sustainable sidewalks).
63. *See, e.g.,* NYC Local Law 57 of 2010 (enhance water efficiency standards); NYC Local Law 56 of 2010 (catch leaks by measuring water use); NYC Local Law 54 of 2010 (stop wasting drinking water for cooling).
64. Lisa Grow Sun, *Smart Growth in Dumb Places: Sustainability, Disaster, and the Future of the American City*, 2011 B.Y.U. L. REV. 2157 (2011); *see also* Farber, *supra* n. 2, at 1803.
65. Salkin, *supra* n. 31, at 10163 & n.70 (citing and quoting GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE chs. 7-142 & 7-143 (Stuart Meck ed., 2002)).
66. STRONGER, MORE RESILIENT 2013, *supra* n. 26, at 50-65.
67. *Id.* at 50-65.
68. *Id.* at 50.
69. *Id.* at 53.
70. *Id.* at 56.
71. *Id.* at 40.
72. *Id.*
73. New York City's local WRP is authorized by New York State's Waterfront Revitalization of Coastal Areas and Inland Waterway Act, McKinney's Exec. Law Ch. 18, Art. 42, which stems from the Federal Coastal Zone Management Act, 16 U.S.C. § 1452. The implementing regulations of the New York Act and coastal area policies can be found in the Department of State regulations, 19 N.Y.C.R.R. Part 600.
74. New York City Department of City Planning, NEW WATERFRONT REVITALIZATION PROGRAM 3 (Sept. 2002) (hereinafter "2002 WRP"), *available at* http://www.nyc.gov/html/dcp/pdf/wrp/wrp_full.pdf; *see also* New York City Department of City Planning, The Waterfront Revitalization Program, http://www.nyc.gov/html/dcp/html/wrp/index.shtml (last visited Feb. 3, 2014).

75. New York City Department of City Planning, The New York City Waterfront Revitalization Program: New York City Approved Revisions Pursuant to Section 197-a of the City Charter 5 (Oct. 30, 2013) (hereinafter "2013 WRP") (discussing history of New York City's WRP and New WRP).
76. The eight goals are: expand public access, enliven the waterfront, support the working waterfront, improve water quality, restore the natural waterfront, enhance the Blue Network (the waterways themselves), improve governmental oversight, and increase climate resilience. *Id.*
77. *Id.* at 6.
78. The City Council approved the revisions to the WRP on October 30, 2013. The revised WRP will go into effect upon approval by the New York State Department of State and the U.S. Department of Commerce.
79. NYC Local Law 42 of 2012.
80. IPCC, the international advisory body on climate change, was formed in 1988 by the World Meteorological Organization and the United Nations Environment Programme. *See* NPCC2, *supra* n. 8, at 34 (glossary of terms).
81. *Id.*
82. *Id.*
83. *Id.* The task force is also responsible for reviewing the NPCC's climate change projections, evaluating potential impacts of climate change on public health, including delivery of public health services to the city's vulnerable populations; evaluating the potential impacts of climate change on the city's natural systems, critical infrastructure and buildings; identifying rules, policies and regulations governing public health, natural systems, critical infrastructure, buildings and economy that may be affected by climate change; and, formulating and updating coordinated strategies to address the potential impact of climate change on the city's communities, vulnerable populations, public health, natural systems, critical infrastructure, buildings and economy. *Id.*
84. "According to anecdotal information from those who prepared the first round of state and local disaster mitigation plans submitted to FEMA,…there is little emphasis in them on the use of effective local land use strategies to create disaster resilient, or adaptive, communities." Nolon, *supra* n. 33, at 967.

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Can the Mere Presence of Contaminants Reduce a Property's Tax Assessment?

By Shannon M. Jones, Karen M. Richards and Patrick L. Seely, Jr.

Introduction

In 1996, the Court of Appeals held that environmental contamination must be considered in property tax assessment when it impairs market value.[1] An extension of this holding was sought recently when the Court granted leave to hear *Roth v. City of Syracuse*, where the petitioner contended that the mere existence of lead paint in his properties automatically rendered their value almost worthless.[2]

Part I of this article explains basic concepts in property valuation and tax certiorari proceedings. Part II provides a brief summary of cases where the Court examined "costs to cure" and "stigma," concepts revisited by the Court in *Roth*. Part III reviews *Roth*, where the Court held that the mere presence of lead paint does not overcome the validity of a property's assessment without substantial evidence that the contaminant depressed the property's market value.

Part I

Valuation of Property in General

Property is traditionally valued by one of three methods: comparable sales, capitalization of income, or reproduction cost less depreciation. The strict application of the traditional methods proved inadequate to analyze the impact of environmental contamination on value,[3] and over time appraisers developed specialized valuation methods and techniques based upon the traditional methods to account for the effect of contamination on value.[4]

Burden of Proof

It is well-settled that a property valuation by a municipal tax assessor is presumptively valid.[5] A petitioner challenging an assessment has the initial burden of overcoming the presumption of validity by producing substantial evidence that the assessment is erroneous.[6] The substantial evidence standard "requires less than clear and convincing evidence, and less than proof by a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt."[7] A petitioner need only "demonstrate the existence of a valid and credible dispute regarding valuation."[8] Substantial evidence at this juncture is whether the petitioner's evidence "is based on 'sound theory and objective data' rather than on mere wishful thinking."[9] The burden of rebutting the presumption of validity may be met by testimonial evidence and "the submission of a detailed competent appraisal, based on standard, accepted appraisal techniques and prepared by a qualified appraiser, demonstrating the existence of a genuine dispute concerning valuation."[10] "The ultimate strength, credibility or persuasiveness of [the] petitioner's arguments are not germane during this threshold inquiry."[11]

If the petitioner rebuts the presumption of validity, "a court must weigh the entire record, including evidence of claimed deficiencies in the assessment to determine whether [the] petitioner has established by a preponderance of the evidence that [the] property has been overvalued."[12]

Part II

Valuation of Contaminated Property in New York State

The concepts of stigma and cleanup costs, which were examined in *Roth v. City of Syracuse*, arose in cases decided previously by the Court of Appeals. Stigma was recognized in *Allied Corporation v. Town of Camillus* and was an integral part of the issue in *Criscuola v. Power Authority of State of New York*, while cleanup costs figured heavily in valuing the property in *Commerce Holding Corp. v. Assessors of Town of Babylon.*

In *Allied*, the property, consisting of more than 1,000 acres of wastebeds, settling lagoons, and buffer zones, had been used for many years to receive waste material from an industrial process.[13] Although the waste material was not classified as hazardous and there was no evidence of contamination,[14] the Court noted that "many of the same economic considerations are present, most notably the 'stigma' attached to environmentally damaged land in the eyes of any potential buyers, the risk that undetected or currently unclassified hazardous materials will be identified, and the costs of clean-up and rehabilitation."[15] The *Allied* Court thus recognized that stigma can attach to a site perceived to be, but not actually, contaminated.

The year following *Allied*, the Court of Appeals confronted the concept of stigma in an eminent domain proceeding.[16] In *Criscuola v. Power Authority of State of New York,* the claimants asserted their property was valueless due to cancerphobia and the stigma associated with the public's perception of health hazards from high-voltage power lines built across the claimants' property.[17] The only issue before the Court was whether the claimants were required to show the reasonableness of the public's fear in order to recover consequential damages for the taking.[18] The Court held they were not required to prove

reasonableness as a separate, additional component of diminished market value because market value may be adversely affected even if the public's fear is unreasonable.[19] Still, the claimants had to prove the value of the property was diminished "in much the same manner that any other adverse market effects are shown, e.g., by proffering evidence that the market value of the property across which power lines have been built has been negatively affected in relation to comparable properties across which no power lines have been built."[20]

Only a few years after deciding *Criscuola* and *Allied*, the Court of Appeals heard *Commerce Holding Corp. v. Assessors of Town of Babylon*.[21] Considered by many to be the leading case in New York on environmental contamination and tax assessment, the Court clearly held that to the extent it impairs market value, "contamination must be considered in property tax assessment."[22]

The industrial property in *Commerce Holding* was severely contaminated by metal plating operations performed by a former tenant of the property.[23] As a result of the contamination, the property was designated a Superfund site, making Commerce as the owner of the property strictly liable for cleanup costs, and Commerce entered into a consent order with the Environmental Protection Agency to remediate the site.[24]

The Town argued that the trial court erred in reducing the property's value by factoring in the costs to remediate the contamination dollar-for-dollar and urged the Court "to adopt a per se rule barring any assessment reduction for environmental contamination."[25] The Court of Appeals rejected this argument because the State Constitution mandates that property cannot be assessed at more than its full value, a concept typically equated with market value, and "[i]n view of this market-oriented definition of full value, the assessment of property value for tax purposes must take into account any factor affecting a property's marketability."[26] "It follows that when environmental contamination is shown to depress a property's value, the contamination must be considered in property tax assessment."[27]

Recognizing that traditional valuation methods were "inevitably hampered to some extent by the lack of available market data," the Court endorsed a flexible approach to valuing contaminated property.[28] While not prescribing any one valuation method, it listed certain factors—present use of the property, Superfund site status, extent of the contamination, ability to obtain financing and indemnification in connection with the purchase of the property, potential liability for third parties, estimated cleanup costs, and stigma remaining after cleanup—that should be considered to assess the effects of environmental contamination.[29] Based on the contamination and market factors present in *Commerce Holding*, the Court concluded that "cleanup costs [were] an acceptable, if imperfect, surrogate to quantify environmental damage and provide a sound measure of the reduced amount a buyer would be willing to pay for the contaminated property."[30]

Part III

Roth v. City of Syracuse

After *Commerce Holding*, the Court remained silent on the issue of environmental contamination and tax assessment until it decided *Roth v. City of Syracuse*.[31] Petitioner in *Roth* commenced a Real Property Tax Law Article 7 proceeding, alleging the assessor's valuations did not account for the adverse effect that the presence of lead paint had upon the market value of the properties.[32]

The properties were five former single-family homes, located near three major universities, which had long been converted to income-producing student housing.[33] During trial, the City's expert determined the properties' market values by using both a sales comparison approach and an income capitalization method and "concluded that the mere presence of lead paint, without more, did not diminish the market value of the five properties."[34] On Petitioner's motion, the trial court excluded the appraisal reports because the City's expert failed to include the data upon which he relied in developing his opinion of the properties' values.[35] Remaining in evidence was testimony from local property owners and brokers that indicated "lead-based paint would have no adverse effect upon either the sales of the properties or their continued profitable use as student housing rental."[36]

Conversely, Petitioner's expert concluded the market values of the properties were negatively impacted by the mere presence of lead-based contaminants. In utilizing an income capitalization method that determined market value based upon a property's ability to generate income,[37] Petitioner's expert first determined the hypothetical non-contaminated market value of each of the properties, reduced the value by their respective cost to cure figures,[38] and concluded that each of the five properties had a market value of one dollar.[39]

The properties, however, continued to generate income, and Petitioner did not incur any costs to cure because he had not taken any steps to remove the lead paint and restore the properties.[40] In addition, there was no legal requirement to abate the lead paint from the properties.[41]

On the merits, the trial court held that Petitioner failed to meet his burden of proof that the properties were overvalued or that the assessments were incorrect.[42] The appellate court unanimously affirmed.[43]

Before the Court of Appeals, Petitioner relied heavily on *Commerce Holding* to support his position that "even if a property owner is not required by law, or has not agreed by contract, to remediate contamination, the cost to cure contamination should be considered in valu-

ing the property for tax assessment."[44] He argued that *Commerce Holding* stood for the propositions that "it is the calculated cost to cure, not the amount actually expended by the property owner to cure the contamination, that must be deducted from the 'uncontaminated' value to get a proper assessment for tax purposes" and that the calculated cost to cure "does not depend on a legal mandate to actually remediate the pollution."[45] He further contended that stigma depressed the properties' market values.[46] In other words, the mere existence of lead paint automatically diminished the market value of each of the properties.[47]

The Court decided that Petitioner's reliance on *Commerce Holding*, however, was misplaced. *Commerce Holding* did not support his position that the costs to cure the lead paint must be deducted from the uncontaminated value of the properties, even though Petitioner was not required by law or by contract to remediate the lead paint. The Court found that:

> [t]he nature of the contamination and market factors in this case further distinguish petitioner from the property owner in *Commerce Holding*. The property in *Commerce Holding* was a designated Superfund site, and the property owner was strictly liable pursuant to CERCLA and a consent order with the Environmental Protection Agency to remediate the site. Thus, we concluded that 'cleanup costs are an acceptable, if imperfect, surrogate to quantify the environmental damage and provide a sound measure of the reduced amount a buyer would be willing to pay for the contaminated property.' Here, in contrast, there was no evidence that a 'buyer of the property would have demanded an abatement in the purchase price to account for the contamination.' Petitioner admits there was no immediate legal requirement to abate the lead paint from the properties, and the ubiquitous nature of lead paint in residential properties, unlike the unique contamination of the Superfund site in *Commerce Holding*, undermines petitioner's unsupported contention that there is a lead paint 'stigma' depressing market value. Thus, petitioner's proposed remediation costs are not an appropriate factor to be considered in evaluating the tax assessments of these properties.[48]

Petitioner's argument that a finding in his favor was required because the trial court struck the City's appraisal reports also failed.[49]

> Petitioner bears the ultimate burden to rebut the presumption of validity accorded to the tax assessments issued by the City. To carry his burden, petitioner must show that the market value of the properties was diminished by the presence of lead paint, not its mere existence. To hold otherwise would permit a taxpayer to avoid his or her fair share of the tax burden, while, as in petitioner's case, reaping the benefits of a rental market that is unaffected by the presence of the contaminant without having incurred any costs to remediate or abate the lead-based conditions.[50]

Petitioner continued to profit from the rental income generated by the properties, and he did not otherwise demonstrate that the presence of lead paint impaired their market value.[51] Accordingly, the Court found Petitioner "failed to meet his burden and there is no basis to disturb the presumption of validity in the City's favor."[52]

Conclusion

While the petitioner's efforts in *Roth* to extend *Commerce Holding* did not succeed, there are a few lessons to be learned. First, continuing to collect market rents without an obligation to incur any remediation costs does not result in a decrease in a property's valuation merely because contaminants are present. Second, it is difficult to factor cleanup costs when valuing property where much of the market contains the same common contaminants, such as the property in *Roth*, particularly where there is no legal obligation to remediate, as compared to factoring cleanup costs in property containing unique contaminants, such as the property in *Commerce Holding*, where there is a legal obligation to remediate. Finally, and most importantly, whether the alleged diminution in property valuation stems from cleanup costs, stigma, market perception, the extent of contamination, or the property's status as a Superfund site, a property owner must demonstrate the factor that depressed the market value of the property or the assessment is upheld as presumptively valid.

Endnotes

1. Commerce Holding Corp. v. Assessors of Town of Babylon, 88 N.Y.2d 724 (1996).
2. Roth v. City of Syracuse, 21 N.Y.3d 411 (2013). The petitioners-appellants also included several single member limited liability companies that engage in the ownership of real estate. In this article, all are referred to as "Petitioner."
3. *Commerce Holding*, 88 N.Y.2d at 731 (recognizing that traditional valuation methods were hampered by the lack of available market data and endorsing a flexible approach to valuing contaminated property).
4. An in-depth discussion of the methods of valuing property is beyond the scope of this article. *See* Thomas O. Jackson, *Methods*

and Techniques for Contaminated Property Valuation, The Appraisal Journal (Oct. 2003) for a discussion on valuing contaminated property.

5. FMC Corp. v. Unmack, 92 N.Y.2d 179, 187 (1998).
6. *Roth*, 21 N.Y.3d at 417.
7. *FMC Corp.*, 92 N.Y.2d at 188.
8. *Id.*
9. *Id.* (citing *Commerce Holding*, 88 N.Y.2d at 732).
10. OCG Limited Partnership v. Board of Assessment Review of Town of Owego, 79 A.D.3d 1224, 1225 (3rd Dep't 2010).
11. *FMC Corp.*, 92 N.Y.2d at 188.
12. *Id.*
13. Allied Corporation v. Town of Camillus, 80 N.Y.2d 351, 353 (1992).
14. *Id.* at 359 (Allied's appraiser stated: "Today there is nothing known to exist in those wastebeds except for the asbestos deposited in specific locations that would indicate that any of the material would be hazardous or toxic, but that doesn't eliminate the possibility that some time in the future that could occur.").
15. *Id.* at 356 (stating "[t]he particularized conditions of such properties make valuation difficult. In most instances, the comparable sales method is inappropriate, as it is in this case. We conclude that on the record the property should have been valued as a specialty.").
16. Criscuola v. Power Authority of State of New York, 81 N.Y.2d 649 (1993).
17. *Id.* The City of Syracuse questioned the applicability of *Criscuola* in a tax certiorari case. In Roth v. City of Syracuse, *Criscuola* was referenced in the following context:

> However, we also made clear that the effect of environmental contamination or hazards should be considered only if the "environmental contamination is shown to depress a property's value" (*id*. [*Commerce Holding*] at 729, 649 N.Y.S.2d 932, 673 N.E.2d 127; *see also* Criscuola v. Power Authority of State of New York, 81 N.Y.2d 649, 602 N.Y.S.2d 588, 621 N.E.2d 1195 [1993]).

Fourteen years before the Court decided *Criscuola*, the Love Canal disaster brought attention to the role environmental contamination could play in health and also the role it could play in property values. Love Canal was a neighborhood in the City of Niagara Falls where homes and schools were built on a site used to bury toxic waste. It was described as "an environmental time bomb gone off" and "what may very well be the first of a new and sinister breed of environmental disasters." Robert P. Whalen, M.D., Commissioner of Health, *Love Canal – Public Health Time Bomb: A Special Report to the Governor and Legislature* (Sept. 1978). The pervasive and severe presence of hazardous waste in the soil caused the Legislature to declare the properties in Love Canal were in a "state of great and imminent peril to the health of the general public." 9 Op. Counsel SBEA No. 58 (N.Y. Bd. Equal. & Ass.), 1989 WL 362672 (citing RPTL § 1700). There was a "planned exodus of 235 families" from Love Canal. Robert P. Whalen, M.D., Commissioner of Health, *Love Canal – Public Health Time Bomb: A Special Report to the Governor and Legislature* (Sept. 1978). Legislation was passed to purchase Love Canal properties "at their market value without any consideration to any deleterious effects of the discovery of the danger to the general health on the market value of those properties." 9 Op. Counsel SBEA No. 58.

18. *Criscuola*, 81 N.Y.2d at 651.
19. *Id.* at 652.
20. *Id.*
21. *Commerce Holding*, 88 N.Y.2d at 724.
22. *Id.* at 729. The Town also argued the property's market value would be unaffected by the presence of contamination because Commerce, by consent order, agreed to pay the cleanup costs even if it sold the property. *Id*. at 730. This argument was "belied by the reality that a purchaser of the site, on notice of the environmental contamination, would nevertheless be liable for the cleanup costs under CERCLA" and would demand "an abatement in the purchase price to account for the contamination notwithstanding the existence of the consent order." *Id.* The Town also argued that providing a reduction in assessment would shift "the cost of environmental cleanup to the innocent taxpaying public in contravention of the public policy of imposing remediation costs on polluting property owners and their successors in title." *Id*. at 727. The Town's "attempt to frame its policy argument in terms of environmental culpability—the guilty polluter versus the innocent tax paying public" failed to take into account that CERCLA is a strict liability statute that imposes liability on property owners without regard to fault. *Id.* at 729 n.3.
23. *Id*. at 728.
24. *Id.* Designation as a Superfund site was pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980. The Court noted that CERCLA is a strict liability statute that imposes liability on property owners without regard to fault. *Id*. at 729 n.3, (citing 42 U.S.C. § 9607[a] [responsible party and owner are liable]).
25. *Commerce Holding*, 88 N.Y.2d at 725, 729. The Town also unsuccessfully argued, alternatively, that if Commerce could "reduce its property value by the cost to cure, then the cost must be projected and discounted to reflect the reality that cleanup would be done in stages." *Id.*
26. *Id*. at 729 (citing N.Y. Const. Art. XVI, § 2 ("The concept of 'full value' is equated with market value, or what 'a seller under no compulsion to sell and a buyer under no compulsion to buy' would agree to as the subject property's price.").
27. *Commerce Holding*, 88 N.Y.2d at 729.
28. *Id.* at 731.
29. *Id.* at 732.
30. *Id*. at 725 (the market factors were the property's designation as a Superfund site, Commerce's strict liability for cleanup costs pursuant to CERCLA, and a consent order being in place).

Commerce's property was valued by the use of the income capitalization approach (the property was income-producing) to determine its value in an uncontaminated state, combined with a downward environmental adjustment in the amount of outstanding cleanup costs. While the Court could not say the methodology was erroneous as a matter of law, it was "cognizant of the potential of this valuation method to overstate the effects of environmental contamination." *Id.*

In *Bass v. Tax Commission of City of New York*, a case cited by both the petitioner and respondent in *Roth*, a contaminant was present, but it was the extent of contamination that was a critical factor in assessing its effects on the property's value. 179 A.D.2d 387 (1st Dep't 1992), *leave to appeal denied*, 80 N.Y.2d 751 (1992). The basis of the petitioner's overvaluation claim was the assessor's failure to consider the impact the presence of asbestos had on the value of a large office building. Transcript of the Record at 33-34, 731-38, 753, 867-72, 1949-50, *Bass*, 179 A.D.2d 387 (at trial, the respondent conceded that asbestos permeated 2,500,000 square feet of space). Although many buildings constructed in the same era contained asbestos, the extent of asbestos in the *Bass* office building was unlike that in other buildings—asbestos permeated the structure, making it essentially "a fifty-layer asbestos cake." *Id.* at 1357, 2126. Its presence in the building was causing such physical and functional impairments that it economically impacted the building. For example, flaking and delaminating asbestos created the risk of exposure through circulation in the air conditioning system, and the asbestos caused dramatically higher maintenance costs. *Id.* at 35-39, 142-43, 151-52, 738, 1126, 1751, 1753, 1950 (the cost to repair a sewer trap typically cost $3,000, but in this

asbestos-laden property, it cost $100,000 to repair). In order to achieve market rental rates, the asbestos had to be removed, which the owner voluntarily undertook. *Id.* at 33-34, 731-38, 753, 863, 867-69, 871-73, 879, 1949-50. The appellate court concluded the trial court properly arrived at a value by using an approach that reflected a pragmatic adjustment to the economic realities of the building and considered the foreseeable cost of curing the asbestos contamination. *Bass,* 179 A.D.2d at 388. The trial court also properly considered physical and functional obsolescence, such as the location of the building directly off New York Harbor, which subjected it to corrosive forces resulting in frequent and costly repairs unlike other properties. Transcript of the Record at 138, 142, 145-46, *Bass*, 179 A.D.2d 387.

31. *Roth,* 21 N.Y.3d at 414.

32. Petitioner claimed that 42 of his properties were overvalued. The parties agreed to proceed to trial on five of the properties as a test case that would guide the disposition of the remaining 37 properties by Supplemental Order of the trial court. Following the Appellate Division affirmance [78 A.D.3d 1590 (4th Dept. 2010)] of the trial court's decision, the remaining 37 properties were discontinued with prejudice.

33. *See Roth*, 21 N.Y.3d at 414-15; *see also* Transcript of the Record at 10-12, 187, 430-31, *Roth*, 21 N.Y.3d 411. The universities are LeMoyne College, Syracuse University and the State University of New York College of Environmental Science and Forestry. The properties are also located near a medical college, a nursing college, and two major hospital complexes. They were purchased by Petitioner between 1977 and 1979.

    When the properties were purchased, the sellers did not disclose the existence of lead, and Petitioner did not have any tests performed for the presence of lead before purchasing them. *See Roth*, 21 N.Y.3d at 415; *see also* Transcript of the Record at 12-13, 188, *Roth*, 21 N.Y.3d 411. In May 2008, after grieving the assessments, testing revealed the presence of lead-based contaminants. *See Roth*, 21 N.Y.3d at 415. Prior to the test results, however, Petitioner believed, given the age of the rental properties, that lead paint was present in the houses. Transcript of the Record at 79, 185, *Roth*, 21 N.Y.3d 411.

34. *Roth,* 21 N.Y.3d at 415.

35. *Id.*; *see* 22 N.Y.C.R.R. § 202.59(g). The City's expert was permitted to provide testimony critiquing the report of Petitioner's expert.

36. *Id.* at 416. Petitioner had not taken any steps to have the lead paint removed and restore the properties. He also was not required by Federal (15 U.S.C. §§ 2681-92) or State law (Public Health Law §§ 1370-76-a) to remove the lead and the lead-based paint from the properties. Brief of the Respondents'-Respondents', at 39-40, *Roth*, 21 N.Y.2d 411.

37. Petitioner's appraiser wholly adopted the income and expenses as reported by Petitioner without any independent analysis of the reasonableness, explaining that this adoption was based on the belief that due to Petitioner's large property holdings, he essentially set the market in the area. Transcript of the Record at 258-59, 334-35, 337, 339, 349-51, 377-78, 386-87, 392-94, *Roth*, 21 N.Y.3d 411. There was no separate analysis by an accountant testifying to the legitimate nature of the expenses. *Id.* at 15a, 18a-19a. The trial court concluded Petitioner's appraiser failed to consider and analyze all of the approaches to valuation. *Id.* at 20a. He only used the direct income capitalization approach. *Id.* at 270-71, 275, 280-81, 378.

38. *Roth,* 21 N.Y.3d at 415. The cost to cure figures included adoption of the actual cost to conduct the testing, the proposed cost of removing the lead-based paint and restoring the properties to their original conditions prior to the deconstruction proposed to remove the lead paint. The cost of removing the lead was based on intensive labor and maintaining the architectural components of these decorative properties.

39. *Id.* at 415 n.2 (noting that the expert's "calculations actually resulted in negative market values for each of the five properties because the 'cost to cure' exceeded the market value of the properties in a non-contaminated state. Relying on the concept of residual value, [Petitioner's expert] consequently assigned each property a market value of one dollar under the theory that a theoretical buyer would purchase property for one dollar.").

40. *Id.* at 416.

41. He was not required by Federal (15 U.S.C. §§ 2681-92) or State law (Public Health Law §§ 1370-76-a) to remove the lead and the lead-based paint from the properties. Brief of Respondents'-Respondents', at 39-40, *Roth*, 21 N.Y.2d 411.

42. *Roth*, 21 N.Y.3d at 416.

43. Roth v. City of Syracuse, 78 A.D.3d 1590 (4th Dept. 2010) (affirming for the reasons stated in the trial court's decision).

44. Brief of the Petitioners-Appellants at 43-44, *Roth*, 21 N.Y.3d 411.

45. *Id.* at 44. These arguments failed to take into account that the Court's decision in *Commerce Holding* was "[b]ased on the record." *Commerce Holding*, 88 N.Y.2d at 731 (where the property was a Superfund site and Commerce had entered into a consent order with the Environmental Protection Agency). The Town's "contention is belied by the reality that a purchaser of the site, on notice of the environmental contamination, nevertheless would be liable for the cleanup costs under CERCLA." *Id*. at 730. "As Commerce's expert opined, a buyer of the property would have demanded an abatement of the purchase price to account for the contamination notwithstanding the existence of the consent order." *Id*. No such facts were present in *Roth.*

46. Brief of the Petitioners-Appellants at 19, 40-42, 44, *Roth*, 21 N.Y.2d 411.

47. Although despite the fact that Petitioner's appraiser admitted that Petitioner had purchased additional properties in the same area recently and paid more than one dollar. Transcript of the Record at 342, 401, *Roth*, 21 N.Y.2d 411.

48. *Roth,* 21 N.Y.3d at 418 n.2 (citations omitted). Although Petitioner's expert opined that stigma attached to the properties, his report did not account for stigma in the opined value because the cost to cure had already resulted in negative values for each of the five properties.

49. *Id.* at 418.

50. *Id.*

51. *Id.*

52. *Id.*

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The Fox in the Henhouse: An Attorney's Experience Sitting on a Jury

By Paul F. Clark

At first glance, there's nothing special about Juror #2. He's about 50 years old with greying hair and dressed in the suburban uniform of khakis and a blue, buttoned-down shirt. He answers the questions of the court easily and seems to enjoy the banter when questioned by the judge.[1]

The attorneys learn that Juror #2 has a wife with four children who are slowly moving out of the family home. He has several police officers in his family, surely an admission that will give the defense some pause before letting him remain on the panel. Yet the juror readily concedes that the testimony of police officers should not be given any undeserved weight because they can be mistaken as easily as anyone else. In sum, there are factors in his profile that appeal to both sides but his employment history concerns the attorneys and court alike: Juror #2 is a practicing attorney who litigates and tries cases himself.

"After 30 years of litigating cases in New York and New Jersey, the tables turned and I was the one questioned about my background, experience, attitudes and potential biases."

I am Juror #2 and was selected to serve on a criminal case in my home county of Union, New Jersey. After 30 years of litigating cases in New York and New Jersey, the tables turned and I was the one questioned about my background, experience, attitudes and potential biases. I was the object in the attorneys' crystal ball, engaged in their elusive exercise of predicting how I would react to the parties, claims, defenses, and anticipated evidence in the case.

After several rounds, I was left unchallenged and sworn in as a juror. I was initially a reluctant participant but, by the end of the case, I was humbled by the experience of deciding the fate of another human being and gratified by working together with 11 other complete strangers with whom I had little in common other than our residence in Union County. The experience also caused me to reconsider some of the long-held assumptions that trial attorneys hold about jurors and how trial attorneys approach their craft. Here's what I learned.

1. **Never waste the jury's time.** Although each juror approached his or her duty with differing levels of enthusiasm, everyone would have preferred to be somewhere other than the courthouse. We showed up reluctantly but ready to fulfill our civic duty. In return, we expected—no, demanded—that the process respect the value of our time. We noticed which attorneys showed up on time, whether the witnesses were sworn in at their scheduled times and how long we waited during any breaks in the trial. So be on time, be prepared and have your witnesses lined up ready to proceed. You want the jury focused on the case, not their watches.
2. **Be aware of your surroundings.** Courthouses are notoriously cramped quarters. The attorneys, litigants and jurors frequently find themselves using the same elevators, bathrooms and lunch venues. With nothing but time on their hands, jurors focus on any attorney and litigant who cross their paths, unconsciously forming opinions based on these silent interactions. The jurors will notice how you carry yourself. So treat the court staff, the newspaper vendor, and the pizzeria counter worker with courtesy and respect. I suggest you honor the "Five Mile" rule and assume you are under the direct observation of at least one juror anytime you are within five miles of the courthouse and conduct yourself accordingly.
3. **Be careful of your leaders**. Previously, I worried about all jurors equally, debating whether to challenge the silent young man with the tattoos sleeping in the corner or the brash middle-aged women who dominates the entire room when expressing her opinions about the litigious nature of her fellow citizens. Jury experience refined my views on this subject, now armed with personal experience about how twelve strangers arrive at a unanimous decision about the guilt or innocence of a person who they never met before. It sounds self-evident but remember that leaders lead and followers follow. Forget the lambs but take great care of the wolves that you leave on your jury because they will dominate their less confident peers.
4. **Educate and entertain the jury**. Yes, you can educate and entertain at the same time. Ask young people where they get their news and you'll find that they tune into cable TV to watch Jon Stewart or Stephen Colbert. Born entertainers, these hosts chronicle the serious news of the

day using parody, satire, hyperbole and irony. They cloak serious discussions in laughter, using skits, interviews and manic, non-stop action to keep things exciting and fresh. Why not try a few blowups when trying to make a point with a document or highlight a prior written inconsistency made by an adverse witness? Better still, project digital images with an ELMO or Smartboard that can be seamlessly displayed on a large screen so that the jury can visually see, with their own eyes, the point you are trying to make. If I am part of the TV generation, the younger jurors are the smartphone, Twitter, and Facebook generation for whom multitasking is a way of life. So be creative with your presentations to keep the jurors' attention while driving your most favorable points home.

5. **Be respectful.** An experienced judge gently holds the jury's hand during a foreign experience (the trial) in a foreign land (the courthouse). She tells the jury when they can sit, relax or use the restroom. She makes them feel special, dispensing badges that grant them unique access in the courthouse. Unless the court's bias is obvious, a rare thing, the jury comes to respect, admire and bond with the trial judge. Tread lightly when disagreeing with the court. You can object to an adversary's question or the court's ruling but it should be done respectfully and without a whiff of disdain, anger or bitterness. Tempers may flare but the tone of your overall presentation should reflect your respect for the court, your adversary and the judicial process. Otherwise, the juror may perceive you as someone who is breaking the rules, is rude or is trying to gain an unfair advantage.

Attorneys are a difficult lot during jury selection, a reluctant group who pre-judge themselves as unqualified for jury duty because of their prior experience as participants in the process. Like many of my colleagues, I approached jury service with dread, worried about my time, my schedule and how I would juggle the myriad demands of my practice while sitting on a jury. But the experience opened my eyes and, in addition to fulfilling an important civic duty, gave me new insights about how a jury actually functions in its decision-making process.

"Like many of my colleagues, I approached jury service with dread, worried about my time, my schedule and how I would juggle the myriad demands of my practice while sitting on a jury. But the experience opened my eyes…"

Endnote

1. In New Jersey, the judge conducts the *voir dire* in both civil and criminal cases.

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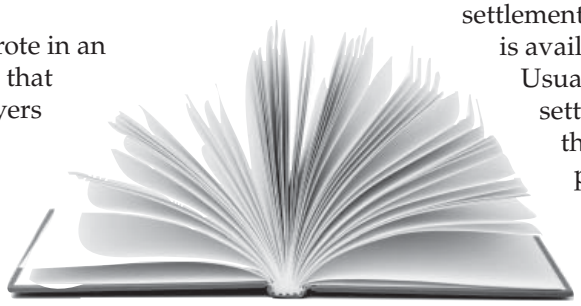
Book Reviews

Commercial Litigation in New York State Courts, 3rd Edition

Reviewed by Martin Minkowitz



It was not so long ago that I wrote in an article for the *New York Law Journal* that general practitioners were the lawyers the average person identified with as his or her lawyer. When someone referred to "my lawyer" it was usually a general practitioner—the one who drafted his or her will, or handled the purchase of the home, or sued someone for a debt owed, or for a loss sustained from an injury to person or property. To be in that role, a lawyer needs to be able to handle the task, needs to know how to do it.

A good law library and competent associates or partners all play a significant part in the ability to be a good generalist.

I recently reviewed a set of books that seem to be intended to provide generalists with a comprehensive, accessible reference to confirm the truth of what a lawyer thinks she knows, or to provide her with the information she needs to represent the client.

Editor-in-Chief Robert Haig has done an outstanding job in putting together a single source entitled *Commercial Litigation in New York State Courts,* West New York Practice Series, published by Thompson Reuters. It is a 7-volume set with 106 chapters, each covering a distinct area of the practice of law from Arbitration and Alternative Dispute Resolution to Warranties and White Collar Crimes. It is authored by 144 distinguished jurists and accomplished lawyers, including chief judges, Judith Kaye and Jonathan Lippman, and a very impressive list of other New York Court of Appeals judges, Appellate Division justices and a federal District Court Judge.

For the lawyer in the commercial practice of law, this treatise provides a step-by-step practice guide to almost every aspect of a commercial representation. There are practical aids and check lists and a significant number of forms in addition to enlightened strategic considerations.

For example, how often have we thought we settled a case only to find it fell apart and then wondered how other lawyers have handed a similar problem? For "strategy" on enforcing settlement agreements, one author advises, "If a handshake settlement has been repudiated, one approach is to write a letter to the court, setting forth both the circumstances of the oral settlement agreement and as much law as is available, asking for a conference. Usually, there is some reliance on a settlement, most commonly, at least, the interruption of the litigation process. No judge likes to hear of a final settlement gone sour. Thereafter, at a conference, more than likely, there will be court interest in more formally reinstating the repudiated settlement." He then goes on to cite cases where settlement agreements have been enforced without an executed writing.

Some of the advice in the treatise may be common sense, some complicated theory, but all comes from a treasure trove of experience and will be valuable to the general practitioner.

Most generalists have been involved with matters relating to insurance, sale of goods, banking, securities, anti-trust, intellectual properties, fraud and various contractual issues. This treatise addresses these and much more.

Each chapter is a detailed and annotated study of its topic and has its own index for easy research reference. There are also tables of forms, jury instructions, statutes, rules and cases. The treatise is kept current and alive with annual pocket parts.

I should also note that this publication was the result of a joint venture between the New York County Lawyers Association (NYCLA) and West. Royalties from its sales and annual pocket parts all go to NYCLA. This publication has evolved over the years. This is its 3rd edition and it is now bigger and better since it was first conceived in 1995.

While most lawyers do not think they need handholding to practice law, it is always good to know there is a helping hand on the shelf should you need to reach out and grab it.

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* * *

Sycamore Row

Reviewed by James K. Riley

John Grisham's latest entry in the loose category of law and literature is *Sycamore Row* (Doubleday), in which the author revisits small town attorney Jake Brigance who is struggling in his "street lawyer" practice in Clanton, Mississippi. Most readers will recall Jake's sterling performance as defense counsel in the Grisham book and subsequent movie, *A Time to Kill.* Times have not been easy for Jake, however, and at present he is living with his wife and daughter in rented quarters. Certain members of the Ku Klux Klan, some now in prison and some still walking the streets, torched their Victorian residence because of Jake's determined defense of a black man. Jake's fire insurance has been slow to pay his claim (which he submitted without benefit of independent counsel); his own inordinate belligerence throughout the claim process certainly has not helped the situation— "fool for a client" one might say.

Jake's law practice is quite typical of many general practitioners and "community lawyers"; members of the community march through his nice law offices ("chambers" might be too aspirational a descriptive term) with a hodgepodge of legal problems which Jake attempts to resolve. Of course, the fees generated by many of these matters are often as unrewarding as are the results obtained for the clients. Therein lies the rub: Jake has accumulated a good number of "fish files," as Grisham describes them, personal injury claims and similar matters which are not really going to go anywhere. The reference is to matters which do not age well and start to stink—Benjamin Franklin's guests after 3 days, so to speak. In my law office, if I had any and I might, I would call them by their Latin name—*Mephitis mephitis*—after the common species of American striped skunk, but the concept is nevertheless the same and in all likelihood universal to small practices.

In the legal profession the word is that all "street lawyers" over the course of their legal careers eventually encounter a matter involving a will contest, and that is now the case with Jake Brigance. He becomes engaged in perhaps the mother of all will contests, at least for Clanton, Ford County, Mississippi. Turns out that its richest citizen, Seth Hubbard, a cantankerous multi-millionaire lumber magnate, writes a handwritten (holographic) will leaving just about everything to his caretaker Hattie and then proceeds to commit suicide by hanging himself from one of the numerous trees in Sycamore Row (hence the title). In small town Mississippi, even in recent times, it does not help that Hattie is a person of color and the decedent was not. Jake ends up with the legal assignment to defend the will, or should one say the "propounded instrument," as it is soon contested by the disinherited self-indulgent children of Mr. Hubbard. Of course, in this telling they retain large big city law firms peopled with robot like, ruthless, "stop at nothing" attorneys for the challenge.

Grisham does an excellent job at setting the stage and presenting the convoluted events which naturally follow as the will contest proceeds through what one must describe as modern pre-trial discovery and through jury trial. The reader's interest is piqued and held by a considerable number of twists and turns. Jake Brigance as a traditional "David"—a sole practitioner lawyer versus the multiple "Goliath" big law firm teams—naturally makes for interesting reading and Grisham lays all of this out quite well.

Sycamore Row is a good story for anyone including, but not limited to, "street lawyers" and their ever hard-pressed assistants who remain interested in matters legal, especially will contests, and small firm versus big firm or deals as well. One cannot say that this novel is perfect because both the practice of law and the trial of lawsuits, especially will contests, is never a perfect experience. But *Sycamore Row* is certainly enjoyable, entertaining, and well worth the read.

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Ethics Opinion 973

Committee on Professional Ethics of the New York State Bar Association (6/26/13)

Topic: Conflicts in arguing ineffective assistance; imputation of conflicts within legal aid organization

Digest: Appellate lawyer in a legal aid organization may not represent a defendant on an appeal that will assert ineffective assistance by trial counsel employed in the same organization unless circumstances allow defendant's waiver of the appellate lawyer's conflict of interest.

Rules: 1.7(a); 1.10(a)

FACTS

1. The inquirer is a member of the appeals unit of a legal aid organization. A lawyer in the trial unit of the same legal aid organization represented a certain defendant at trial, and the trial resulted in a conviction. The inquirer proposes to prosecute the defendant's criminal appeal even though ineffective assistance of trial counsel will be asserted as a basis of the appeal. It is presupposed that that there is at least a colorable basis for arguing ineffective assistance of counsel, and that such argument will reflect adversely on trial counsel.[1]

QUESTION

2. May an appellate legal aid attorney prosecute the appeal of a criminal defendant who was represented at trial by another lawyer in the inquirer's legal aid organization, when the appeal will argue that the defendant was denied effective assistance of trial counsel?

OPINION

3. The touchstones for our analysis are Rules 1.7 and 1.10 of the New York Rules of Professional Conduct. The answer to the inquiry will depend on whether the inquirer, under those Rules, is subject to a "personal-interest" conflict that precludes the inquirer's prosecution of the appeal. The basic standard for personal-interest conflicts is set forth in Rule 1.7(a):

> Except as provided in paragraph (b) [governing waiver], a lawyer shall not represent a client if a reasonable lawyer would conclude that...(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

4. On the facts of the inquiry, a personal-interest conflict could arise either directly or by imputation. A conflict could arise directly because the inquirer has an interest in the reputation of the legal aid organization that employs both the inquirer and the inquirer's allegedly ineffective colleague. Moreover, the inquirer presumably has an interest in collegiality within the office, and may not wish to alienate a colleague by attacking his work. The risk of an adverse effect on the inquirer's professional judgment would be magnified if the inquirer has a friendship or close professional relationship with trial counsel whose work would be criticized on appeal; if trial counsel has a high-level position within the legal aid organization or has a role in evaluating the inquirer's job performance; or if trial counsel had consulted the inquirer for advice during the trial. These kinds of considerations would be factors in applying the Rule 1.7(a)(2) standard directly to the inquirer. More detailed facts would be needed for a definitive application of that standard, but on the facts as presented, it seems not unlikely that a reasonable lawyer would perceive a significant risk that the lawyer's professional judgment on behalf of the appellant would be adversely affected.

5. However, even if the presence of a direct conflict could be denied on some fuller set of facts, there is no question about the existence of an imputed conflict. Clearly if *trial counsel* were prosecuting the appeal, a reasonable lawyer would perceive a significant risk that the lawyer's professional judgment on behalf of the appellant would be adversely affected by the lawyer's interest in his or her own reputation. *See* N.Y. State 533 (1981) ("Where a lawyer, as the basis for an appeal, must attack his own competence as trial counsel there is obviously a personal interest that is fundamentally at odds with the client's right to impartial and zealous representation—and the spectre of malpractice litigation strains such a

relationship even further."). Thus it would present a personal-interest conflict for trial counsel to prosecute the appeal by asserting ineffective assistance at the trial level.

6. The inquirer, as a colleague of the trial counsel in the same legal aid organization, is burdened with the same conflict. Rule 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." A legal aid office is a "firm" as defined by the Rules.[2] Because the inquirer is associated in the same legal aid organization as the trial counsel whose conflict arises under Rule 1.7, that conflict would be imputed to the inquirer. *See*, *e.g.*, N.Y. State 862 ¶¶ 5-9 (2011); N.Y. State 592 (1988); N.Y. State 533 (1981); N.Y. State 462 (1977).

7. We turn to the question whether these conflicts may be waived by the client's informed consent. Both Rule 1.7(a) and Rule 1.10(d) allow for waiver by consent of the affected client(s) if the conditions of Rule 1.7(b) are met. Of particular relevance in the circumstances under consideration are the first and fourth of the conditions set forth in Rule 1.7(b). The first is that "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." Rule 1.7(b)(1). The fourth condition is that "each affected client gives informed consent, confirmed in writing." Rule 1.7(b)(4). Since there is only one client in this case, only he or she is affected and, accordingly, only his or her consent would be required.

8. As noted above, *trial counsel* would have a direct conflict in prosecuting the appeal on the basis of ineffective assistance below, and in our view that conflict would not be readily waivable. Trial counsel's interest in a personal reputation for competence would typically be strong and at sharp odds with the appellate needs of the client. Accordingly, any belief by trial counsel that he or she could provide "competent and diligent representation" would be unlikely to be reasonable. Moreover, for client consent to be informed, trial counsel would need to help the client understand issues surrounding the potential waiver, which would in turn put trial counsel in the further conflicted position of giving advice as to the quality of his or her own legal services at trial and ability to prosecute the appeal effectively. Trial counsel's conflict thus appears nonconsentable.[3]

9. The analysis proceeds differently, however, for the imputed conflict of the inquirer. Only the underlying conflict, and not the nonconsentability of that conflict, is imputed. In other words, whether the inquirer's imputed conflict is waivable is to be judged from the position of the inquirer, and not from the position of the trial counsel whose conflict gave rise to the imputation. *See* N.Y. State 968 ¶¶ 25-26 (2013). And because consentability of the imputed conflict is judged from the position of the inquirer, the analysis for the imputed conflict is the same as it would be for waivability of any direct conflict that may apply to the inquirer.

10. Thus, although trial counsel's conflict appears nonconsentable, there may be a greater prospect that the inquirer's conflict could be waived. The kinds of considerations that could interfere with the inquirer's professional judgment, see paragraph 4 above, may well be less distortive than those applicable to trial counsel. Just as they would be less sure to create a conflict in the first place, they would also, in the event of a conflict, tend to be more allowing of a reasonable belief in an ability to give the client competent and diligent representation. And the inquirer would be in a better position than trial counsel to provide the client with fair and complete advice as needed for any properly informed consent.

11. To say that the imputed conflict might be waivable, however, is not to say that waivability would be inevitable or even common. We note a few considerations bearing on this question. First, it requires a detailed factual analysis. We again refer to the kinds of considerations that factor into the existence of a conflict, see paragraph 4 above, because they also factor into consentability.

12. Second, there may be a widespread perception that waiver of such conflicts is typically inappropriate. Standards promulgated by the National Legal Aid and Defender Association, while not controlling, seem to reflect such a view. Those standards adopt a per se approach to the existence of a conflict:

> Each office shall have a written definition of situations which constitute a conflict of interest…. Those situations shall include...
>
> b. When the defendant was represented by the trial division of that same defender agency and it is

> asserted by the client or appears arguable to the appellate attorney that trial counsel provided ineffective representation….[4]

Furthermore, the standards could be taken to reflect a view that the conflict is unwaivable.[5] *See also* N.Y. State 533 (1981) (decided under Code of Professional Responsibility, and on similar facts finding preclusive conflict without discussing possibility of waiver).

13. Third, even if the inquirer deems the conflict waivable, the requirement of informed consent requires particular care in the context of a defendant whose alternatives to assigned appellate counsel may be limited.[6] We also note, without opining on, potential constitutional implications under the Sixth Amendment of the United States Constitution. *See* N.Y. State 605 (1989) (citing *Wheat v. United States*, 486 U.S. 153 (1988)).

CONCLUSION

14. An appellate lawyer in a legal aid organization needs to consider conflicts of interest before undertaking to represent a defendant on an appeal that asserts ineffective assistance by trial counsel employed in the same organization. The pursuit of appellate claims that would reflect adversely on a colleague in the same organization would give rise to a personal-interest conflict at least by imputation and perhaps directly as well. The appellate lawyer may undertake the representation only when the circumstances allow, and the defendant makes, an effective waiver of the appellate lawyer's conflict.

Endnotes

1. There may be circumstances in which the assertion of ineffective assistance of trial counsel would not reflect adversely on that counsel. An example might be a case in which trial counsel requests a continuance, claiming that more preparation is needed to represent the defendant effectively, and the judge denies that request. The analysis in this opinion is not intended to address such cases.
2. *See* Rule 1.0(h) (defining "firm" to include "lawyers employed in a qualified legal assistance organization"); Rule 1.0(p) (defining "qualified legal assistance organization" to mean "an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof"); Rule 7.2(b)(1) (expressly listing "a legal aid office" when operated or sponsored by various specified entities).
3. *Cf.* N.Y. State 865 (2011) (to permit lawyer who planned estate to undertake representation of executor with colorable malpractice claim would place lawyer in "manifestly untenable position of having to counsel the executor on whether to sue himself (the lawyer)," and thus lawyer could not reasonably believe that the lawyer could provide competent and diligent representation to executor, and conflict would be unwaivable).
4. Nat'l Legal Aid and Defender Ass'n, *Standards and Evaluation Design for Appellate Defender Offices, II. Criteria for Assuring the Efficiency of the Legal Representation, E. Procedures for Handling Conflict of Interest Cases*, ¶ 1 (1980), found at http://www.nlada.org/Defender/Defender_Standards/Standards_For_Appellate_Defender_Offices?printable=yes.
5. *Id*. ¶ 1 (written definition to include conflicts "requiring the assignment of outside counsel"), ¶ 2 ("If a conflict of interest exists, it exists for the entire office, and assigning the case to another attorney within that entire agency will not cure the conflict.") & ¶ 3 ("As soon as a case is identified as meeting the definition of 'conflict of interest case' the case shall be immediately identified and assigned to counsel outside the defender office.").
6. The fact that appellant has been assigned counsel is not preclusive of voluntary consent, but the appellant's ability to exercise choice is among the factors to be taken into account. *See* N.Y. State 811 (2007) (citing N.Y. State 800 (2006) and N.Y. State 490 (1978)).

(52-12)

Ethics Opinion 974

Committee on Professional Ethics of the New York State Bar Association (7/19/13)

Modifies N.Y. State 576 (1986)

Topic: Lawyers as title insurance agents; reduction of legal fees; illegal fee arrangements; excessive fees

Digest: When the circumstances make it ethically permissible for a lawyer to represent a party in a real estate transaction and also receive payment to act as agent of a title abstract company, the lawyer must consider any relevant legal restrictions before reducing the legal fee to the transaction party. Reasonableness of legal fees must be determined under Rule 1.5(a) in light of all the facts and circumstances, and overlap in the services provided to the transaction party and the company does not automatically render fees excessive.

Rule: 1.5(a)

FACTS

1. The inquirer represents parties in real estate transactions. He sometimes has occasion to act also as a title insurance agent in those transactions, performing services for, and receiving payment from, a title abstract company.

2. There have been numerous ethics opinions relating to attorneys who also act as title insurance agents in real estate transactions, and the inquirer asks about the continuing validity of those opinions. He says that "a more recent Insurance Department Opinion, as well as the promulgation of a Model Title Insurance Disclosure Form by the Real Property Law Section of the New York State Bar Association has reintroduced confusion to the issue…."

3. The inquirer, claiming a conflict between our prior opinions and the opinion of the Insurance Department, asks that we clarify the matter generally, and asks two questions in particular.

QUESTIONS

4. May a lawyer who represents a party in a real estate transaction, and also acts as a title insurance agent, reduce the legal fee when the client uses that attorney's title agency to obtain insurance?

5. If not, will disclosure and the use of the Model Title Insurance Disclosure Form cure the problem?

OPINION

6. This Committee has issued several opinions discussing circumstances in which lawyers connected to a title abstract company in a real estate transaction—by serving as its agent or having an ownership interest in the company—may also represent a party in the transaction.

7. In N.Y. State 351 (1974), we concluded that when the lawyer serves as agent for the title abstract company, the lawyer may also represent a party to the transaction,

> provided it is clear that there is no conflict of interest between the client and the title company, that both parties consent after the attorney makes full disclosure to both, and his client is either given credit for the amount of any fees paid to the attorney by the title company or the client expressly consents to the retention of such fee.

This analysis was amplified in N.Y. State 576 (1986), which among other things indicated that particular conflicts between representing a party and acting as agent for the title abstract company may or may not be consentable, *id*. n.5; *see* N.Y. State 631 (1992). We have reached a more restrictive result when the lawyer has an ownership interest in the abstract company.[1] The current inquiry, however, does not present the circumstance of ownership.

8. Two other aspects of N.Y. State 576 are relevant here. First, we reaffirmed our view that, absent client consent, the lawyer should credit the client with any savings realized from the title company:

> [I]f a lawyer has a relationship with one or more title insurance companies that enables the lawyer to achieve a reduction in total cost to the client for the appropriate legal services and any title insurance requested, while providing a reasonable fee to the lawyer and doing so without violating any legal or ethical constraint, we believe that the lawyer has a duty to afford the client the opportunity to realize the savings.

N.Y. State 576 (1986) (citations omitted).

9. Second, N.Y. State 576 went beyond the principle that a lawyer may not receive fees from the title abstract company unless there is disclosure and client consent. It held that overlap of services to the client and the title abstract company would result in an excessive and therefore impermissible fee:

> Moreover, even with client consent, the lawyer is not entitled to receive amounts from the transaction that would in the aggregate constitute an excessive fee. DR 2-106(A). To the extent that the services for which the title insurance company is paying are duplicative of services the lawyer would render the client in any event, we believe that compensation to the lawyer from both for those same services would constitute an excessive fee.

We have since reiterated this principle. *See* N.Y. State 626 n.1 (1992).

10. We were clear in prior opinions that our analyses addressed only ethical considerations, and not whether any legal rules would prohibit the various fee arrangements discussed.[2] Indeed, we recognized that actual fact patterns might well raise substantial legal issues.[3]

11. As noted by the inquirer, the Real Property Law Section of the New York State Bar Association has published an article including a "Model Title Insurance Disclosure Form." *See* NYSBA, "Title Insurance: Disclosure to and Consent by Client," 37 N.Y. Real Prop. L.J. 42 (Winter 2009). The model form was intended to "represent a good-faith effort on the part of [an ad hoc subcommittee] to draft a form that complies with the various ethics opinions issued by the Committee on Ethics of the New York State Bar Association." The article cited ten relevant opinions of this Committee and urged attorneys to be familiar with them. *Id*. at 42-43.

12. The Model Title Insurance Disclosure Form contains various disclosures relating to the cost of title insurance and to the attorney's relationship to the title insurance company. The form then states:

> Our code of ethics prohibits us from being compensated twice for the same services if there is any duplication of services in the work we do for you and the title insurance company. Therefore, to the extent that there is any duplication of services, we are required to reduce our legal fee by the amount attributable to the same services for which we are also being compensated by the title insurance company. This reduction will be reflected as a credit on your statement for legal services rendered.

37 N.Y. Real Property L.J. at 43. This language was seemingly included to reflect what we have said in some of our prior opinions as cited above.

13. The article containing the model form included two caveats. First, it made clear that the model form may need to be revised "as may be appropriate for each transaction," *id*. at 42, which is an important caution given the variety of permutations, and resulting ethical implications, that can arise.[4] Second, the article and the model form—like our opinions—were addressed to ethical issues rather than legal ones.[5]

14. As noted by the inquirer, one such legal issue was addressed by a New York State agency with responsibility for this area. In July 2009, the Office of the General Counsel of the New York State Insurance Department (which has since been incorporated into the newer Department of Financial Services) issued an opinion to the effect that "[a]n attorney who is also a title agent may not lawfully charge an applicant for title insurance a reduced legal fee as an inducement to use the attorney's title agency to obtain insurance, because such an inducement would violate N.Y. Ins. Law § 6409(d)…." After quoting from the relevant statute, the opinion concludes:

> Providing reduced legal fees to title insurance applicants who use the attorney's title agency to obtain insurance constitutes the giving by the agent/attorney of "consideration or valuable thing as an inducement for…title insurance business," in violation of Insurance Law § 6409(d). In addition, such fee reduction constitutes a special benefit not afforded to other applicants who choose not to obtain title insurance from that attorney's title agency. See Circular Letter No. 9 (2009).

OGC Op. No. 09-07-08 (available at http://www.dfs.ny.gov/insurance/ogco2009/rg090708.htm).

15. The Committee, as noted above, opines as to ethical issues but not legal ones. We do not address the legal issues raised in Opinion 09-07-08, nor do we opine as to the opinion's soundness. But that is not to say that the opinion would be irrelevant to a lawyer considering ethical responsibilities in this area.

16. A lawyer considering payment arrangements in this area must take into account Insurance Law § 6409(d) and other relevant statutes, not only because they determine legal obligations, but also because they provide a backdrop against which ethical obligations must be assessed. *See* N.Y. State 576 (1986) (asserting duty to offer savings to client if lawyer can do so "without violating any legal or ethical constraint"); Rule 1.2(d) of the New York Rules of Professional Conduct (the "Rules") (prohibition of counseling or assisting a client to engage in conduct that the lawyer knows is illegal or fraudulent); Rule 8.4 (b) (prohibition of engaging in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer). In assessing the import of such statutes, a lawyer should, of course, consider all relevant materials, including agency materials such as Opinion 09-07-08. If that opinion is sound, it states a significant legal constraint for the lawyer to take into account.

17. If a lawyer determines that a particular fee arrangement is permitted by Insurance Law §6409(d) and other relevant statutes, there is still a question whether further restrictions may be imposed by the rules of legal ethics. We now turn to that topic. We will set forth reasons leading us to reexamine our earlier assumptions and reasoning with regard to excessiveness of aggregate fees in this situation. Based on that reexamination, we reach a conclusion on this point different from that of N.Y. State 576.

18. Although the ethics opinions previously cited were decided under the former Code of Professional Responsibility, its replacement by the Rules of Professional Conduct in April 2009 did not change the operative principles applied in those opinions. *Compare* DRs 1-106 (responsibility for non-legal services), 2-106 (fees), 5-101(A) (personal conflicts) and 5-105 (conflicts in multiple representation) *with* Rules 5.7, 1.5(a) and 1.7. Thus it is not the change from the Code to the Rules that leads us to reconsider N.Y. State 576.

19. We are mindful of the extent to which conditions in the residential real estate market, as well as the practices of those serving that market, have changed since Opinion 576 was issued. Looking back 25 years, we recall a time when many attorneys, particularly in upstate New York, did their own title searching and certified the property's title for their clients. Then, the use of title insurance was quite unusual. Today, nearly every transaction involves the use of title insurance. As the use of title insurance has become the norm, the respective responsibilities of the lawyer, examiner and insurer have become more pronounced even while the potential for duplication of effort has increased. Thus, the same time and effort may be expended from quite different perspectives to satisfy manifestly distinct responsibilities and professional obligations.

20. Further, fee structures for residential closings have changed. In years past, it was fairly common to see residential closings billed as a percentage of the purchase price or on the basis of the time expended. Today, lawyers are far more likely to bill as a flat fee, and it would seem difficult if not impossible to identify which part of a flat legal fee should be attributed to arguably duplicative work.

21. With these changes in mind, we consider Rule 1.5(a), which sets forth the ethical standard governing the size of legal fees:

> A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is excessive when, after a review of the facts, a reasonable lawyer would be left with a definite and firm conviction that the fee is excessive. The factors to be considered in determining whether a fee is excessive may include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent or made known to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

22. We understand the facts of the inquiry to be that the lawyer performs services for both the transaction party and the title abstract company, and that the payment from the title abstract company is for services provided to it.[6] The Rule 1.5(a) standard is to be applied to the legal fee from the transaction party, and that legal fee does not include the amounts earned by the lawyer for services to the title abstract company.[7]

23. As noted, one of our conclusions in N.Y. State 576 was that the fee to the transaction party is excessive to the extent that the services for which the title abstract company is paying are duplicative of services the lawyer would render the transaction party client in any event. We now modify that conclusion. We do not see anything in Rule 1.5 to suggest that the receipt of a payment from the title abstract company, and some overlap in the work, *necessarily* renders excessive the fee charged to the transaction party.

24. Although there may be some overlap, we have already noted that the work for the two parties may be done to satisfy distinct responsibilities and professional obligations. Moreover, the factors listed in Rule 1.5(a) do not seem to rule out the legitimate possibility of payment from both parties despite overlapping services. Indeed, in certain circumstances, some of them could support that possibility. For example, if the fee to the transaction party were small when judged by the time spent on the matter by the attorney, and when judged by the customary charge in the locality, then that fee may well not be excessive even though the attorney also receives a payment from the title abstract company. *See* Rule 1.5(a)(1), (a)(3).

25. To be sure, overlap in the work for two parties can be relevant. The reasonableness of a fee depends in part on the time and labor required. When services to be provided to two parties require some of the same work, the time and labor required to provide services to one or both may be reduced. But that factor would be taken into account on a case-by-case basis under Rule 1.5(a), rather than standing as an irrebuttable presumption of excessiveness.

26. In one circumstance there will be a brighter line. When the lawyer and client have agreed that legal work will be charged on an hourly basis, then the lawyer may charge only for the hours actually expended, and charging for hours separately billed to another party is impermissible. *See* ABA 93-379. Even in the context of hourly rates, however, it may be permissible to receive payment from each despite some overlap in the work, as long as the same hours are not billed to two different parties.

27. Thus, when the proper standard is applied, it is not impermissible *per se* for the lawyer to be paid by the transaction party and the title abstract company for partially duplicative services. Unless a reasonable lawyer, having reviewed the degree of overlap, the billing arrangements, locally customary fees and other relevant facts, would be left with a definite and firm conviction that any legal fees to the transaction party are excessive, then those fees may be charged consistently with Rule 1.5(a).[8]

CONCLUSION

28. A lawyer who represents a party in a real estate transaction and also receives payment to act as an agent of the title abstract company in that transaction may not receive an excessive legal fee from the transaction party. Overlap between work performed for the transaction party and the company does not automatically render that fee excessive, and the lawyer should apply the standards of Rule 1.5(a) to determine the fee's reasonableness. Depending on all the circumstances, the lawyer's fee may be reasonable even if there is some duplication in the services provided.

29. A lawyer receiving payment for acting as agent to a title abstract company should consider any relevant legal restrictions before determining that it is permissible to make corresponding reductions in legal fees to the party to the transaction who is represented by that lawyer, with or without disclosures such as those reflected in the "Model Title Insurance Form." The Committee does not opine as to such legal questions, but their resolution may inform the lawyer's ethical obligations.

Endnotes

1. In particular, we have found that an ownership interest makes certain conflicts nonconsentable:

> With respect to abstract title companies, in N.Y. State 595 (1988), N.Y. State 621 (1991) [with four members of the Committee dissenting], and N.Y. State 738 (2001), we held that a lawyer could, with consent after disclosure, refer real estate clients to a title abstract company in which the lawyer or his or her spouse had an ownership interest "for purely ministerial abstract work," but not where the abstract company provided the additional service of preparing a title report or serving as an agent for the title underwriter. The central rationale was that if the abstract company prepared a report showing exceptions in title and recommending whether a title insurance policy should be issued, the law firm for the party would be required "to negotiate these issues… with itself." N.Y. State 738 (2001). *See also* N.Y. State 731 (2000) (lawyer cannot pay employees to refer clients to lawyer-owned title company for non-ministerial tasks).

N.Y. State 753 (2002). Those opinions were decided under the Code of Professional Responsibility, but we have reached the same conclusion under the Rules of Professional Conduct. *See* N.Y. State 891 (2011).

2. *See*, *e.g.*, N.Y. State 667 (1994) (declining to opine whether proposed arrangement would violate any law such as RESPA prohibition on "kickbacks" and "unearned fees"); N.Y. State 626 n.1 (1992) (noting that "the Committee does not pass upon questions of law, and therefore we do not address any issues that might be raised by such circumstances under the Real Estate Settlement Procedures Act, 12 U.S.C. § 2601, et seq., the New York Insurance Law, § 6409(d), or any other legal provision"); N.Y. State 595 (1998); N.Y. State 576 (1986) (expressing "no opinion on whether the division of premiums with an attorney acting as agent for the title insurer is in whole or in part an impermissible subterfuge or whether such a division otherwise violates either or both" of RESPA and Insurance Law §6409(d)).

3. For example, we assumed for purposes of one opinion that it is unlawful "for the lawyer to receive any compensation from the title insurer except for services rendered." In the same opinion, we considered various fee arrangements and said it seemed "apparent that at least some of the differences constitute an inducement to 'get the business' and not a real and substantial difference in legal services provided…. If the representation is one in which the client pays more under one arrangement than under another for the same services and the same title insurance, it is difficult to escape the conclusion that the difference is for originating business." N.Y. State 576.

4. For example, the same section of the form refers both to ministerial services (*e.g.*, "examining the title") and those that require the exercise of professional judgment (*e.g.*, "clearing underwriting objections"), a distinction that is significant under our prior opinions. *See*, *e.g.*, N.Y. State 753 (2002) (quoted in n.1 *supra*). Similarly, while the form does not distinguish between agencies that are owned by lawyers and those that are not, we have previously determined that, regardless of the client's informed consent, "[a] lawyer who owns a title abstract company and a mortgage brokerage is barred from acting as a lawyer in a transaction in which one or both of those companies is also acting in a variety of situations in which the lawyer's personal interest in a fee (or dividend) from the ancillary businesses compromises the independence of the lawyer's legal advice." *Id.*

5. "We note, however, that we do not examine what legal duties and restrictions are imposed upon an attorney/title agent. An attorney/agent should well consider the statutory restrictions and limitations of the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 et seq . and Section 6409 of the New York Insurance Law before undertaking an attorney/agency relationship with a client." 37 N.Y. Real Prop. L.J. at 43.

6. Our prior opinions have assumed as much. One stated that there would be a clear violation of law (and ethics) when an attorney-agent "performs no significant additional services in return for his portion of the premium," and accordingly analyzed the ethical issues "on the assumption that the lawyer actually renders services to the title insurer and receives payment from the title insurer solely for such services." N.Y. State 576, *supra.*

7. N.Y. State 576 said that in the context of overlapping work for the transaction party and the title company, the lawyer may not receive amounts "from the transaction" that would "in the aggregate" constitute an excessive fee. In other words, the lawyer would add the amounts received from the transaction party and the title abstract company in determining whether the total fees were excessive. *See also* N.Y. State 667 (1994). However, the differing responsibilities and professional obligations undertaken lead us to analyze the reasonableness of the fee from the transaction party on its own, rather than as aggregated with the payment from the title abstract company. Of course if the lawyer serving as title insurance agent also provides legal services to the company, then the fee for those services would also be subject to Rule 1.5(a). *See* N.Y. State 576 (reviewing various bundles of services that lawyers sometimes provide to title companies). And if the lawyer's "nonlegal services" to the company were "not distinct" from the legal services, then the nonlegal services would be subject to Rule 5.7(a)(1) and the Rules generally, and the lawyer's total compensation from the company would be subject to Rule 1.5(a). *See* N.Y. State 958 ¶ 14 (2013).

8. We leave for another day the question of the extent to which the lawyer must offer the client a credit for the amounts received from the title insurer. *See* N.Y. State 351 (1974) (identifying a requirement that when the attorney is paid by both parties, "his client is either given credit for the amount of any fees paid to the attorney by the title company or the client expressly consents to the retention of such fee"). As noted above, in N.Y. State 576, we treated this requirement as an aspect of the lawyer's fiduciary obligation to obtain the best deal possible for the client. But the conclusion that the lawyer is taking on additional responsibility in performing services for the title company suggests that that lawyer might be entitled to keep some or all of what he or she earns from the title insurer, because it compensates the lawyer for that undertaking. Our prior opinions state that the lawyer must obtain informed consent in all such cases, and Rule 1.8(f) requires a lawyer to obtain the client's informed consent in order to "accept… anything of value related to the lawyer's representation of the client." We do not today address the precise scope of that consent or what must be disclosed to obtain it. The current opinion is about whether, upon whatever informed consent is needed, it can ever be ethically permissible for the lawyer to retain payment from a title insurance company for overlapping services.

(2-12)

Ethics Opinion 975

Committee on Professional Ethics of the New York State Bar Association (7/19/13)

Topic: Imputation of conflicts among part-time, independently operating members of Public Defender Office

Digest: A county Public Defender Office is a firm for imputation purposes even if its lawyers work independently. A lawyer in such an office who is a part-time Assistant Public Defender in Family Court would be subject to an imputed conflict when another Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9. The lawyer could not appear in such matters unless the imputed conflict were waivable and properly waived, and the availability of waiver may be limited by various circumstances.

Rules: 1.0(h); 1.7; 1.10 (a), (d)

FACTS

1. Inquiring counsel has been offered a position as a part-time Assistant Public Defender in a small upstate county to practice in Family Court. The Public Defender's office has three part-time criminal public defenders and two part-time Family Court public defenders. There is an attorney who as Public Defender is the administrator and maintains an office for himself and a secretary. All the Assistant Public Defenders maintain their own private offices. There is no overlap in the case assignments of the two kinds of Assistant Public Defender: the criminal Assistant Public Defenders do all the office's criminal work, and they do not appear in Family Court.

2. The Family Court public defenders each have a private practice. They do not share files with each other, either at the Public Defender's Office or in their separate private practices. One of them appears in Family Court on Monday, Wednesday and Friday, and the other appears in court on Tuesday and Thursday.

QUESTIONS

3. If inquiring counsel accepts a position as part-time Assistant Public Defender practicing in Family Court, then may inquiring counsel appear in Family Court in the following situations?

   A. As the "conflict" Assistant Public Defender on cases in which the first (*i.e.*, the other) Assistant Public Defender has a conflict of interest;

   B. Appearing "against the first Assistant Public Defender" by representing the "opposing party" either (i) as an Assistant Public Defender or (ii) as retained (*i.e.*, private) counsel; or

   C. As an Attorney for the Child in matters in which another Assistant Public Defender appears.

4. If inquiring counsel accepts a position as part-time Assistant Public Defender practicing in Family Court, then may inquiring counsel accept assignments under County Law article 18-B to represent criminal defendants in the same county?

OPINION

5. Counties in New York are authorized by statute to create an Office of Public Defender, or to contract with another county's Office of Public Defender. County Law §716 *et seq.* Public defenders represent not only indigent criminal defendants, County Law §717(1), but also persons in Family Court or Surrogates Court who are entitled to counsel but financially unable to obtain such counsel,[1] which can include persons in numerous kinds of Family Court proceedings.[2]

6. Answers to the various parts of the inquiry will depend on whether certain conflicts of interest would be imputed to the inquiring lawyer. The New York Rules of Professional Conduct provide: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7 ["Conflict of Interest: Current Clients"], 1.8 ["Current Clients: Specific Conflict of Interest Rules"] or 1.9 ["Duties to Former Clients"], except as otherwise provided therein." Rule 1.10(a).

7. A public defender's office is a "firm" as defined in the Rules.[3] Accordingly, our prior opinions make clear that when one lawyer in a public defender's office has a conflict based on Rule 1.7, 1.8 or 1.9, that conflict is imputed to other lawyers in the same public defender's office. *See* N.Y. State 941 ¶ 14 (2012); N.Y. State 862 ¶¶ 5-9 (2011); *cf.* N.Y. State 973 (2013) ¶ 6 (2013) (legal aid office). This remains the rule even when the assistant public defenders work on a part-time basis, and even when the lawyers concerned

work in different divisions of the office. N.Y. State 862 ¶ 8 (the phrase "associated" in Rule 1.10(a) "includes part-time attorneys as well as full-time attorneys," and "fact that the inquirer appears as a Public Defender only in Family Court rather than in the Criminal Courts does not change the result"; inquirer is still "associated" with the disqualified Assistant in same firm "even though his area of practice is different," because "Rule 1.10(a) imputes conflicts to all lawyers in a firm, in all practice areas, not just to lawyers in the same department or practice area").

8. The inquirer notes that—unlike in some public defenders' offices—the Assistant Public Defenders in the inquirer's small upstate county maintain their own private offices, without working in any common locations, and they do not share their Public Defender files with each other. In some respects, therefore, the inquirer's prospective office is similar to the kind of lawyer panel we addressed in N.Y. State 914 (2012). That opinion concerned a panel of lawyers established to provide legal assistance to indigent clients when the Legal Aid Society has a conflict. The panel members did not work out of or store active files at a common location, did not have a common supervisor, and did not share client confidential information with the Legal Aid Society lawyers. We concluded that when members of that conflicts panel "act as independent counsel to their assigned indigents," they are not members of the same firm for imputation purposes. *Id*. ¶ 10.

9. The question that this Committee confronts, then, is whether the similarities of this small upstate Public Defender's Office to the legal aid conflicts panel are sufficient to remove this particular office from the rule articulated in N.Y. State 862, and instead bring it within the rule articulated in N.Y. State 914. In the Committee's opinion they are not, and the rule stated in N.Y. State 862 therefore applies.

10. While it is relevant that in actual practice the Assistants work independently, that factor is outweighed by others. The structure of the office and the central role of the Public Defender are prescribed by statutory provisions.[4] There is a single attorney who is the Public Defender and who is publicly listed with that title. The other attorneys in the office serve as Assistant Public Defenders and are publicly identified as such. The Public Defender appoints those assistants, and fixes their compensation, subject to authorization by the board of supervisors. It is the Public Defender who is statutorily charged with representing clients of the office. *See* County Law §701(2) (quoted in footnote 1 above). We accept the inquirer's representation that the defenders typically do not share assignments or files, but they could, consistent with the underlying statutory provisions, sometimes work together collaboratively.[5]

11. Taking into account all the circumstances, we do not believe that the similarities between the inquirer's prospective Public Defender's Office and a legal aid conflicts panel, or anything in N.Y. State 914, would take this office out of the usual rule that applies to public defenders' offices. The result could be different if the defenders were organized with a different structure, more like the legal aid conflicts panel considered in N.Y. State 914. *See*, *e.g.*, County Law §722(3)(a)(i) (counties required to adopt a plan for provision of counsel that may, as alternative to using a public defender, use a plan of a local bar association whereby "the services of private counsel are rotated and coordinated by an administrator"). But a Public Defender's Office like the one in the inquiry, organized in the manner prescribed by County Law §716, constitutes a firm within which conflicts are subject to imputation under Rule 1.10(a). In light of that principle, we address the four situations posed by the inquirer.

Appearance in Family Court as a "conflict" Assistant Public Defender

12. We address first the inquirer's question whether it would be permissible to serve as a "conflict" Assistant Public Defender who would be assigned to handle cases in which the other Family Court Assistant Public Defender has a conflict of interest. If the other Assistant's conflict is based on Rule 1.7, 1.8 or 1.9, then for reasons discussed above, none of the other lawyers of the Public Defender's Office may "knowingly" represent the client who cannot be represented by the other Assistant.[6] The inquiring lawyer's knowledge of the conflict would be implicit in service as a "conflict" defender.

13. Thus when the other Family Court Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9, the conflict would be imputed to the inquiring lawyer, and the inquiring lawyer could serve as "conflict" defender only if the imputed conflict were properly waived. Rule 1.10(d) provides that imputed disqualifications may be waived by the affected client under the conditions stated in Rule 1.7. Even if the *other* Assistant's conflict is unwaivable under Rule 1.7(b), the *imputed* conflict may still be waived if the necessary conditions of waiver are satisfied

as to the "conflict" defender. *See* N.Y. State 968 ¶¶ 25-26 (2013).

Appearance in Family Court against another Assistant Public Defender

14. The inquirer next asks whether it is permissible to appear "against" the other Family Court Assistant Public Defender on behalf of the party "opposing" that other Assistant Public Defender's client, either when inquiring counsel is acting as an Assistant Public Defender or as retained (private) counsel. Such a situation might happen, for example, when one parent opposes another parent in a litigated matter.

15. These two situations by their terms presuppose that the inquiring lawyer and the other Family Court Assistant Public Defender would be representing "differing interests" as defined by Rule 1.0(f). That in turn means that under Rule 1.7(a)(1), a single Assistant Public Defender proposing to represent both parties would have a conflict of interest. Rule 1.10(a) would impute that conflict to other Assistant Public Defenders for reasons discussed above.

16. Moreover, the inquiring lawyer would be subject to the imputed conflict whether acting as Assistant Public Defender or as retained counsel, because the inquiring lawyer remains "associated" with the Public Defender's Office even when not acting in that capacity.[7] A part-time Assistant Public Defender thus does not escape imputation when representing a client in the role of private practitioner. The inquiring lawyer could not appear in either capacity unless the conflict imputed to the inquiring lawyer were waivable and waived under the conditions stated in Rule 1.7(b).

17. Such a conflict may well be unwaivable, especially since it involves two members of the same firm appearing for adverse parties in the same litigation.[8] In our view, however, that posture does not mean that the conflict is necessarily unwaivable in every circumstance. There is a *per se* rule that the conflict may not be waived for a *single* lawyer who represents both sides.[9] But as noted in paragraph 13 above, such unwaivability is not imputed by Rule 1.10(a). *See* N.Y. State 968 ¶¶ 25-26 (2013). Whether such an *imputed* conflict is waivable may require consideration of the interests not just of the opposing clients but also of the public and the judiciary, see *id*. ¶ 28, but we cannot say categorically that such a conflict is never waivable in any set of circumstances.

18. The conflict will not be waivable, however, unless the lawyers on both sides of the litigation (here, the inquiring lawyer and the other Assistant Public Defender) each reasonably believe that they can "provide competent and diligent representation" to their respective clients. Rule 1.7(b)(1). If the lawyers work in separate offices rather than in a common location, have little interaction, and do not share files, it may be more likely that both lawyers could reasonably form that belief. But each such conflict would have to be evaluated on its own facts and circumstances.

Appearance in Family Court as Attorney for the Child when another public defender also appears

19. The inquirer has also asked about the propriety of appearing as an attorney for a child concerned in a Family Court proceeding when another Assistant Public Defender is appearing for a party in such proceeding. Private attorneys may be appointed as attorneys for children,[10] and appointment is available in a wide variety of circumstances, *see* Family Court Act §249 (listing specific circumstances and providing that in other Family Court proceedings, the court may appoint an attorney to represent the child when in the judge's opinion it would serve statutory purposes and independent legal counsel is not available to the child).

20. The inquiry is cast in general terms. The question of whether there would be a conflict can be resolved only in the factual context of a particular matter. If the inquiring lawyer serving as attorney for the child and the Assistant Public Defender would not be representing differing interests, then there would be no conflict under Rule 1.7(a)(1). If they would be representing differing interests, then there would be a conflict under Rule 1.7(a)(1), and it would be imputed to both lawyers under Rule 1.10(a).

21. If such a conflict were imputed, then the inquiring lawyer could not serve as attorney for child unless the imputed conflict could be waived, and was in fact waived, under the standards of Rule 1.7(b) as applied through Rule 1.10(d). However, even if such a conflict were waivable, the inquiring lawyer's client would be a child and would be incapable by himself or herself of giving informed consent to satisfy Rule 1.7(b)(4). *See* N.Y. State 941 ¶ 8 (2012); N.Y. State 790 ¶ 8 (2005). The situation might be different if the child had another representative with authority to consent to a conflict, but whether a representative would have such authority is a question

of law beyond the Committee's jurisdiction. *See* N.Y. State 895 ¶ 16 (2011) (raising but declining to answer that question with respect to representatives of the child "such as a parent, guardian *ad litem*, custodian, guardian, committee, trustee or court").

Appearance in criminal court as assigned counsel under County Law article 18-B

22. The inquirer's final question has to do with appointment to represent criminal defendants when the Public Defender's Office has a conflict.[11] This is the question that was addressed in N.Y. State 862 (2011), and we reach the same result that we did in that opinion.

23. Specifically, if the conflict in the public defender's office were based on Rule 1.7, 1.8 or 1.9, it would be imputed to the inquiring lawyer for reasons discussed above. The inquiring lawyer, knowing of the underlying conflict, could not accept the appointment unless the imputed conflict were waivable, and waived, under the standards of Rule 1.7(b) as applied via Rule 1.10(d).

CONCLUSION

24. Even though the lawyers in a county's Public Defender Office work independently, the office constitutes a "firm" for purposes of imputing conflicts of interest under Rule 1.10(a).

25. A lawyer who is a part-time Family Court Assistant Public Defender in such an office would be subject to an imputed conflict if that lawyer were to appear in Family Court (i) as a "conflict" lawyer when another Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9; (ii) as an Assistant Public Defender or retained counsel "opposing" another Assistant Public Defender; or, (iii) depending on the circumstances, as an attorney for the child in a matter in which another Assistant Public Defender has appeared. The same principles of imputation under Rule 1.10(a) would also apply if a part-time Assistant Public Defender were to appear in criminal court as assigned counsel when another Assistant Public Defender has a conflict under Rule 1.7, 1.8 or 1.9.

26. In all such cases, the part-time Assistant Public Defender could not undertake the representation, even in private practice as retained counsel, unless the imputed conflict were waivable and properly waived. Whether a given conflict is waivable can be determined only by considering all the circumstances, and waivability may be less likely in various circumstances such as when the two Assistant Public Defenders seek to represent adverse parties in the same proceeding, or when the client is a child and thus incapable, acting alone, of providing informed consent.

Endnotes

1. "The public defender shall also represent, without charge, in a proceeding in family court or surrogate's court in the county or counties where such public defender serves, any person entitled to counsel pursuant to [certain statutes], who is financially unable to obtain counsel. When representing such person, the public defender shall counsel and represent him at every stage of the proceedings, shall initiate such proceedings as in the judgment of the public defender are necessary to protect the rights of such person, and may prosecute any appeal when, in his judgment the facts and circumstances warrant such appeal." County Law §701(2).
2. The Public Defender represents, among others, persons entitled to counsel under Family Court Act §262, which includes parties in a "child protective proceeding (child neglect or abuse, termination of parental rights, and Article 10-A permanency hearings), the petitioner and the respondent in a family offense case, the parents involved in a custody proceeding, the respondent in a paternity case, the parent who opposes adoption in an adoption proceeding, and any person who faces possible incarceration for contempt of court," as well as "foster parents or other persons having physical or legal custody of the child in a child protective proceeding, and non-custodial parents or grandparents who receive notice pursuant to Social Services Law Section 384-a(2)." Merril Sobie, Practice Commentaries, New York Family Court Act §262 (McKinney's) (citations omitted).
3. *See* Rule 1.0(h) ("firm" includes "lawyers employed in a qualified legal assistance organization"); Rule 1.0(p) ("'Qualified legal assistance organization' means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof."); Rule 7.2(b)(1)(iii) (applying to "a legal aid or public defender office…operated or sponsored by a governmental agency").
4. "The board or boards of supervisors may designate an attorney-at-law as public defender and shall fix his term and compensation. Subject to the approval of such board or boards, the public defender may appoint as many assistant attorneys, clerks, investigators, stenographers and other employees as he may deem necessary and as shall be authorized by such board or boards. The public defender shall fix the compensation of such aides and assistants within the amounts such board or boards may appropriate for such purposes." County Law §716.
5. For example, while Assistants are normally assigned to appear in court only on different days, if one gets sick, has a vacation scheduled, or otherwise cannot go to court one day, then it would be possible for another Assistant Public Defender to cover the court appearance. Similarly, whether or not routine, the statutory basis of the office would allow the Assistant Public Defenders to have conferences, or informally call one another to discuss issues they are confronting, as a mutual resource network. Presumably, all cases taken in would be included in the Public Defender's conflict checking system.
6. Conflicts based on Rules other than 1.7, 1.8 or 1.9 are not imputed by the terms of Rule 1.10(a), although service as a "conflict" defender in such cases may require the inquiring lawyer to consider other provisions. *See*, *e.g.*, Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 532, 578 (2013 ed.) (discussing other Rules that "carry their own imputation provisions"); *id*. at 578 (pointing out that even when one lawyer has a kind of conflict not imputed to associated lawyers, an associated lawyer could still be subject to a direct

conflict such as one based on personal interest); N.Y. State 890 (2011) (conflicts under Rule 1.10(h), relating to family members, are not "automatically" imputed to other lawyers in the firm, "but imputation may arise in the particular circumstances of any given case").

7. *See* N.Y. State 862 (2011) (imputation of an assistant public defender's conflict to another assistant public defender "in his private practice"); *cf*. N.Y. State 793 ¶ 15 & n.7 (citing authority for rule that where lawyer is of counsel to two firms, the firms are treated as one for conflicts purposes, so that conflict arising in one firm is imputed to lawyers in the other firm).

8. *See* Rule 1.7(b)(1) (conflict not waivable unless lawyer has reasonable belief in ability to provide competent and diligent representation to the affected client); Rule 1.7(b)(3) (conflict not waivable if it involves "assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal"); Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 557-58 (2013 ed.) (noting question as to whether different lawyers in same firm may represent both sides in the same suit, even with informed consent, and expressing doubt about propriety of doing so in light of Rules 1.7(b)(1) and 1.7(b)(3)).

9. Rule 1.7(b)(3). This rule refers to a "lawyer" rather than a "law firm" and thus does not, by its literal text, categorically prohibit different lawyers in the same firm from opposing each other in the same litigation or other proceeding before a tribunal.

10. "Under New York Law, children (minors) in many kinds of court proceedings…are entitled to be represented by counsel…. A governmental office entitled the Attorneys for Children Program ('AFC Program') maintains a list or 'panel' of attorneys qualified to represent children, and assigns an attorney from the panel to children involved in the judicial system who qualify by law for an appointed attorney." N.Y. State 941 ¶ 2 (2012) (footnotes omitted). Attorneys for children may also be assigned through agreements with legal aid societies or with individual attorneys. Family Court Act §243.

11. "In many cases, counties that have chosen to establish a public defender in accordance with County Law Article 18-A rely on private attorneys under Article 18-B in cases in which the public defender is unable to represent an indigent litigant because of a conflict of interest with another client of the office (co-defendants in a criminal proceeding, for instance)." N.Y. State 811 (2007); *see* County Law §722.

(12-13)

Ethics Opinion 976

Committee on Professional Ethics of the New York State Bar Association (7/25/13)

Topic: Arrangement between law firm and nonlegal service provider

Digest: A law firm may not enter into an exclusive contractual agreement with a marketing company to provide clients with forensic mortgage analysis as well as legal services, to pay the company for referred clients, or to share legal fees with the company.

Rules: 1.7(a); 5.4(a); 5.5(b); 5.8, 7.2(a)

FACTS

1. The inquiring law firm wishes to enter into an exclusive Services Agreement with an entity ("the Company") that it describes as "a national marketing company with a nationally marketed website that educates mortgagors on a unique cause of action where they can proactively bring an action in state court to contest the validity of their mortgage."

2. The Company's website would inform its New York viewers of the availability of this cause of action. For those interested in pursuing such relief, the Company would "enter into a contractual agreement with the individual mortgagor for the purpose of performing a forensic analysis on their mortgage and its chain of title" so as "to ascertain if an error exists." If the Company finds such an error, it would "inform the individual of [the inquiring law firm's] services." When such persons contact the inquiring firm, the firm would "attempt to become retained by them for the purpose of filing this particular action" in New York. The inquiring firm would charge such clients a contingent fee or "success fee" of twenty percent of the debt it reduces in a successful action to "invalidate a client's…mortgage and clear their title."

3. The Company would charge the inquiring firm a fixed monthly fee for marketing the law firm's services. It would also charge the law firm additional fees relating to individual clients that it has referred to the firm. These additional fees would be characterized either as a success fee or as a fee for the Company to file and collect on a lien on the client's house to ensure payment of legal fees. The inquiring firm has asked whether these additional fees—whichever way characterized—could properly be set as (a) "a determined percentage" of the law firm's fee, or (b) a fixed fee regardless of the size of the client's mortgage or debt reduction.

4. Thus the firm proposes a multi-faceted relationship with the Company. The Company would market to people in need of a specific legal service. The Company would conduct a "forensic" analysis of whether those people may have legal claims, and then would refer prospective claimants to the law firm. To secure the legal fee as well as its own fee, the Company may file liens against the firm's clients. The law firm would pay the Company both the fixed periodic "marketing fee" and also, in the particular matters undertaken, the "success" fee or a fee for lien services as described above. The arrangement is exclusive to the law firm; the Company would not offer legal services by any other provider.

QUESTION

5. The inquiring law firm asks whether it can enter into compensation arrangements as described above. We will address that question, but we also perceive and analyze additional ethical concerns with the firm's proposal.

OPINION

6. "The term 'multidisciplinary practice' means a venture that offers both legal and non-legal services to the public." N.Y. State 930 ¶ 6 (2012) (recounting history of multidisciplinary practice rules, including "MacCrate Report" of 2000, subsequent adoption of DR 1-106 and DR 1-107 in Code of Professional Responsibility, and their replacement by Rules 5.7 and 5.8 upon adoption of Rules of Professional Conduct in 2009).

7. One form of multidisciplinary practice occurs through contractual relationships between lawyers and nonlegal professionals. This form is authorized, but also limited, by Rule 5.8 of the New York Rules of Professional Conduct. That rule provides that a lawyer or law firm may—but only under certain conditions—"enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services." Rule 5.8(a). In the Joint Appellate Division Rules, such a relationship is termed a "cooperative business arrangement." *See* 22 NYCRR §1205.2 (definition).

8. The inquiry contemplates an exclusive contractual relationship between the inquiring law firm and the Company, which is a nonlegal professional service firm. The proposed relationship would be for the purpose of offering the public legal services, as well as services of the nonlegal professional service firm, on a systematic and ongoing basis. This form of multidisciplinary practice would thus be a cooperative business arrangement, and thus, to be permissible, it would have to satisfy Rule 5.8. *See* N.Y. State 930 ¶¶ 11-15 (2012) (concluding that language of rule 5.8(a) is mandatory, not permissive); Rule 5.8(c) (rule on cooperative business arrangements does not apply to relationships consisting solely of "non-exclusive" reciprocal referral agreements).

9. Rule 5.8(a) specifies three conditions that must be met for a law firm to enter into a cooperative business arrangement with a nonlegal professional service firm. The first of these is that the profession of the nonlegal professional service firm "is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules." Rule 5.8(a)(1).

10. The proposed arrangement does not satisfy this first of the three requirements in Rule 5.8(a). Whether the Company is viewed as a marketing company or one that provides forensic mortgage analysis, it is not engaged in one of the nonlegal professions listed by the Appellate Divisions, which are currently limited to Architecture, Certified Public Accountancy, Professional Engineering, Land Surveying, and Certified Social Work. *See* 22 NYCRR §§ 1205.3 (process for establishing list of professions), 1205.5 (setting forth list); *cf., e.g.*, N.Y. State 930 ¶ 10 (1012) (lawyer may not enter into proposed cooperative business arrangement because listed professions do not include provision of insurance services); N.Y. State 885 ¶¶ 6-7 (2011) (lawyer may not enter into proposed cooperative business agreement because listed professions do not include provision of tax reduction services).

11. Thus, from the fact that the Company is not among the types of nonlegal professional service firms that have been approved for cooperative business arrangements, it follows that the proposed arrangement is impermissible. Although Rule 5.8(a) fully disposes of the inquiry, other features of the proposed arrangement also raise concerns meriting comment.

12. First, Rule 5.5(b) provides that a lawyer "shall not aid a nonlawyer in the unauthorized practice of law." Determining the boundaries of unauthorized practice is not within our charge, but we consider the Company's activities here—conducting forensic analyses of mortgage instruments and title, and identifying "errors" that would make the mortgage appropriate for the marketed "unique cause of action"—sufficiently near the borders of legal practice to advise the law firm to reflect on these matters.

13. Second, we note some statutory provisions that may be relevant. New York prohibits the corporate practice of law.[1] There are also statutory limits on the solicitation of legal business by employees of attorneys,[2] and on the solicitation of legal business by corporations.[3] These provisions (like the prohibition of aiding unauthorized practice) present questions of law on which the Committee does not opine.

14. Third, the proposed fee arrangements implicate the rule against paying for referrals. Rule 7.2(a) says that (except in circumstances 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." This provision does not prohibit paying a fixed monthly fee to a company for advertising or marketing services, though the advertisements and other aspects of the arrangement must comply with other relevant Rules. Rule 7.2, Cmt. [1]; *see*, *e.g.*, Rule 7.1 (advertising); Rule 7.3 (solicitation); Rule 8.4(a) (a lawyer may not violate the Rules through the acts of another).

15. Here, however, the law firm would pay the Company not only the monthly marketing fee but also, for individual cases handled, either "success fees" or fees for services in connection with filing and collecting on liens. If any of the various fees would constitute payments to the Company for having recommended or obtained employment by a law firm client, then those payments would violate Rule 7.2(a). There could be a violation even if the fee were stated to be one for lien services,[4] and the violation would be plain if the law firm were to pay the Company a "success fee" for each referred client. *See* N.Y. State 902 (2012) (lawyer may not base marketing fee on number of actual or potential clients the marketer introduces to the lawyer); *cf*. N.Y. State 887 (2011) (improper to pay marketer a bonus based on particular referrals or profitability); N.Y. State 779 (2004) (improper for attorney to pay marketer for bundles of leads to potential clients).

16. Moreover, whatever the particulars of the inquiring firm's payments to the Company, other more general considerations suggest that the firm's participation would violate Rule 7.2(a). The law firm would be providing benefits to the Company not only through the marketing pay-

ments and per-client payments but also by its very participation in the ongoing program. It appears that a substantial part of the value that the Company would provide in return would consist in providing referrals. The Company will advise potential clients of its "unique" claim for relief, identify the law firm (and only the law firm) as engaged in the business of filing such a claim, and then refer potential claimants to the law firm upon the company's "forensic" inquiry into the claimants' qualifications to make the claim. The firm may legitimately provide benefits to the Company for marketing and lien services, but if the benefits are also to reward referrals, then it is difficult to harmonize the arrangement with Rule 7.2(a). *See* N.Y. State 799 (2006) (impermissible for lawyer to pay a website marketer a fee for recommending the lawyer based on the marketer's analysis of the client's problem).

17. Fourth, one of the options contemplated by the inquiry is that the law firm would pay the Company an amount based on a percentage of the firm's legal fee. Rule 5.4(a) provides that a "lawyer or law firm shall not share legal fees with a nonlawyer," except in circumstances outside the scope of the inquiry. The inquiring firm, recognizing this fee-sharing issue, asks whether it may be avoided by having the payment made not from the firm to the Company, but rather directly from the client to the Company, as to be provided by contract between those parties. If such a contractual arrangement is independent of the legal fee, then it may be consistent with Rule 5.4. *See*, *e.g.*, N.Y. State 875 (2011) (lawyer may handle case on contingent fee basis where the client has already retained a non-testifying expert to work on the same case on a contingent fee basis).

18. However, the situation would be different if the separate compensation agreement between the client and the Company were merely an attempt to circumvent the rule against fee-sharing. For example, the arrangement could constitute impermissible fee-sharing if the client's payment to the Company were insufficiently related to the value of the services provided by the Company, or if the law firm's fees were reduced to allow for the client's payment to the Company. *See* N.Y. State 885 ¶ 8 (2011) (finding improper fee-splitting where attorney reduced customary contingency fee "knowing that the amount of the reduction would be owed to the non-attorney company" that provided tax reduction services and referred clients to the attorney, and where there appeared to be "no relation between the funds to be received by the non-lawyer company and the value of the services actually performed for the client"); N.Y. State 727 (2000) (when accounting firm that referred clients to law firm received fees from those clients for accounting services that clients had not sought, fee arrangement "appear[ed] to constitute a portion of the contingency fee that would otherwise have been paid to the lawyer").

19. Finally, a participating lawyer in the inquiring firm would have to "consider the edicts of Rule 1.7(a)(2), as qualified by Rule 1.7(b), to determine whether the lawyer's personal and financial interest in the arrangement complicates the inquirer's representation of the [Company's] clients." N.Y. State 930 ¶ 18 (2012); *see* N.Y. State 932 (2012) (even when referral arrangements are non-exclusive, "the lawyer must not have such an interest in a steady stream of referrals that it undermines the lawyer's professional judgment for the client").

CONCLUSION

20. A lawyer or law firm may not maintain an exclusive contractual arrangement with a company that provides marketing services and forensic mortgage analysis so as to offer both legal and nonlegal services to the public on a regular basis; may not pay the company for referring clients; and may not share legal fees with the company.

Endnotes

1. Judiciary Law §495(1) provides: "No corporation or voluntary association shall…(c)…render legal services or advice, nor (d) furnish attorneys or counsel, nor (e) render legal services of any kind in actions or proceedings of any nature or in any other way or manner, nor (f) assume in any other manner to be entitled to practice law,…nor (h) advertise that either alone or together with or by or through any person whether or not a duly and regularly admitted attorney-at-law, it has, owns, conducts or maintains a law office or an office for the practice of law, or for furnishing legal advice, services or counsel."
2. Judiciary Law §482 provides: "It shall be unlawful for an attorney to employ any person for the purpose of soliciting or aiding, assisting or abetting in the solicitation of legal business or the procurement through solicitation either directly or indirectly of a retainer, written or oral, or of any agreement authorizing the attorney to perform or render legal services."
3. Judiciary Law §495(2) provides: "No corporation or voluntary association shall…solicit any claim or demand for the purpose of…furnishing legal advice, services or counsel to, a person sued or about to be sued in any action or proceeding or against whom an action or proceeding has been or is about to be brought, or who may be affected by any action or proceeding which has been or may be instituted in any court or before any judicial body."
4. It might be permissible for the firm to pay the Company a fee for lien services if the fee were reasonably related to the value of the services provided, but otherwise that characterization of the fee could be problematic. *Cf.* N.Y. State 727 (2000) (when accounting firm that referred clients to law firm received fees from those clients for accounting services that clients had not sought, fee arrangement appeared to serve as impermissible pretext to avoid prior Code rule against payments for referrals).

(20-12)

Ethics Opinion 977

Committee on Professional Ethics of the New York State Bar Association (8/1/13)

Topic: Trial publicity in administrative proceeding; distributing via social media a petition and survey in support of client's pending case

Digest: A lawyer who represents a client in an administrative proceeding may distribute an online petition and survey in support of the client's case unless there is reason to believe that distributing those statements would have a substantial likelihood of materially prejudicing the adjudication.

Rule: 3.6

FACTS

1. The inquiring lawyer is defending a client in a cancellation proceeding before the U.S. Trademark Trial and Appeal Board ("TTAB"). In the pending TTAB proceeding, a third-party petitioner has alleged that the client's registered mark is confusingly similar to the petitioner's registered mark and is seeking cancellation of the client's registration.

2. The client has created an online petition to garner opposition to cancellation. The petition presents the proceeding as a contest between a family business and a big corporation, and asks readers to sign in order to demonstrate that there is no likelihood of confusion between the petitioner's mark and the client's mark. The lawyer asks if there is any ethical prohibition of distributing a link to the client's online petition via social media (specifically, using Facebook and Twitter) if the lawyer will merely tell readers it is there but not ask them to sign it.

3. In addition, the lawyer asks if it is ethically permissible to post online a survey asking questions along the lines of the following: "Do you think Mark X is confusingly similar to Mark Y? Click here to express your opinion."

4. The lawyer does not indicate what he intends to do with the petition or the survey results (*e.g.*, whether he intends to try to present the results as evidence in the proceeding).

QUESTIONS

5. If a client has set up an online petition in support of his case in a trademark cancellation proceeding, may the client's lawyer distribute a link to the petition via social media?

6. May a lawyer in a trademark cancellation proceeding post an online survey asking readers whether they find two trademarks confusingly similar?

OPINION

7. Rule 3.6(a) of New York's Rules of Professional Conduct (the "Rules") provides that a lawyer who is participating (or has participated) in a criminal or civil matter "shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." This provision attempts to balance the public value of informed commentary with a party's right to a fair proceeding.[1] We note that such provisions have been the subject of constitutional challenge,[2] but we are limited to interpreting the rules of legal ethics and do not undertake to assess their validity.

8. The prohibition in Rule 3.6(a) can be divided into a few components: (i) it applies to a lawyer who is participating in "a criminal or civil matter" in which there is or will be an adjudicative proceeding; (ii) it applies when the lawyer "make[s] an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication"; and (iii) it applies to statements "that the lawyer knows or reasonably should know… will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." We consider how each of these components applies to the communications proposed in the inquiry.

9. The first component is clearly satisfied. "Matter" is defined by Rule 1.0(*l*) to include "any… administrative proceeding." A trademark cancellation proceeding is an administrative and adjudicative proceeding.[3] The inquiring lawyer is therefore subject to Rule 3.6(a).

10. As to the second component we start by considering whether distributing a link to the petition would constitute making extrajudicial statements. The petition itself includes extrajudicial statements, as it is a document that is being distributed online and it characterizes the nature and merits of the dispute in particular ways.

The fact that it was the client who created and posted the petition does not make the rule inapplicable. The lawyer, by distributing the link, is effectively disseminating the petition—and thus "mak[ing]" the statements it contains—over the internet as a means of public communication.

11. Whether the proposed survey meets this second component is less clear and may depend on a more detailed description of its contents. It may not make any "statement" subject to the Rule if it is limited to posing questions in neutral terms and giving readers the opportunity to express opinions. But if it includes leading questions, they could constitute implied statements subject to the Rule.

12. The final and central element of the prohibition is that the lawyer knows or reasonably should know that the statement "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

13. The rule provides some guidance on this final element by identifying certain kinds of statements that are presumptively permissible and other kinds that are presumptively impermissible. *See* Rule 3.6(b) (1)—(6) (listing kinds of statements "ordinarily" deemed likely to be prejudicial; Rule 3.6(c) (1)—(7) (listing kinds of information a lawyer may state, without elaboration, if the statement does not violate the basic prohibition in Rule 3.6(a)). As to the communications in question, however, the rule's presumptions do not apply. Neither the petition nor the survey would be within any of the presumptively permissible categories of information listed in Rule 3.6(c). Nor would either of those communications be presumptively prohibited, because Rule 3.6(b) applies only to certain statements that refer "to a civil matter triable to a jury, a criminal matter or any other proceeding that could result in incarceration." A trademark cancellation proceeding is not triable to a jury.[4] For this inquiry, therefore, the rule's lists of categories give no presumptive answer to the question of likely prejudice.

14. However, the presumptions described above do not exhaust the content of Rule 3.6. Whether or not one of the presumptions applies, the governing standard remains the one found in Rule 3.6(a). We turn to some factors that bear on whether the communications would have a substantial likelihood of materially prejudicing the cancellation proceeding.

15. One factor is the nature of the adjudicative proceeding. Its relevance may be inferred from Rule 3.6(b), because as noted above, the presumptive prohibitions do not apply to civil matters not triable to a jury. Here is a more direct statement of this factor's importance:

> Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

Rule 3.6, Cmt. [6]. Indeed, it has been said that the concern about improperly influencing a factfinder's decisions

> is largely irrelevant in matters to be decided by judges. Judicial officers are expected to be immune from the influences of inadmissible evidence and similar sources of information and from the potentially distorting effects of inflamed public opinion. Thus, media comments by a lawyer outside a nonjury proceeding will pose a significant and direct threat to the administration of justice…only in extreme situations.[5]

16. Another factor is the content of the extrajudicial statements. For example, statements on peripheral issues may carry little risk of prejudice. Statements may be more likely to be prejudicial if they address crucial issues committed to the finder of fact or are expressed in an inflammatory way.

17. The likelihood of prejudice will depend in part on the likelihood that the statements will come to the attention of the finder of fact. Thus the method of disseminating extrajudicial statements may be a relevant factor, and another related one is the statements' timing.[6] Other relevant factors may include the purpose with which the statements were made[7] and whether the information in the statements is otherwise available from public sources.[8] Having listed some of the factors relevant to likely prejudice (but without any claim that the list is comprehensive), we consider their application to the inquiry.

18. The nonjury nature of the TTAB proceeding is a consideration counting strongly against likely prejudice. On the other hand, while the inquiry does not fully describe the proposed communi-

cations, it appears at least that the statements in the petition, and implied ones in the survey if any, would directly address the merits of the dispute. The inquiry does not reveal the amount of time that would be expected to pass from the making of the statements until the trial.

19. A factor that may assume particular significance on these facts is motive. In this connection it is useful to distinguish between the mere making of the statements and their ultimate intended uses. The inquiry does not specify those uses.

20. It is possible that the lawyer's intent is to use the survey results as evidence that the two marks are not confusingly similar. If so, then the question arises whether such survey evidence would be permissible in a cancellation proceeding. If conducting the survey were an appropriate means of seeking competent evidence, then it would not have a substantial likelihood of "prejudicing" the proceeding. On the other hand, if the survey results would not constitute proper evidence, their dissemination could give rise to additional concerns. *Cf*. Rule 3.6(b)(5) (in jury or criminal context, statement ordinarily likely to be prejudicial if it relates to information the lawyer knows or reasonably should know is "likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial"). Similar questions would apply to possible intended use of the petition in evidence.

21. However, the petition was created by the client and there is no indication of intent to use is as evidence. In the absence of some other explanation, the inquiring lawyer should consider whether the client's goal is to disseminate the petition so broadly as to influence the finders of fact other than through the tribunal's processes. Of course in that instance it would be improper for the lawyer to participate in its dissemination.

22. We have mentioned various relevant facts not contained in the inquiry, and their absence limits our ability to balance the above factors. Even without those facts, however, we can identify an outline of the analysis. The dominant factor in this case may be the nature of the adjudicative proceeding. The fact that the adjudication will be by an administrative tribunal like the TTAB counts heavily in favor of the inquiring lawyer being permitted to disseminate the proposed communications. There could be a different answer if the inquiring lawyer were aware of additional facts indicating that the client seeks to use the petition to exert improper influence, or that prejudice is otherwise likely. But in the absence of such additional facts, it seems unlikely that distribution of the petition or the survey would materially prejudice an adjudicative proceeding to be conducted by a panel of specialized trademark judges.

23. We have addressed only such constraints on the proposed communications as might be imposed by the rules of legal ethics. There could also be legal constraints, but issues of law are beyond the scope of this Committee. The inquiring lawyer may be well advised to review TTAB rules and other applicable laws and rules before distributing the petition or survey.

CONCLUSION

24. A lawyer representing a client in a trademark cancellation proceeding may use social media to distribute a link to an online petition in support of the client's case, and may post an online survey, where there is no substantial likelihood that the petition or survey would materially prejudice the upcoming administrative adjudication. If the lawyer knew that the client were trying to use the petition to pressure the trademark judges, or the lawyer had other information indicating a likelihood of materially prejudicing the proceeding, then the lawyer should not participate in disseminating those statements. But in the absence of such information, such statements may fairly be considered unlikely to prejudice a proceeding conducted by a panel of administrative judges.

Endnotes

1. *See* Rule 3.6, Cmt. [1] (discussing "balance between protecting the right to a fair trial and safeguarding the right of free expression," and noting "vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves").

2. *See*, *e.g.*, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1063, 1075 (1991) (holding in criminal case that "'substantial likelihood of material prejudice' standard…satisfies the First Amendment" as "it is designed to protect the integrity and fairness of a State's judicial system, and it imposes only narrow and necessary limitations on lawyers' speech"); *Hirschkop v. Snead*, 594 F.2d 356, 373-74 (4th Cir. 1979) (concluding that a rule limiting lawyers' speech on matters pending before administrative tribunals, more restrictive than Rule 3.6, was unconstitutional because overbroad, and noting lack of record evidence "that any administrative decision has been set aside because the comments of lawyers impaired the fairness of the proceedings").

3. *See* Trademark Trial and Appeal Board Manual of Procedure §102.02 (3d ed., rev. 2, June 2013) (describing proceedings within jurisdiction of TTAB, including cancellation proceedings); *id*. §102.03 (cancellation proceedings include pleadings, motions and trial). This TTAB Manual is available at http://www.uspto.gov/trademarks/process/appeal/Preface_TBMP.jsp.

4. TTAB Manual, note 2 *supra*, §102.03 (decisions on merits of cases are rendered by panels of TTAB judges).

5. Restatement (Third) of The Law Governing Lawyers §109, cmt. b (2000). *But cf., e.g., United States v. Khan*, 538 F.Supp.2d. 929, 932-35 (S.D.N.Y. 2007) (interpreting analogous local rule against statements likely to "prejudice the due administration of justice" to prohibit not only lawyer's statements likely to taint jury pool but also those likely to threaten safety of witnesses).

6. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1044 (1991) (citing case law and ABA source for proposition that timing of a statement is significant factor in the assessment of the possible threatened prejudice, and giving as problematic example a statement "which reaches the attention of the venire on the eve of *voir dire*"); Restatement (Third) of The Law Governing Lawyers §109, cmt. c (2000) ("statement made long before a jury is to be selected presents less risk than the same statement made in the heat of intense media publicity about an imminent or ongoing proceeding").

7. *See Gentile v. State Bar of Nevada*, 501 U.S. at 1064-65, 1080 (disciplinary authority considered purpose of statements in assessing likelihood of prejudice); *id*. at 1079 (minority finding it persuasive that lawyer admitted having called press conference to influence venire, because it was "difficult to believe that he went to such trouble, and took such a risk, if there was no substantial likelihood that he would succeed").

8. *See id*. at 1046 (minority portion of opinion noting that "[m]uch of the information provided by petitioner had been published in one form or another, obviating any potential for prejudice"); Restatement (Third) of The Law Governing Lawyers §109, cmt. c (2000) (if same information "is available to the media from other sources, the lawyer's out-of-court statement alone ordinarily will not cause prejudice," but this factor is not "controlling" and "the information must be both available and likely in the circumstances to be reported by the media"); *In re Sullivan*, 185 A.D.2d 440, 445 (3d Dept. 1992) (dismissing disciplinary charges against criminal defense lawyer whose "television interview was a mere drop in the ocean of publicity" surrounding the trial, when the matters discussed "had been otherwise publicized prior to the interview").

(14-13)

Ethics Opinion 978

Committee on Professional Ethics of the New York State Bar Association (8/06/13)

Topic: Counsel to closely held corporation

Digest: An attorney acting as general counsel to a closely held corporation 1) represents the entity and not its directors/sole shareholders and 2) must explain to the directors/shareholders that he does not represent them when he becomes aware that action to be taken on behalf of the entity may be divergent from their personal interests.

Code: 1.13(a); 1.4(b)

BACKGROUND

1. An attorney acts as general counsel for a closely held corporation in which its directors are also the sole shareholders. The attorney does not represent the directors/shareholders. Discussions are ongoing within the corporation as to certain issues relevant to the corporation's by-laws and shareholder agreements, the result of which will impact the corporation's ability to take advantage of a tax/property evaluation benefit. While the change will benefit the corporation, half of the directors will be personally disadvantaged by it. The lawyer is aware that the interests of the individuals will diverge from those of the entity and/or the other directors/shareholders when these issues are raised and the lawyer fears the board will deadlock and be unable to take advantage of the benefit.

QUESTION

2. Is the lawyer required to raise the issues on behalf of the organization because of the relevance to the discussion or is the lawyer prohibited from raising the issues because the lawyer is aware of the divergent personal interests of the shareholder directors?

ANALYSIS

3. As Rule 1.13(a) notes, "[w]hen a lawyer employed or retained by an organization is dealing with the organization's directors,…shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents." As Professor Simon notes, "[t]he essence of the rule is in the final clause, which says that a lawyer who is employed by an organization 'is the lawyer for the organization and not for any of its constituents.'" Simon's New York Rules of Professional Conduct Annotated 2013 Edition, p. 633.

4. The question then becomes whether the lawyer must raise the issue with the client, the organization, or remain quiet because of the awareness of the divergent interests among the director/shareholders. Rule 1.4(b) requires that "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." If knowledge of the issue is reasonably necessary to permit the client to make an informed decision, then it must be raised. At this juncture, Rule 1.13(a) will provide guidance to the lawyer. Now that the lawyer has made the decision that this is something he must raise with his client, the organization, and that it may be adverse to the personal interests of the directors/shareholders or presents a conflict between the interests of the directors/shareholders, the lawyer is required to explain to the director/shareholders that he is the lawyer for the organization and not for any of them personally. Comment 2A to Rule 1.13(a) notes:

> There are times when the organization's interests may differ from those of one or more of its constituents. In such circumstances, the lawyer should advise any constituent whose interest differs from that of the organization: (i) that a conflict or potential conflict of interest exists, (ii) that the lawyer does not represent the constituent in connection with the matter…, (iii) that the constituent may wish to obtain independent representation, and (iv) that any attorney-client privilege belongs to the organization and may be waived by the organization.…

CONCLUSION

5. When a lawyer acting as general counsel to a closely held corporation becomes aware of an issue, the knowledge of which is necessary for the entity to make an informed decision and proposes a change that may be contrary to the personal interests of certain directors/shareholders, the lawyer must advise the entity of the issue and should consider, as appropriate, advising the directors/shareholders (1) the lawyer is the lawyer for the organization and not for the directors/shareholders, (2) that an actual or potential conflict of interest exists, (3) that the directors/shareholders may wish to retain counsel on their own behalf, and (4) that any attorney client privilege belongs to the organization and may be waived by the organization.

(71-12)

Ethics Opinion 979

Committee on Professional Ethics of the New York State Bar Association (8/8/13)

Topic: Lawyer-mediator group; payment for referrals

Digest: A group of lawyer-mediators, though not associated in a firm, may place joint advertisements and maintain a website that lists the varied experience and biographies of its members, allowing those seeking mediation services to contact a particular member of the group by visiting a website maintained by the group or calling a telephone number listed for the group as a whole.

Rules: 2.4; 5.7(a); 7.2(a)

FACTS

1. The inquirer is a lawyer who, with another lawyer, has been organizing a group of lawyer-mediators with varied areas of experience. The group has a name, and a website that lists the names, areas of experience, and detailed biographies of each member. The group plans to place advertisements. Members of the group will pay its operating costs, including the price of the advertisements.

2. A legal assistant employed by the inquirer will answer calls to a telephone number listed on the website, but will not recommend specific members of the group to the caller. Instead, those seeking mediation services from the group will be expected to pick the appropriate lawyer-mediator based on the information about each member contained on the website. The inquirer has asked whether this arrangement would constitute a referral arrangement prohibited under the authority of N.Y. State 678 (1996).

QUESTION

3. May a group of lawyer-mediators, though not associated in a firm, place joint advertisements, maintain a website that lists the varied experience and biographies of its members, and maintain a phone line available to callers seeking a particular lawyer-mediator?

OPINION

4. The New York Rules of Professional Conduct generally do not allow lawyers to pay for referrals of clients. Subject only to certain exceptions not relevant to this inquiry, "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." Rule 7.2(a). However, this prohibition is not meant to keep "a lawyer from paying for advertising and communications permitted by the[] Rules, including the costs of print directory listings, online directory listings, newspaper ads, television and radio airtime,… and group advertising." Rule 7.2, Cmt. [1].

5. We consider two threshold questions as to the applicability of Rule 7.2. The first asks which of the Rules apply (and in particular whether Rule 7.2 applies) to the kind of mediation services contemplated by this inquiry. One that would clearly apply is the Rule specific to service as a third-party neutral.[1] Some other Rules apply to lawyers at all times, irrespective of whether they are providing legal services.[2]

6. The applicability of other Rules, including Rule 7.2, presents a more complicated question that requires consideration of whether mediation services constitute legal services. A service that can lawfully be performed only by lawyers is clearly a legal service, but nonlawyers can lawfully serve as mediators. We nonetheless concluded in N.Y. State 678 (1996) that "lawyers who serve as mediators should be presumed to be rendering a legal service," and thus, at least presumptively, "are engaged in the practice of law."[3] If that conclusion is correct today, then mediation services by a lawyer are presumptively governed by the Rules. *See* Rule 5.7, Cmt. [4] (lawyer or law firm rendering legal services "is always subject to these Rules").

7. There is, however, controversy on this point. Some authorities have concluded that mediation services by a lawyer do not constitute the practice of law and are not subject to the full range of legal ethics rules.[4] Other authorities have endorsed the approach of N.Y. State 678.[5] And some have taken a middle position in which a lawyer-mediator may or may not be practicing law, and may or may not be generally subject to the rules of legal ethics, depending on the circumstances.[6] In any event, the current inquiry does not require, and we do not now undertake, a reconsideration of N.Y. State 678.[7]

8. The other threshold question has to do with the status of the group of lawyer-mediators. If they were to constitute a law firm, then its members would merely be making financial contributions toward advertising for that very firm. In that case the inquiry would implicate general restrictions on advertising but not the prohibition on paying others for referrals. *See* Rule 7.2, Cmt. [1] (stating that lawyers are not permitted "to pay others" for channeling professional work). On the facts as presented in the inquiry, however, the group of lawyer-mediators does not constitute a law firm as defined by Rule 1.0(h). Rule 7.2 is thus applicable (subject to considerations in the previous paragraph). We also note that joint advertisements must not misstate the relationship among members of the group. *See* Rule 7.1(c)(2) (advertisements shall not "imply that lawyers are associated in a law firm if that is not the case").

9. We turn to the application of Rule 7.2(a). Some of our prior opinions shed light on the boundary between referrals and group advertising. In one opinion applying the former Code of Professional Responsibility, the Committee concluded that

> a program in which an advertising agent runs generic ads for legal services and distributes prospective clients to participating lawyers who have been assigned the exclusive right to cases arising in particular geographical areas is more in the nature of a lawyer referral service than advertising by an individual lawyer. When a prospective client answers the advertisement, the purpose is to be given the name of a lawyer, rather than to contact a particular lawyer.

N.Y. State 597 (1989). The Committee found such an arrangement to violate certain provisions, then part of the Code, limiting lawyer referral services.

10. The Committee reached a different conclusion, however, as to an advertisement which "presents in a meaningful fashion" the names and other information of the lawyers or firms participating in the group advertisement "so that the potential client knows the identity of the lawyer to whom his call will be referred and there is no discretion in referrals on the part of the advertising agent." The Committee found such a listing permissible if otherwise compliant with the Code and court rules, and we noted that "such joint advertising may be the only way it is economically feasible for a practitioner with a small practice to afford certain forms of advertising." N.Y. State 597.

11. We followed the reasoning of N.Y. State 597 in the context of a divorce mediation service that proposed running ads with an "800" number. Callers would be referred to a participating mediator based on the caller's geographic location. The Committee reiterated that this type of arrangement—in which a potential client calls to get the name of a provider of services rather than to contact a specified individual—would constitute a lawyer referral service. N.Y. State 678 (1996).

12. We believe that the lines drawn by these precedents with respect to certain provisions in the former Code apply equally to the prohibition of payments for referrals that is in the current Rules of Professional Conduct. The proposed conduct does not, like the arrangements that our prior opinions found to be referral services, contemplate that prospective clients will call a number and be given the name of a lawyer. Rather, the members of the inquirer's group will be listed on a website and perhaps other advertisements by name and areas of experience. The website will include a detailed member biography. This format is reasonably designed to encourage the consumer to select the member with the expertise appropriate to the consumer's needs, rather than to trigger a consumer to call for a referral. We rely also on the inquirer's assurance that a caller seeking a referral will not be supplied with the name of a lawyer-mediator, but rather will be directed back to the website to choose a member with appropriate qualifications. Accordingly, in the model proposed, the members of the group would be paying for joint advertising but would not be making payments for referrals as prohibited by Rule 7.2.

13. We note that the inquirer may need to consider various matters of legal ethics beyond Rule 7.2. For example, the inquirer may need to consider ethical constraints on advertising, claims of specialization, trade names and payment arrangements.[8] However, the inquiry neither focuses on these matters nor fully describes the facts surrounding them, and we do not opine as to the permissibility of the proposed conduct in these respects.

CONCLUSION

14. A group of lawyer-mediators, though not associated in a firm, may place joint advertisements and maintain a website identifying the group's members and listing their varied experience, practice areas and biographies, so as to allow a party seeking mediation services to call a single telephone number or visit a single website to contact the lawyer-mediator of that party's choice. The members of the group may pay the group's operating costs as long as the advertising and payment arrangements comply with relevant Rules.

Endnotes

1. Rule 2.4 ("Lawyer Serving as Third-Party Neutral") applies to lawyers serving as mediators and in other neutral capacities. Moreover, a lawyer who serves as a third-party neutral "may be subject to court rules or other law that applies either to third-party neutrals generally or to lawyers serving as third-party neutrals," as well as various codes of ethics. Rule 2.4, Cmt. [2]. We express no opinion on the applicability or import of any such constraints outside the Rules of Professional Conduct. *See, e.g.*, N.Y. State 900 ¶ 19 (2011).

2. Rule 5.7 determines when the Rules are generally applicable to lawyers who are providing "nonlegal services," but a comment to the rule explains that some Rules apply in all circumstances: "Although a lawyer may be exempt from the application of these Rules with respect to nonlegal services on the face of [Rule 5.7(a)], the scope of the exemption is not absolute. A lawyer who provides or who is involved in the provision of nonlegal services may be excused from compliance with only those Rules that are dependent upon the existence of a representation or client-lawyer relationship. Other Rules, such as those prohibiting lawyers from misusing the confidences or secrets of a former client (see Rule 1.9), requiring lawyers to report certain lawyer misconduct (see Rule 8.3), and prohibiting lawyers from engaging in illegal, dishonest, fraudulent or deceptive conduct (see Rule 8.4), apply to a lawyer irrespective of the existence of a representation, and thus govern a lawyer not covered by [Rule 5.7(a)]." Rule 5.7, Cmt. [4].

3. We reasoned in part: "Whether or not one conceives of the lawyer as 'representing' the participants in divorce mediation, the lawyer's role as a neutral mediator may include rendering advice about legal questions or preparing a separation agreement—services that would ordinarily seem to entail the practice of law when performed by lawyers." We did not treat this as a *per se* rule: "Presumably a lawyer who serves as a mediator outside of the law office, gives no legal advice or opinions, and does not draw up an agreement is not acting in any legal capacity and is not then governed by the lawyer's code. This would, however, be a rare case. More often the lawyer would offer impartial legal advice or explain the law to the participants." N.Y. State 678 (1996).

4. *E.g.*, Indiana Opinion 5 (1992) (because nonlawyers may act as mediators and nature of mediation is substantially different from practice of law, lawyer-mediator was not generally bound by legal ethics rules on trade names and solicitation); Kentucky Opinion KBA E-377 (1995) (corporation formed by attorney to provide mediation services not subject to legal ethics rule on trade names, though advertisement of mediation services which identifies any participant as a lawyer must comply with ethics rules on advertising). The case that such services are not the practice of law was arguably bolstered by New York's adoption of the Rule specifically governing a lawyer's service as a mediator. In relevant part the Rule provides: "A lawyer serves as a 'third-party neutral' when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them." Rule 2.4(a).

5. *E.g.*, Iowa Opinion 96-30 (1997) (alternative dispute resolution done by nonlawyers "has not been held to be the practice of law…[b]ut when done by a lawyer it becomes the practice of law" and lawyer working as a mediator would be bound by Iowa legal ethics code); Mississippi Opinion 241 (issued 1997, amended 2013) (mediation is a "law related" service which when provided by a lawyer becomes the practice of law and is subject to rules of legal ethics); New Jersey Opinion 711 (2007) (when mediation center advertised that lawyer-mediators would help parties understand legal rights and procedures, attorneys who accept referrals to mediate "are practicing law" by "accepting clients in a form of limited representation… for the sole purpose of serving as a third-party neutral, as contemplated by [New Jersey Rule 2.4]," and their conduct is governed by New Jersey legal ethics rules).

6. *E.g.*, Oregon Opinion 2005-101 (identifying certain rules of legal ethics that would apply if the mediation service "would involve the practice of law, such as by drafting settlement agreements"); Pennsylvania Opinion 96-167 (mediation appears to be among "nonlegal services" such that Rule 5.7 will determine applicability of other Rules, but "if an attorney-mediator advertises his/her services, he/she must comply with the advertising and solicitation rules").

7. If—contrary to N.Y. State 678—mediation services by a lawyer do not constitute legal services subject to the full range of legal ethics rules, then Rule 7.2 would not apply, and the conduct proposed in the inquiry would not be prohibited by the Rules. The other possibility—following N.Y. State 678—is that mediation services by a lawyer constitute legal services (either always or in particular cases), and Rule 7.2 applies. Even in that case, based on the analysis in the rest of this opinion, the proposed conduct would be permissible. In other words, the outcome would be the same either way and would not turn on whether we would reach the same conclusion if we were deciding N.Y. State 678 today.

8. Limits on advertising, claims of specialization, and trade names are set forth in Rule 7.1, Rule 7.4, and Rule 7.5(b) respectively. As to payment by the lawyer-mediators for advertisements and other operating costs of the group, some arrangements could be problematic and require further analysis. For example, the inquiry mentions that the amount of each lawyer's payments may be determined as a percentage of fees earned by that lawyer on work brought in through the group's marketing. *See* Rule 1.5(g) (generally prohibiting division of legal fees with a lawyer not associated in same firm); Rule 5.4(a) (generally prohibiting sharing legal fees with a nonlawyer). If we had occasion to reach such issues, the threshold question would be the applicability to the proposed conduct of the Rules cited in this footnote, and that would require consideration of N.Y. State 678 in light of Rule 2.4. *See* paragraphs 6-7 *supra*.

(28-13)

Ethics Opinion 980

Committee on Professional Ethics of the New York State Bar Association (9/4/13)

Topic: Disclosure of confidential information to collect a fee; candor toward a tribunal

Digest: A lawyer, having learned in a prior proceeding that a then-client imparted material and false information about the client's finances to the tribunal, has a duty to take reasonable remedial measures that may still be available, including, if necessary, disclosure to that tribunal. Even if the correct information about the former client's finances is confidential, the lawyer may disclose it in the former client's bankruptcy proceeding if, but only to the extent that, the lawyer reasonably believes that disclosure is necessary to collect a fee that the former client owes to the lawyer.

Rules: 1.6; 3.3(a)-(c)

FACTS

1. While the inquiring attorney was representing a client in a contested judicial proceeding in which the client's finances were at issue, the client disclosed confidential information to the attorney about the client's finances (including that the client was working "off the books"). The information was inconsistent with what the client was providing to the court. The attorney, according to the inquiry, did not "promote" this information in the judicial proceeding.

2. Subsequently, the client filed for protection from creditors, including the inquiring lawyer, who is owed a legal fee from the prior representation. The lawyer wishes to reveal the confidential information from the first proceeding in the bankruptcy proceeding so as to aid the lawyer's effort to be paid the legal fee.

QUESTION

3. Having received confidential information from the client in one proceeding, may the inquiring lawyer disclose that information in a subsequent bankruptcy proceeding in an effort to collect an unpaid legal fee?

OPINION

4. Ordinarily, under Rule 1.6(a) of the New York Rules of Professional Conduct (the Rules), a lawyer shall not "knowingly reveal confidential information" or "use such information to the disadvantage of a client or for the advantage of the lawyer." One of the exceptions to this proscription is Rule 1.6(a)(3), which says that a lawyer may do so if "the disclosure is permitted by paragraph (b)" of Rule 1.6. That paragraph, among other things, permits a lawyer to "reveal or use confidential information to the extent that the lawyer reasonably believes necessary…to establish or collect a fee." Rule 1.6(b)(5)(ii).

5. We caution that Rule 1.6(b)(5)(ii) is no license for counsel to reveal any confidential information beyond what is "reasonably believe[d] necessary" to collect the fee. The Rules do not shed much light on these terms.[1] Nonetheless, these terms provide significant limits beyond which a lawyer may not go in seeking to collect a fee. We have previously discussed those limits, and while some of the opinions were decided under the prior Code of Professional Responsibility, we believe they generally remain sound guides under the Rules.

6. First, a lawyer should not resort to disclosure to collect a fee except in appropriate circumstances.[2] Second, the lawyer should try to avoid the need for disclosure.[3] Third, disclosure must be truly necessary as part of some appropriate and not abusive process to collect the fee.[4] Fourth, disclosure may not be broader in scope or manner than the need that justifies it, and the lawyer should consider possible means to limit damage to the client.[5]

7. Bearing in mind these limits on the fee-collection exception, we now turn to its applicability. The exception, as set forth in Rule 1.6(b)(5)(ii) and quoted above, is not reserved for any particular kinds of proceedings. In particular, the fee-collection exception "has been applied to bankruptcy proceedings." D.C. Opinion 236 (1993) (citing examples and concluding that a "well-established but narrow exception to the general rule against revealing client confidences and secrets…permits the disclosure of such information in connection with actions to establish or collect fees in bankruptcy proceedings in limited circumstances").

8. Of course, the limits on the exception also apply in bankruptcy proceedings.[6] Indeed, there is some authority as to how those limits may apply to particular uses of confidential information in the bankruptcy context.[7] However, because the inquiry does not specify the particular planned uses of confidential information, we leave to the inquiring attorney a careful consideration of whether disclosure is appropriate under the above prin-

ciples, and if so, how to limit it to the minimum necessary.

9. The inquiring attorney should also consider whether the information from the client is not only confidential under the rules of ethics, but also subject to attorney-client privilege, and whether such privilege might affect the permissibility of the proposed disclosure.[8] However, questions of privilege are legal matters on which we do not opine.

10. We turn to a second question that was not part of the inquiry but is raised by its facts. The inquiring attorney says that the attorney did not "promote" the client's apparently false evidence about the client's finances during the first proceeding. Depending on when that first proceeding occurred, however, the lawyer may have had a greater duty to the tribunal than forbearing from relying on the false evidence. Specifically, the applicable rule may have obliged the attorney to disclose the confidential information to the first tribunal if the client declined to do so and lesser remedial measures were insufficient to cleanse the record of the untrue evidence.

11. The Rules of Professional Conduct became effective, replacing the former Code of Professional Responsibility, on April 1, 2009. On that day, a lawyer's duty in appearing before a tribunal materially changed. The relevant provision of the Code had required that a lawyer who learned that the lawyer's client had clearly perpetrated a fraud upon a tribunal "shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected…tribunal, *except when the information is protected as a confidence or secret*." DR 7-102(B)(1) (emphasis added).

12. In contrast, one of the new rules that took effect on April 1, 2009, sweeps more broadly. The duty to take remedial steps is triggered when "a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity." Rule 3.3(a)(3). The duty is also triggered whenever the lawyer knows of "fraudulent conduct related to the proceeding."[9] In either case, "the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Rule 3.3(a)(3), (b). There is no longer any exception for confidences or secrets. *See* Rule 3.3(c) (duty applies "even if compliance requires disclosure of information otherwise protected by Rule 1.6"); N.Y. State 837 ¶¶ 6-7 (2010).

13. The application of the new standards of Rule 3.3 depends on when the first proceeding occurred. In N.Y. State 831 (2009), we concluded that, notwithstanding the adoption of Rule 3.3, DR 2-107(a) remained in force as to a fraud committed by the client prior to April 1, 2009, regardless of when the lawyer came to know the falsity of the information. Here, the lawyer's duty to disclose the information to the tribunal depends on whether the client imparted the false information to the tribunal before or after April 1, 2009.

14. If the false information was imparted before that date, the lawyer had a duty to call upon the client to rectify the fraud. However, if the client declined to do so, the lawyer had no further duty to disclose the information to the tribunal if that information was protected as a confidence or secret. And the information was undoubtedly so protected, given its nature and the way the lawyer learned it. On the other hand, if the false information was material and was imparted to the tribunal on or after April 1, 2009, then the lawyer had a duty to take reasonable remedial measures, and if measures short of disclosure were insufficient, then the lawyer would have a duty of disclosure to the tribunal.

15. This leaves us with two remaining matters, each on the assumption that Rule 3.3, not DR 7-102(B), governs the lawyer's obligations. One is the issue of whether, even if the Rules of Professional Conduct would seem to require disclosure of the false information, such information might nevertheless be shielded from disclosure in the first proceeding by the attorney-client privilege.[10] As noted above, however, privilege issues are questions of law beyond our purview.

16. The other remaining issue is the duration of the lawyer's obligation to make a Rule 3.3(a) disclosure to a tribunal. Although the State Bar proposed that the duty continue only to the conclusion of the proceeding, the courts did not adopt that proposal. N.Y. State 837 ¶ 16 (2010). Thus it appears that the obligation to disclose "may continue even after the conclusion of the proceeding in which the false material was used." We nevertheless opined that the endpoint of the obligation "cannot sensibly or logically be viewed as extending beyond the point at which remedial measures are available, since a disclosure which exposes the client to jeopardy without serving any remedial purpose is not authorized under Rule 3.3." *Id*. (citations omitted); *accord* N.Y. City 2013-2 (opining that "for a measure to be remedial, it must have a reasonable prospect of protecting the integrity of the adjudicative process," and discussing how application of that standard requires consideration of law and court procedures applicable to correction of the false evidence in question).

CONCLUSION

17. A lawyer who in one proceeding obtains confidential information about a client's financial affairs may disclose that information in a subsequent bankruptcy proceeding if, but only to the extent that, the lawyer reasonably believes that disclosure is necessary to collect a fee that the former client owes to the lawyer and disclosure is not barred by attorney-client privilege.

18. If a lawyer learns that a client has imparted false and material information to a tribunal since Rule 3.3 has been in effect, then the lawyer has a duty to take reasonable remedial measures that are still available, including, if necessary, disclosure to that tribunal, unless disclosure is barred by attorney-client privilege.

Endnotes

1. A lawyer "reasonably believes" something when "the lawyer believes the matter in question and…the circumstances are such that the belief is reasonable." Rule 1.0(r). The Rules do not define "necessary," but *Webster's Unabridged Dictionary* at 1200 (2nd ed. 1983) says that the word means "unavoidable, essential, indispensable, needful."

2. *See* N.Y. State 684 (1996) (analogizing to rule allowing withdrawal when client "deliberately disregards" a fee obligation, which occurs when "'the failure is conscious rather than inadvertent, and is not *de minimis* in either amount or duration'"); Restatement (Third) of the Law Governing Lawyers §41 cmt. c (2000) [hereinafter Restatement] ("The lawyer's fee claim must be advanced in good faith and with a reasonable basis.").

3. *See* Rule 1.6, Cmt. [14] ("Before making a disclosure, the lawyer should, where practicable, first seek to persuade the client to take suitable action to obviate the need for disclosure."); N.Y. State 608 (1990) (noting Code principle that a lawyer should "zealously avoid," and "attempt amicably to resolve," fee controversies with clients, and concluding that lawyer may use a collection agent to collect a fee but only after all other reasonable efforts short of litigation have been exhausted).

4. *See* N.Y. State 684 (1996) (disclosure to a credit bureau would appear to aid collection process if at all "only by virtue of its *in terrorem* effect on the client," and where "the client's potential injury arising from the disclosure of the client secret is the very vehicle of collection, such disclosure cannot be viewed as the type that is 'necessary' for the collection"); Restatement §41 cmt. c (lawyer "may not disclose or threaten to disclose information to nonclients not involved in the suit in order to coerce the client into settling").

5. *See* Rule 1.6, Cmt. [14] ("a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose," and disclosure in adjudicative proceeding "should be made in a manner that limits access to the information to the tribunal or other persons having a need to know the information, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable"); Restatement §65, cmt. d (describing requirements that use or disclosure of confidential information in compensation dispute be proportionate and restrained); *id.* §41, cmt. c ("lawyer should not disclose the information until after exploring whether the harm can be limited by partial disclosure, stipulation with the client, or a protective order").

6. "[T]he inquirer must have a good faith expectation of recovering more than a *de minimis* amount of the outstanding fee." D.C. Opinion 236 (1993). "[T]he proposed disclosure to the bankruptcy court must be as narrow as possible, providing only the minimal information necessary to establish or collect a fee. In addition, if possible, the inquirer should use protective orders, in camera proceedings, John Doe pleadings, and/or other appropriate mechanisms to protect the identity and interests of the client. *Id.*; *accord* Los Angeles County Opinion 452 (1988) (attorney may prosecute adversary proceeding to have a debt declared non-dischargeable but "as in any fee collection action, the attorney should avoid the disclosure of confidences and secrets to the extent feasible, and should obtain appropriate confidentiality orders for this purpose").

7. One ethics committee, while opining that an "attorney may make a claim in the bankruptcy case, and may prosecute a dischargeability proceeding as to the claim," also opined that the attorney may not participate in the "collective collection effort of the bankruptcy process." In other words, "the attorney may not use confidential or secret information to challenge the right of his former client to a discharge, and may not disclose such information to the trustee or other creditors," or otherwise "assist [the] trustee or other creditors in recovering assets." Los Angeles County Opinion 452 (1988).

8. We have previously noted a question whether the court-adopted rules of legal ethics "can override the statutory protection to the attorney-client privilege afforded by CPLR § 4503(a)." N.Y. State 831 (2009). Even if they cannot, however, it is not clear that privilege would bar disclosure in the case at hand. We note that in certain proceedings seeking relief from creditors, the privilege typically belongs to the Trustee and not to the person seeking relief. Thus, the person with capacity to waive the privilege may reside in someone other than the lawyer's onetime client. Moreover, an exception to the privilege could apply. *See*, *e.g.*, Alexander, CPLR §4503 Practice Commentaries, C4503:5(b) (McKinney) (discussing, as an exception to the privilege, "the rule that permits a lawyer to reveal confidences in order to collect a fee from the client"); Restatement §83(1) ("attorney-client privilege does not apply to a communication that is relevant and reasonably necessary for a lawyer to employ in a proceeding… to resolve a dispute with a client concerning compensation or reimbursement that the lawyer reasonably claims the client owes the lawyer"); Restatement §82(a) (exception to privilege when client "consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud").

9. Rule 3.3(b). Under the new rules, "fraudulent" conduct includes not only conduct that is fraudulent under applicable law, but also conduct that "has a purpose to deceive." Rule 1.0(i). This new definition apparently broadened the category of conduct constituting client frauds that could require remedial steps. *See* N.Y. State 831 (2009).

10. We have already noted issues as to whether privilege might bar disclosure otherwise permitted for the purpose of collecting a fee, see footnote 8 *supra*, and some of the same considerations (including possible applicability of the crime-fraud exception) apply to whether privilege might bar disclosure otherwise mandated by Rule 3.3. In any event, even if the privilege applied to the client communications in question, it may not extend to the context of disclosure under Rule 3.3. *See* Rule 1.6, Cmt. [3] (attorney-client privilege is part of evidence law and applies "when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client"); N.Y. State 837 ¶¶ 12-13 (2010) (noting that CPLR §4503's limit on remedial measures "extends only to the introduction of protected information into evidence"); Restatement §86(1) (privilege may be invoked "[w]hen an attempt is made to introduce in evidence or obtain discovery" of a privileged communication).

(48-12)

Ethics Opinion 981

Committee on Professional Ethics of the New York State Bar Association (10/2/13)

Topic: Payment to lawyer of referral fee for clients who sign up for a security system

Digest: A lawyer may receive a referral fee under certain circumstances.

Rules: 1.7; 5.4

FACTS

1. The inquirer, whose legal practice is predominantly residential real estate, has been approached by a company which provides home security services. The company has offered to pay a referral fee of $150.00 for each person who procures security services using a code on flyers placed in the lawyer's office. It is assumed that the attorney is not recommending these services and that the services are not substantially related to the legal services being provided by the attorney to the person who procures the services.

QUESTION

2. Can the attorney accept a referral fee from the home security company?

DISCUSSION

3. There are a number of opinions which discuss whether it is appropriate for a lawyer to receive a referral fee for referring a client to a service particular provider.[1] In each of these opinions the service provider was related in some way to the legal services being provided by the lawyer to the client.

4. Here, in contrast, the nature of the service provider (home security services) is not related to the legal services to be provided by the lawyer. These flyers would be available to anyone who passed through the lawyer's waiting room, including clients, delivery persons and individuals who might accompany clients to the lawyer's office. The lawyer is expressing no opinion regarding the quality or suitability of the services. He is merely providing space for the flyers for collection by anyone who might have an interest in a security system. Nothing in the Rules of Professional Conduct prohibits a lawyer from being compensated for providing passive space for advertisement by third parties.

5. However, should the lawyer recommend the services, or should the non-legal services be related to the legal services provided by the lawyer, the opinions in footnote 1 should be carefully considered before proceeding.

CONCLUSION

6. A lawyer may receive a referral fee from a home security firm which places flyers in the lawyer's office.

Endnote

1. See for example: N.Y. State 667 (1994) where it was opined that a lawyer could receive a referral fee from a mortgage broker provided certain conditions were met; Nassau County 2001-10 where a real estate lawyer could receive a referral fee from a termite treatment company; N.Y. State 461 (2007) which permitted a lawyer to receive a portion of a commission from a fire adjuster; N.Y. State 845 (2010) which permitted a real estate broker to share her commission with lawyers who refer buyers or sellers to her; D.C. Opinion 361 (2011) permitted a referral fee; Arizona Opinions 95-10 (1995) and 06-02 (2006) both of which prohibited referral fees. All of the opinions turned on an analysis of Rule 1.7 (or its predecessor) to determine whether such a referral fee created a conflict of interest between the lawyer receiving compensation and the obligation of the lawyer to make a referral which was in the client's best interest.

(5-13)

Ethics Opinion 982

Committee on Professional Ethics of the New York State Bar Association (10/2/13)

Topic: Obligation to disclose potential fraud on a tribunal

Digest: A lawyer who has not appeared before a tribunal has no duty and no right to disclose confidential information protected by Rule 1.6 even if necessary to correct a prior false statement by the lawyer, made to opposing counsel before any proceeding began, which may be later used as evidence before the tribunal.

Rules: 1.0(b); 1.0(q); 1.0(c); 1.6(a); 1.6(b)(2); 1.6(b)(3); 3.3(a); 3.3.(b)

FACTS

1. The inquiring lawyer represented a client in an estate matter in which a will has yet to be offered for probate. The inquirer is not admitted in this State and so associated with a member of the New York bar to handle the matter.

2. Although the will has not been offered for probate, it is likely to be, and, in the inquirer's judgment, will result in a contested proceeding between two siblings. The inquirer represented one of the siblings—for ease of reference "AB"—who provided the inquirer with seemingly credible and material information which the lawyer in turn sent to counsel for the sibling, the adverse client to whom we refer as "CD." Upon review of the information, CD's counsel responded by strongly questioning the accuracy of the information. When the inquirer confronted AB with CD'S response, AB admitted in confidence that the information AB had provided to the inquirer was false. The inquirer urged AB to correct the information, citing the lawyer's own ethical obligations and AB's potential criminal liability. Despite these entreaties, AB refused to correct the information. Thereafter, the inquirer terminated the attorney-client relationship with AB, and notified opposing counsel of the withdrawal without reference to the inquirer's earlier provision of information to CD's lawyer that the inquirer now knows to be false. While we are not opining on the propriety of the resignation, there is every reason to believe it proper under Rule 1.16.

3. The inquirer states that no basis exists for a reasonable belief that CD's counsel is relying on the statement that the inquirer provided to CD which the inquirer now knows to be untrue, a belief apparently rooted in the tenacity of opposing counsel's rejection of the information. Nevertheless, the inquirer apprehends that some party to the probate proceeding, be it AB or CD, will submit the inquirer's statement to the tribunal. This prospect gives rise to the inquirer's interest in whether, in such a circumstance, a lawyer may or must reveal "confidential information" as defined in Rule 1.6 of the N.Y. Rules of Professional Conduct. For our purposes, we assume that the information AB imparted qualifies as such. We do not address purely legal questions such as the application of evidentiary privileges, in this instance, for example, whether AB provided the information in furtherance of a crime or fraud, thereby removing the information from the protection of the attorney-client privilege. These issues are for courts to decide.

4. The inquirer suggests two exceptions to Rule 1.6(a) that may permit but not require the lawyer to disclose the information. One is Rule 1.6(b)(2), which permits a lawyer to prevent a client "from committing a crime," and the other is Rule 1.6(b)(3), which allows a lawyer to "withdraw a written or oral opinion or representation previously given to the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud." The lawyer also asks whether Rule 3.3(a), which concerns a lawyer's candor to a tribunal, requires the lawyer to disclose the information.

QUESTION

5. The inquiry before us asks that we determine whether a lawyer has an obligation to disclose a fraud on a tribunal when the lawyer is not appearing, and has never appeared, before that tribunal. We find no such language in the Rules of Professional Conduct and accordingly answer the inquiry in the negative.

ANALYSIS

6. We begin with Rule 1.6(b)(2), which permits a lawyer to disclose confidential information to prevent a client from committing a crime. Whether AB's failure to correct the false infor-

mation constitutes a crime at this stage of the matter, or even later, is also a legal issue beyond our jurisdiction to address. If the inquirer concludes that AB has already committed a crime, then Rule 1.6(b)(2) would not apply and thus would not allow the lawyer to disclose AB's confession. N.Y. State 674 (1994). This is true even though AB is now a former client. N.Y. City 1994-8 (1994). The inquirer's fear that AB may *later* commit a crime by submitting the false information to a tribunal—namely, the court overseeing the probate proceeding—is unduly speculative. The permissive disclosures in Rule 1.6(b) allow the revelation of confidential information only "to the extent that the lawyer reasonably believes necessary" under one or more of the enumerated circumstances. As of the date of the inquiry, the probate proceedings have not yet started. That AB and her new counsel may elect not to submit the information remains a possibility and calls into question the necessity of disclosure. Even if the lawyer were to conclude that the commission of a crime were imminent, the restricting language of Rule 1.6(b) cautions that disclosure should be to AB's current counsel, not to the opposing counsel or the court.

7. Whether Rule 1.6(b)(3) permits disclosure of the information depends on the reasonableness of the lawyer's belief that CD's lawyer continues to rely on the information the lawyer provided. That CD's lawyer "rejected" the information—that an adversary questioned its veracity—does not invariably mean that CD and her counsel are not relying on the information. Rule 1.0(b) defines "belief" to mean that "the person involved actually believes the fact in question to be true," which "may be inferred from the circumstances." Rule 1.0(q) defines "reasonable" to be "conduct of a reasonably prudent and competent lawyer." Rule 1.0(r)'s definition of "reasonable belief" combines these two concepts. "A mere suspicion or theoretical possibility that a third person is still relying is not enough—the lawyer must actually believe it." *Simon's Rules of Professional Conduct Annotated* 223 (2013). Without knowing the information or the content of the exchanges between counsel, we must accept the inquirer's unqualified statement that the lawyer does not reasonably believe that CD's counsel is still relying on the inquirer's statement. If that is so—if in light of all the facts and circumstances a lawyer does not reasonably believe that CD's counsel is so relying—then Rule 1.6(b)(3) provides no license for the lawyer to reveal the information.

8. This does not end the inquiry, for the lawyer asks also whether Rule 3.3(a) requires the lawyer to disclose the information if the probate proceeds and AB's successor counsel presents the court with lawyer's prior factual representation as a true statement. That Rule mandates disclosure, notwithstanding the confidentiality restrictions of Rule 1.6, in certain circumstances. That a lawyer appearing before a tribunal must correct a client's false statement to the tribunal (after unsuccessfully trying to persuade the client to do so) is not at issue. The question, instead, is whether a lawyer who knows that a former client is using the lawyer's prior statements or work product to place false evidence before a court is required or permitted to disclose the information.

9. The requirement that a lawyer do so is not readily apparent in Rule 3.3. Rule 3.3(a), unlike Rule 3.3(b), does not limit its application to a "lawyer who represents a client before a tribunal," yet the mandate of disclosure in Rule 3.3(a) extends only to the knowing failure of a lawyer "to correct a false statement of material fact or law previously made to the tribunal by the lawyer." It is difficult to read this phrase to mean anything other than a statement that the lawyer personally makes to the tribunal, rather than a statement the lawyer previously made to an adverse counsel which another lawyer then places before the court. In contrast to some other jurisdictions, the New York Rules do not make the obligations of Rule 3.3 "ongoing," or cross-reference Rule 3.3 in Rules 1.6 and 1.9, *e.g.*, Indiana Opinion 2 (2003); Illinois Opinion 98-07 (1999), which would clarify the duties of former counsel in these circumstances. Absent such clarity, we cannot conclude, based on Rule 3.3 alone, that a lawyer who is not counsel appearing before the court has an obligation to correct information that another lawyer submits to a court. *See* Virginia Opinion 1777 (2003) (forbidding disclosure); *but see* ABA 93-376 (1993) (holding that "noisy withdrawal" does not relieve the lawyer of the duty of candor in Rule 3.3).

10. Practical concerns support this conclusion. Rule 1.16(a)(3) permits a client to discharge a lawyer at any time for any reason. For better or worse, Rule 1.6 does not allow a discharged lawyer to reveal confidential information to successor counsel without a client's consent. These Rules, taken together, mean that a client may discharge a lawyer precisely because the lawyer is unwilling to further a client's ill-advised and potentially fraudulent pursuits. The so-called "noisy

withdrawal" provisions of Rule 1.6(b)(3) supply some leverage to the lawyer in these circumstances, but only upon a "reasonable" belief that reliance on a lawyer's prior statements persists. As we have said, if, as here, that condition is not met, then the avenue of permissive disclosure is closed. Upon withdrawal from a matter, the lawyer's interest in the representation ends except insofar as Rule 1.9 protects former clients from the disclosure of confidential information and the lawyer's involvement in matters adverse to the onetime client substantially related to the prior representation. To impose on the former lawyer the additional obligation to monitor the client's use of a lawyer's onetime statements to opposing counsel exceeds any duty that the language of the Rules imposes.

11. The inquiry does not require us to speculate on the lawyer's obligations if, despite having no duty to watch over the matter, the lawyer somehow learns that the lawyer's erstwhile client intends to use, or has used, the lawyer's statement before a tribunal. For now, we deal only with the question before us, which does not present those facts. Whether a lawyer may or must disclose information in such circumstances implicates a variety of Rules that are best left for consideration when the issue is presented.

CONCLUSION

12. A lawyer who has not appeared before a tribunal has no duty and no right to disclose confidential information protected by Rule 1.6 even if necessary to correct a prior false statement by the lawyer, made to opposing counsel before any proceeding began, which may be later used as evidence before the tribunal.

(73-12)

Ethics Opinion 983

Committee on Professional Ethics of the New York State Bar Association (10/8/13)

Topic: Legal fees; advance payment retainers

Digest: Lawyer may retain unearned portion of prior retainer on conclusion of matter, at client's request, as advance payment of fees for future legal services; such advance payment may be treated as client-owned funds depending on agreement with client.

Rules: 1.5; 1.15

FACTS

1. The inquirer is a lawyer who settled a case he was handling for his client. He had been paid a retainer (the "first retainer") that was not exhausted, and he sought to return the balance. The client asked him to keep the balance in his escrow account, telling the lawyer she "might need [him] for something else."

QUESTION

2. May the lawyer, at the client's request, keep the unearned portion of the first retainer in his escrow account, as an advance against unspecified legal services to be provided in the future?

OPINION

3. The inquiry concerns advance payment retainers, which the Committee has previously addressed.[1] "An advance payment retainer is a sum provided by the client to the lawyer to cover payment of legal fees expected to be earned during the representation." N.Y. State 816 ¶ 3 (2007). The arrangement proposed by the inquiry is of this type—it is a deposit toward payment of fees for future legal services—even though there is not yet any agreement between client and lawyer as to what further legal services, if any, will actually be provided.[2] Any ultimately unearned portion of an advance payment retainer must be returned to the client.[3]

4. The inquiry raises a question about how an advance payment retainer may be handled from the time it is provided to the lawyer until it is either earned by the lawyer or returned to the client. Under our opinions, the parties may choose either of two options. One option is to treat advance payment of legal fees as client funds, in which case the lawyer must deposit the advance payment into an escrow account and may not retain interest earned on the funds.[4] Alternatively, the parties may "agree to treat advance payment of fees as the lawyer's own." N.Y. State 816 ¶ 5. Under this option,

> the lawyer may use the money as the lawyer chooses (except that the lawyer may not deposit it in a client trust account), subject only to the requirement that any unearned fee paid in advance be promptly refunded to the client upon termination of the employment. In [this] case, any interest earned on the advance payment of fees would belong to the lawyer.

N.Y. State 570 (citation omitted). By allowing both options, the New York ethics rule differs from rules in a number of other jurisdictions where the client necessarily continues to own the funds until earned, and thus the lawyer must keep the funds in an escrow account.[5]

5. An advance payment retainer, in either of these two variations, is to be distinguished from a "general retainer," which is not a payment for specific legal services. Rather, it is "a payment to the lawyer for being available to the client in the future and for being unavailable to the client's opponents," and it is "earned upon receipt."[6]

6. On the facts of the current inquiry, the first retainer was an advance payment retainer to pay for services in the matter that has now been concluded, and the funds in question are the unused balance of that first retainer. These funds are now intended to pay for unspecified legal services in the future, if and when the parties agree that such further services will be provided, rather than to secure the availability of the lawyer to the client. Thus these funds are being maintained as a further advance payment retainer.

7. The client has requested that the funds be kept in the lawyer's escrow account, and as seen above, the lawyer is free to agree to that request. The parties are thus agreeing that the funds will be treated not as belonging to the lawyer, but rather as belonging to the client unless and until earned by future provision of legal services. "[O]nce a lawyer agrees to treat a fee advance as client property, the lawyer is bound by that agreement and all of its consequences," including all ethical requirements "applicable to client funds and trust accounts." N.Y. State 570 (1985).

8. We note an additional question about the lawyer's ongoing duties during the period from completion of the first matter until such time as the parties may agree on the performance of further legal services. The inquiry does not specify whether the parties contemplate that their attorney-client relationship will continue during that period. It is possible that the lawyer could serve merely as an escrow agent for the funds without continuing as attorney for the person whose funds are being held. Even then, however, the lawyer would remain bound by certain ethical duties to that person. *See*, *e.g.*, Rule 1.9 (duties to former clients); Rule 1.15 (preserving identity of funds of others, fiduciary responsibility, and record keeping).

9. Alternatively, the attorney-client relationship may continue while the lawyer holds the advance payment retainer, in which case lawyer would continue to be bound by the full set of ethical duties owed to clients. The inquiry does not say that the lawyer has told the client that the representation has terminated. The parties have discussed the possible future provision of legal services. And the lawyer is agreeing to keep possession of the client's funds for that purpose. Each of these circumstances is a factor that may bear on whether the client reasonably views that the representation will continue.[7] However, whether there is an attorney-client relationship during the interim between past services and potential future ones is a legal rather than an ethical question. We have mentioned some relevant factors but it is not our province to opine whether the representation continues. *See*, *e.g.*, Rules Scope ¶ [9] ("principles of substantive law external to these Rules determine whether an client-lawyer relationship exists"); N.Y. State 963 ¶ 10 (2013).

10. Of course the lawyer would be well advised to try to avoid misunderstandings as to either the treatment of the advance payment retainer or whether the representation is continuing. *See*, *e.g.*, N.Y. State 816 ¶ 9 (2007) ("imperative for a lawyer at the outset of the representation to discuss the advantages and disadvantages of advance payment retainers and to reach an agreement about the treatment of any such advances"). Moreover, to embody agreements with the client in writing, whether or not required,[8] may enhance clarity. *See*, *e.g.*, Rule 1.3, Cmt. [4] ("Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.").

CONCLUSION

11. At the client's request, the lawyer may retain the unspent portion of the retainer on the conclusion of a matter as an advance payment of fees to be used for unspecified future legal services. Such advance payment retainers may be treated either as client-owned funds, to be kept in the lawyer's escrow account, or as lawyer-owned funds, subject to the lawyer's obligation to reimburse the client for any portion ultimately not earned in fees.

Endnotes

1. *See* N.Y. State 570 (1985), adhered to in N.Y. State 816 (2007). These opinions were decided under the prior Code of Professional Responsibility, but we see no reason that the current Rules of Professional Conduct (the Rules) would lead to different results.

2. There are variations in terms used to describe retainer agreements. Here we follow the usage of our prior opinions, but what we are calling an advance payment retainer or advance fee retainer is also sometimes called a "special," "specific" or "security" retainer. *See Grievance Administrator v. Cooper*, 06-36-GA (Mich. Att'y Disc. Bd. 2007). The term "special retainer" is also sometimes used to denote a broader category of arrangements, as distinguished from the "general retainers" described in paragraph 0 below. Special retainers in that broader sense can be further divided into "security retainers," which are advances intended to secure the client's payment of fees when earned for future legal services, and "advance fee retainers," which in this usage means "a present payment to a lawyer as compensation for the provision of specified legal services in the future," generally "intended to compensate the lawyer for all work to be done on a matter, regardless of the time required or the complexity of the assignment," and also known as "fixed" or "flat" fees. *See*, *e.g.*, *In re Hann*, 819 N.W.2d 498, 505-06 (N.D. 2012) (quoting D. Richmond, "Understanding Retainers and Flat Fees," 34 J. Legal Prof. 113 (2009)). Using this terminology, the present inquiry concerns a proposed security retainer.

3. *See* Rule 1.5(d)(4) ("A lawyer shall not enter into an arrangement for, charge or collect…a nonrefundable retainer fee," though a retainer agreement may include a reasonable and clear minimum fee clause); *id.*, Cmt. [4] (lawyer "may require advance payment of a fee, but is obliged to return any unearned portion"); Rule 1.16(e) (upon termination of representation, lawyer shall take steps to avoid foreseeable prejudice to the rights of the client, including "promptly refunding any part of a fee paid in advance that has not been earned"); N.Y. State 816 ¶¶ 3-4, 8, 10 (2007); *In re Cooperman*, 83 N.Y.2d 465 (1994) (interpreting prior Code to prohibit nonrefundable advance payment retainers).

4. *See* N.Y. State 816 ¶ 5, quoting N.Y. State 570; Rule 1.15(b)(1) & Cmt. [1] (money "that is the property of clients" or prospective clients must be kept in one or more trust accounts). Interest earned on the funds while in an escrow account must be remitted to the client unless the funds are deposited into an "interest on lawyer account" or "IOLA," which is an unsegregated interest-bearing account for the deposit of moneys "which, in the judgment of the attorney, are too small in amount or are reasonably expected to be held for too short a time to generate sufficient interest income to justify the expense of administering a segregated account for the benefit of the client or beneficial owner." Judiciary Law §497(1), (2). Under Judiciary Law §497(6)(c), interest on such accounts is remitted to the IOLA fund established by State Finance Law §97-v.

5. *See* N.Y. State 570 (1985) (noting that "majority of opinions by other ethics committees that have addressed the issue…would require that advance payments of legal fees be deposited in a client trust account and retained there until earned," and citing examples). Some jurisdictions have adopted explicit rules to this effect. *E.g.*, Arizona ER 1.15(c); Maine Rule 1.15(b)(1); *see* ABA Model Rule 1.15(c) (lawyer "shall deposit into a client trust account legal fees…that have been paid in advance, to be withdrawn by the lawyer only as fees are earned"). Some others have adopted such a rule as a matter of interpretation. *E.g.*, *In re Lochow*, 469 N.W.2d 91, 97-98 (Minn. 1991); *State v. Fellman*, 678 N.W.2d 491, 497 (Neb. 2004); *In re Dawson*, 8 P.3d 856, 859 (N.M. 2000); Oklahoma Opinion 317 (2002); Philadelphia Opinion 96-7. Other jurisdictions yet have adopted this rule only as a default. *E.g.*, *Att'y Grievance Comm'n of Maryland v. Stinson*, 50 A.3d 1222, 1226 n.4 (2012) (fees to be deposited into client trust account unless client "gives informed consent, confirmed in writing"); *In re Mance*, 980 A.2d 1196, 1201 (D.C. 2009) (advances of unearned fees to be treated as property of client "unless the client gives informed consent to a different arrangement"). *See generally* Kewalramani & Greenberger, "Advance Payment Retainers: Whose Property? What Account?," N.Y.L.J (Feb. 15, 2013); O'Shea, "Advance Fee Retainers: Should We Change the Rules?," N.Y. Prof. Resp. Report (July 2001) (arguing against amending Code to require that advance fee payments be held in trust until earned, and opining that N.Y. State 570 "has served for many years as clear and largely uncontroversial guidance for the New York Bar").

6. N.Y. State 570 n.1; *accord* N.Y. State 816 ¶ 3. According to one source:

> A general retainer is also known as a "true," "classic," or "availability" retainer, or as an "engagement fee." A true retainer fee is an amount a lawyer charges the client not for specific services but to ensure the lawyer's availability whenever the client may need legal services. Such a fee is a charge separate from fees incurred for services actually rendered. In other words: A fee is an engagement retainer only if the lawyer is to be additionally compensated for actual work, if any, performed.… A retainer purporting to be "both for availability and for services" has been called a "hybrid" and is usually treated as a special retainer or advance payment of fees.

Grievance Administrator v. Cooper, 06-36-GA (Mich. Att'y Disc. Bd. 2007) (footnotes and internal quotations omitted).

7. "If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal." Rule 1.3, Cmt. [4]; *see* Restatement (Third) of the Law Governing Lawyers §14(1)(b) & cmt. e (2000) (relationship of client and lawyer arises when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person…and…the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services").

8. The Rules do not state that the terms of a representation must be written, and depending on the circumstances, a writing may or may not be required by law. *See* Rule 1.5(b) (lawyer "shall communicate" to client the scope of the representation and the basis or rate of fee and expenses); 22 N.Y.C.R.R. §§ 1215.1(a), 1215.2(a), (b) (written letter of engagement not required where "the fee to be charged is expected to be less than $3000," or "the attorney's services are of the same general kind as previously rendered to and paid for by the client").

(6-13)

Ethics Opinion 984

Committee on Professional Ethics of the New York State Bar Association (10/8/13)

Topic: Conduct that has no substantial purpose other than to cause needless expense

Digest: A lawyer's refusal to provide copies of publicly available pleadings to adverse counsel does not violate Rule 3.2.

Rule: 3.2

FACTS

1. Inquirer is asked by adverse counsel in a case to provide copies of pleadings and other documents already filed which form the basis of a default judgment. Inquirer proposes to respond that he will not provide copies of documents that are available from the court file, although such documents are electronically stored on his computer and may not be available electronically from public sources. Such refusal will mean that adverse counsel will incur the cost of time and expense travelling to the court clerk in order to photocopy those documents.

QUESTION

2. Would such a refusal violate Rule 3.2?

OPINION

3. We assume without opining that the inquirer is not required by law or court rule to provide the documents in question. *See* Rule 3.3(a) (lawyer shall not intentionally violate any established rule of procedure or of evidence), Rule 8.4(b) (lawyer shall not engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer). If the lawyer were so required, refusal to provide the documents would constitute a violation of Rule 3.2.

4. New York Rule of Professional Conduct 3.2 states that "In representing a client, a lawyer shall not use means that have no substantial purpose other than to delay or prolong the proceeding or to cause needless expense." Cmt. [1] to the Rule adds that "The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay or needless expense."

5. Rule 3.2 was introduced to New York on April 1st, 2009 when the Rules of Professional Conduct were promulgated by the courts to supersede and replace the old Code of Professional Responsibility. There was no predecessor version of Rule 3.2 in the old Code but it did include Disciplinary Rule 7-101(A)(1) "Representing a Client Zealously" which stated in pertinent part that "acceding to reasonable requests of opposing counsel which do not prejudice the rights of the client" was not a violation. Former Ethical Consideration 7-38 stated that a "lawyer should…accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client." The quoted language from the former DR 7-101(A)(1) and EC 7-38 was not included by the Courts in the Rules of Professional Conduct, nor in the Comments to the Rules (the Comments were adopted by the New York Bar Association's House of Delegates). But it seems instructive that only the Ethical Consideration (not the Disciplinary Rule) stated a lawyer "should" accede, because Ethical Considerations had an aspirational, rather than disciplinary, nature. This is our first opinion construing Rule 3.2.[1]

6. While providing the documents would save adverse counsel time and effort, the documents were presumably produced or obtained at the expense of adverse counsel's client, so even if no money were expended, there would be an implicit cost to sharing them. But even if there were no implicit cost, it does not seem likely that in promulgating Rule 3.2 the courts intended to create an ethical obligation to share information, documents or resources solely because the cost of sharing would be minimal. Otherwise, one side could be compelled to provide copies of the cases it has cited in pleadings or even to "lend" the assistance of salaried personnel. When Rule 3.2 states that a lawyer shall not "cause needless expense" we believe it means that a lawyer shall not take *affirmative steps* which result in "needless expense" but that mere refusal to cooperate, as here, does not constitute such an affirmative step. In short, declining to provide

documents available at the court to adverse counsel does not constitute "causing" needless expense.

7. We add that while Rule 3.2 does not compel sharing the documents available from the court, we also see no prohibition in the Rules against acceding to such a request. *See* Rule 1.2(e) (lawyer may exercise professional judgment to accede to reasonable requests of opposing counsel when doing so will not prejudice the client's rights). The lawyer should also consider whether the circumstances of the request merit consultation with the client before deciding whether to accede. *See* Rule 1.4(a)(2) (lawyer shall "reasonably consult" with client regarding the means of accomplishing client's objectives).

CONCLUSION

8. The proposed refusal would not violate Rule 3.2.

Endnote

1. Cf., N.Y. State 469 (1977) (lawyer may not interpose a general denial knowing that the client has no valid defense). We do not find any state or federal court decisions in New York that construe the Rule either. ABA Model Rule 3.2 reads differently, stating that "A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."

(23-13)

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