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ONEONONE

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Message from the Chair

Richard Klass

At this year's joint Annual Meeting of the General Practice Section and the Committee on Professional Ethics, part of the program addressed the ramifications of sanctions by a court in civil and criminal proceedings and the implications for professional discipline.

Listening to each of the panelists (which included a judge, disciplinary committee counsel and ethics defense counsel), I couldn't help but think that many of the sanctions doled out to attorneys resulted from a lack of civility in the profession. There was discussion of the "nutcase" judge who is prone to sanction counsel and the attorney who flagrantly flouts court orders. It would likely surprise many practitioners that, while there are *Standards for Civility*, which outline conduct unbecoming a judge, attorney and client, these standards are only aspirational and encouraged, and not mandated rules. It is unfortunate that some in our profession do not appreciate the level of respect that should be bestowed upon every participant in the litigation process. Perhaps much of the sanctions could be avoided if all remembered to be more civil to each other. Agreeing to disagree is a fundamental part of our adversarial system; however, personal attacks, failing to follow the rules and disregarding the rights of others are not. Through participation in bar association activities, continuing legal education programs and other civic organizations, judges and attorneys can learn to "play nice" with each other.

In promoting good practice and good spirits, the General Practice Section has numerous programs designed to help attorneys. We hope that you will come to one of our Section's programs.

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NYSBA

General Practice Section's Executive Committee Dinner

Abigael's Restaurant, New York City
February 24, 2015

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In April, the GP Section had its Spring Program on Long Island's North Fork. The weekend program included a continuing legal education program about the history of Long Island's oysters and efforts to protect the oyster farming industry. Attendees were delighted to visit a winery, try cigars rolled from a local tobacconist's plants and enjoy fine local fare. Special thanks to our Event Chairs Elisa Rosenthal and Emily Franchina (our Chair-Elect).

In May, we are planning a great CLE program, one that has likely not been offered by NYSBA and one particularly germane to the GP Section, entitled "The Dos and Don'ts of Finding and Hiring a Law Firm Associate." Since a large percentage of our membership is comprised of solo and small firm practitioners, this program will cater to helping our members in their quests to grow their practices. Topics will include resources to finding qualified associates, interviewing skills from the employer's side, due diligence of the potential hire including social media, good practices, and tips on avoiding discrimination claims.

Future programming in 2015 will include a variety of fun activities and events. Acting Skills for Lawyers, which will include audience participation, will help prepare attorneys to feel more comfortable and prepared in court and in meetings. Keeping in mind that a healthy body produces a healthy spirit, our Section will be hosting a fitness coach who will train lawyers in how to keep in optimal shape, including exercises which promote health and vigor and the proper diet for success. There will also be a program on Dressing for Success, at which attorneys will learn the finer art of selecting the right attire for the right effect.

Aside from the live programs, the GP Section is always proud to host one of NYSBA's most active listserves. On a daily basis, attorneys from all over the State and beyond exchange ideas, forms, questions and answers, and goings-on. I encourage you to join the listserve and take advantage of the wealth of knowledge from the other participants.

I encourage all of you to contact me about getting more involved in the activities of the General Practice Section to enhance its benefits even more. I hope you enjoy this issue of *One on One* and look forward to receiving submissions highlighting the issues our members face in their individual practices.

Richard Klass

From the 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:

Legislate Process: Researcher Barbara Anderson, in an article titled "Looking for the Law," goes into great detail to show the intricacies of drafting legislative amendments. She highlights the transformation of legislative drafting from being a paper-based process to one now involving information technology systems, which allows for new drafting tools to seamlessly make all amendments and revisions to a myriad of statutes and rules affected by the enactment of new laws.

Fugitive Disentitlement Doctrine: Introducing our readers to a legal concept that has been around for a long time but not necessarily known by name, Steven D. Cohn, Esq., describes the Fugitive Disentitlement Doctrine, found in Title 28 of the U.S. Code. This doctrine proscribes a person who willfully disobeys a court order from, at the same time, seeking relief from the court order. At its root, the doctrine prevents a fugitive from justice from flouting the authority of the court by disallowing the fugitive from seeking clemency of the court or pursuing other remedies unless or until there is compliance with the court's directives.

Workers' Compensation: In an article by Co-Editor Martin Minkowitz, Esq., he brings to light some interesting issues arising under the Second Injury Fund. Workers' Compensation Law Section 15(8) established this Fund to provide incentives to employers to hire people who were previously injured and suffered physical impairments. Although the Second Injury Fund only applies to workers who suffered injuries in accidents prior to July 1, 2007, many are still able to receive benefits now and for years to come.

Securities: In what appears to be a "sea change" in the way stocks are traded, there are now "dark pools" which bypass the traditional securities exchanges. Numerous large financial institutions operate their own dark pools, which are generally defined as securities exchanges (similar to the New York Stock Exchange) but the traders cannot see all of the information regarding their fellow traders, including names, trade volumes and stocks traded. By design, these dark pools reduce the risk to the large institutions from high-speed traders so as to ensure better trade execution prices.

Martin Minkowitz

Wills and Trusts Law: Former Elder Law Section Chair Anthony J. Enea, Esq., lays out the status of the law surrounding the claim of undue influence over a testator.

Book Reviews: In a review by Jim Riley of the book, *The Dream of the Celt*, he introduces readers to the historical figure Sir Roger Casement, an Irish-born Protestant who led various human rights causes on behalf of workers' rights and indigenous peoples around the world living under colonial rule. Later in life, Sir Casement took up plans to overthrow British rule over Ireland.

Co-Editor Richard Klass offers his review of the new book by Gary Muldoon titled *The Education of a Lawyer.* This very practical book starts from the beginning of a person's decision whether to go to law school through the practice of law. Filled with a lot of insight from a long-term practitioner, the book gives the reader direction through the nuances of the legal field.

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

Matthew Bobrow
Associate Editor

Looking for the Law

By Barbara M. Anderson

Since ancient times, people have lived by codes of written laws.[1] Such codes allow people to know both the rules by which they are to live and the consequences of their failure to follow the rules, ignorance of the law being no defense to its violation. If enforced justly and equitably, written laws can provide both stability and fairness. Over time, the publication of written laws has evolved from stone and papyrus to paper and, more recently, electronic documents on the Internet.

The modern legislative process is derived from a paper-based system in which a written bill is filed in one or both houses, amended numerous times (thereby creating several bill versions), enacted, published in a book as a session law, and eventually incorporated into the codified statutes.[2] States have both complex guidelines for drafting legislation[3] and documents to help citizens understand the legislative process.[4] Bills that add new statute sections can be difficult to draft, and require the drafter to determine where the sections should be placed within the statutory hierarchy. Bills that amend existing statute sections are somewhat easier to draft and generally take one of three formats—full section amendments, subsection amendments, and directive amendments.

A bill drafted as a full section amendment includes the entire text of a statute section with the proposed changes indicated by either highlighting or stricken and underlined text. This type of bill readily shows the scope of the amendment and is relatively easy to incorporate into the statutes, but may not be the best format when, for example, the bill changes only one word of a 500-word statute section. A subsection amendment is similar, but the bill includes only the affected subdivision, paragraph, etc. Because the full statutory context is missing, this type of bill is less likely to convey the scope of the amendment. Correct integration of the amendment can be difficult in a long statute section that includes several subparagraphs with the same designation.

A directive amendment that instructs a revisor to, for example, change "supervisory committee" to "board of supervisors" wherever it appears in the statutes gives no indication of the scope of the amendment.[5] Not only must the revisor find all instances of "supervisory committee" in the statutes, he must also make judgments as to what the legislature intended. For example, if the statutes include the sentence, "The supervisory committee shall make rules, and the committee's decisions are final," should "committee's" be changed to "board's"? Presumably so (and directive legislation often includes provisions for such variations), but directives slow down the statutory integration process and introduce great potential for error and confusion.[6]

Until a session law is integrated into the statutes, it is difficult (and in the case of directive legislation impossible) to understand its scope and application. While statutes do not have the same legal status as session laws, they are more easily read and understood, and provide needed context for implementing and interpreting a law.[7] Electronic publishing of integrated statutes on state and other web sites, readily accessible from computers and mobile devices, has made it easier for people to know which laws affect them, and to see the scope of statutory amendments. As a result, lawyers and other interested citizens now want access to integrated session laws as soon as they are enacted. Impediments to rapid statutory integration include the format of the bill, the enactment of duplicative and conflicting bills in the same legislative session, and the presence of delayed effective dates, contingencies, and sunset provisions.

With the advent of information technology (IT) systems and electronic publishing, there are numerous tools available to assist with the bill-drafting process.[8] Most of these drafting tools, however, assume a paper-based legislative process where the end result is the publication of the session laws in a book. They do little to facilitate the rapid and accurate integration of the session laws into the statutes and the publication of the statutes on the Internet. This shortcoming has been compared with that of the early automobile manufacturers who simply put motorized engines on coaches instead of on vehicles designed for faster travel, but there is interest in redesigning these tools so that the expected end result of the legislative process (integrated statutory text) is easier to achieve.[9] Technology has created opportunities to examine the paper-based approach to bill drafting and make systemic changes aimed at improving the integration process so that integration becomes a goal rather than an afterthought. These changes can also improve accuracy and eliminate unintended differences between the official session law text and the integrated statutory text.[10]

IT systems have produced word processing applications and numerous drafting aids such as model clauses. The resulting documents can be readily shared and revised, which facilitates the creation of bill versions. These documents, however, need to be converted to a different format before they can be integrated and published on a web site.[11] Bills that are drafted as web-compatible docu-

ments with embedded markup language do not require conversion before publication, eliminating the potential for conversion errors and speeding the integration process. Bill formats, such as directive legislation, that hinder the integration process can be replaced with more efficient, web-based formats.

New drafting tools developed to facilitate the quick and accurate integration of session laws into statutes should combine the ease of editing a word-processed document with the publication flexibility of markup language. These tools should produce legislative-specific documents and include such features as automatic subsection renumbering for amendments, and hierarchy and naming convention recommendations for new sections, based on the existing formal structure of the statutes (articles, chapters, sections, etc.) and the functional aspects of the text (definitions, prescriptions, penalties, etc.).[12] Tools that identify the presence of conflicting and duplicative bills in a legislative session, and replace them with one consolidated bill for consideration, would speed integration by eliminating the need to blend amendments and account for discrepancies with editorial notes. Delayed effective dates, contingencies, and sunset provisions are valuable legislative devices, but such provisions slow down the integration process because they require the addition (or amendment) of explanatory notes. New drafting tools must be able to accommodate and track such important devices.

Louis Sullivan, the architect who pioneered the modern skyscraper, wrote the phrase "form ever follows function" to explain the principle that the shape and appearance of a building should always be dictated by the intended purpose of the building. While the format of a bill is also secondary to its intended legislative purpose, bill drafting methods and tools that speed integration can help effectuate that purpose.

Endnotes

1. Fragments of these codes found in museums today include the Code of Hammurabi from Babylon, the Draconian Constitution of Greece, the Twelve Tables of Roman Law, and the Book of Leviticus from the Dead Sea Scrolls.
2. *See* N.Y. Legis. Law § 40 (McKinney 2015).
3. *Bill Drafting Manuals*, National Conference of State Legislatures (Oct.1, 2014), http://www.ncsl.org/legislators-staff/legislative-staff/legal-services/bill-drafting-manuals.aspx.
4. *How a Bill Becomes a Law*, New York State Senate, http://www.nysenate.gov/How_a-Bill_Becomes_a_Law (last visited Feb. 27, 2015).
5. Such amendments are generally limited to ministerial provisions.
6. If the statutes include the sentence, "The supervisory committee and the board of directors shall make rules, and the board shall enforce them," is it the legislature's intent to give the board of supervisors enforcement powers?
7. Wim J.M. Voermans, Welmoed Fokkema, Remco Van Wijk, *Free the Legislative Process of its Paper Chains: IT-Inspired Redesign of the Legislative Procedure* 9, *available at* http://ssrn.com/abstract=1855595.
8. National Conference of State Legislatures, Bill Drafting Systems in State Legislatures (2012), available at http://www.ncsl.org/legislators-staff/legislative-staff/information-technology/bill-drafting-systems.aspx.
9. Voermans, *supra* note 7, at 4.
10. *Id* at 10.
11. *Id* at 5-7.
12. C. Biagioli, E. Francesconi, P. Spinosa, M. Taddei, *The NIR Project: Standards and tools for legislative drafting and legal document Web publication*, Proceedings of ICAIL Workshop on e-Government: Modelling Norms and Concepts as Key Issues, at 69-78 (2003), *available at* http://www.academia.edu/5557297/The_NIR_Project_Standards_and_tools_for_legislative_drafting_and_legal_document_Web_publication.

What Is the Fugitive Disentitlement Doctrine?

By Steven Cohn and Ilana Hochman

The Second Department Appellate Division employed the Fugitive Disentitlement Doctrine for the first time joining the Third and Fourth Departments.

The Fugitive Disentitlement Doctrine can be found in the United States Code in Title 28, Judiciary and Judicial Procedure. This doctrine states that a judicial officer may prevent a fugitive from using the resources of the United States courts in furtherance of a claim, civil or criminal, when their fugitive status is inextricably linked to the need for such relief. In short, those who try and evade the Court's jurisdiction by flight should not expect clemency when they request any form of judicial relief, whatever it may be.

The doctrine accomplishes several objectives, most notably:

1) Assuring the enforceability of any decision that may be rendered against the fugitive;
2) Imposing a penalty for flouting the judicial process;
3) Discouraging flights from justice and promoting the efficient operation of the courts;
4) Avoiding prejudice to the other side caused by the defendant's escape.[1]

The doctrine's rationale is that fugitives who attempt to circumvent the law should not be able to concurrently reap the benefits of the judicial relief it affords.

The standard used for applying the Fugitive Disentitlement Doctrine was established by the Supreme Court case, *Ortega-Rodriguez v. United States.* This standard necessitates a connection between the Defendant's fugitive status and the appellate process, "sufficient to make an appellate sanction a reasonable response."[2] This means that the relief they are seeking must be related to their fugitive status.

Though the doctrine has its roots in criminal law, over the years it has been applied to the denial of relief in civil cases when the fugitive is requesting some form of relief while at the same time attempting to evade an order issued in a civil case.

The Third Department was the first Appellate Court in New York to adopt the Fugitive Disentitlement Doctrine by name. Until this point each of the departments of the Appellate Division had dismissed fugitives' appeals in criminal proceedings on the grounds that "the appellant is not presently available to obey the mandate of the Court in the event of an affirmance."[3]

The Third Department ultimately adopted the doctrine in a family law case entitled *Skiff-Murray v. Murray.* In a divorce proceeding, the Court awarded sole custody of the children to the mother. The Court further imputed income to the father and he appealed, moving to strike certain documents that were placed in the addendum to the Petitioner's brief. These documents indicated that the Respondent Father was absent from trial during the divorce action, voluntarily left the state, and deliberately disobeyed the March 2002 child support order resulting in a bench warrant and order of commitment.

The Petitioner Mother cross-moved to dismiss the respondent's appeal, arguing that his current status as a fugitive from the jurisdiction of the trial courts invoked the Fugitive Disentitlement Doctrine. The Court subsequently dismissed the appeal.[4]

In the Fourth Department case entitled *Shehatou v. Louka*, the respondent was also a parent in default of a support order issued by the Court. The Court determined that the respondent had willfully violated the Court's order and was thereby sentenced to a period of six months of incarceration. There was also a warrant issued for his arrest.

At this point, the respondent submitted an order to show cause in an attempt to vacate both orders. The Court refused to sign the order stating that the Fugitive Disentitlement Doctrine applies to the respondent who relocated to California as he was attempting to "evade the law while simultaneously seeking its protection."[5]

The Second Department has now applied this doctrine. Its application of the doctrine has also emerged in a civil setting, in the field of family law, concerning the case of *Allain v. Oriola-Allain*. In *Allain*, the parties were married in 2000 and divorced in 2005. The Father was awarded custody of the child who was four at the time. The Mother worked as a system's engineer and as such, the Court imputed an annual income of $100,000.00. The Mother, Oriola-Allain, was obligated to pay monthly child support in the amount of $1,296.00.

Over the next four years, Oriola-Allain filed five petitions in the Family Court to have the amount of child support reduced. In 2009, the Family Court ordered an increase in support payments to $1,467.00. The Mother then filed two petitions for a downward modification of the support amount which were both dismissed.

In 2011, the Mother relocated to Nigeria. She was still able to appear by telephone for a conference that was held on December 21, 2011 where the proceedings were further adjourned to January 17, 2012. The proceedings were

adjourned several more times until they were put on for April 19, 2012.

On April 19, 2012, the Court found that the mother had willfully violated the December 2009 order and was directed to pay $28,363.31 in arrears and the support magistrate requested her incarceration.

Due to her failure to appear, the Court issued a warrant for Oriola-Allain's arrest, but stayed the issuance of the warrant until August 17, 2012, in order to provide the mother with an opportunity to appear before the Court for a hearing with respect to the confirmation of the Support Magistrate's findings and recommendation of incarceration. Oriola-Allain never personally appeared but rather appealed, claiming the Court erred in denying her an adjournment of a July 31, 2013 proceeding and denying her application to testify by phone. Furthermore, she contends that the Court erred in issuing a warrant for her arrest.

The Court ultimately dismissed her appeal on the grounds that the Oriola-Allain purposefully fled from the jurisdiction of the New York courts in response to the October 2011 violation petition where she willfully disobeyed the 2009 child support order.[6]

Now that the Second, Third and Fourth Departments have all recognized the Fugitive Disentitlement Doctrine as a tool at their disposal, it will be interesting to see whether the First Department will follow suit in the near future.

Endnotes

1. Bar-Levy v. U.S. Dep't of Justice, I.N.S., 990 F.2d 33, 35 (2d Cir. 1993).
2. Ortega-Rodriguez v. United States, 507 U.S. 234, 249 (1993).
3. People v. Sullivan, 28 N.Y.2d 900, 901, 271 N.E.2d 561, 562 (1971).
4. Skiff-Murray v. Murray, 760 N.Y.S.2d 564, 305 A.D.2d 751 (App. Div. 2003).
5. Shehatou v. Louka, 987 N.Y.S.2d 746, 746-47, 118 A.D.3d 1357, 1357-58 (App. Div. 2014).
6. Allain v. Oriola-Allain, No. 2012-10378, 2014 WL 5350479, at *4 (N.Y. App. Div. Oct. 22, 2014).

Steven Cohn is a past President of the Brooklyn Bar Association, a member of the New York State Bar Association House of Delegates and partner in Goldberg & Cohn, LLP. Ilana Hochman recently graduated from New York Law School with a J.D.

The Slow Demise of the Second Injury Fund

By Martin Minkowitz

The closing of the Special Disability Fund in 2007 to new claims for future accidents marked a major change to the Workers' Compensation Law. Section 15(8) of the Special Disability Fund, more commonly known as the Second Injury Fund ("Fund"), provided that if a claimant had a permanent physical impairment from a prior accident or disease which could obstruct or hinder that person from being employed, the Fund would provide an incentive to employ that person. It did that by reimbursing an employer if the employee was injured in the course of employment and a compensation award was made by the Workers' Compensation Board for a permanent disability or death. In addition, it paid medical costs and expenses. The employer was entitled to file for a claim for reimbursement from the Fund and could receive reimbursement if all statutory conditions were met.

This Special Injury Disability Fund was first created in New York in 1945. It was of particular importance to the troops coming home from the War who had become disabled while in service, and who were now seeking employment.

The Fund continued to accept claims until July 1, 2010 by employers, or their workers' compensation insurance carriers, for injuries from accidents that occurred prior to July 1, 2007.[1]

There was no right to file a claim for reimbursement from the Special Disability Fund for an injury or illness with a date of accident or date of disablement on and after July 1, 2007, and no one could file a claim with the Fund after July 1, 2010, even if the injury or illness was before July 1, 2007.[2]

All claims filed before July 1, 2010 would be processed, and if an employer or its carrier met the statutory conditions, they would be entitled to reimbursement for payments they made on the award to the claimant. The Fund is therefore not quite dead. It will continue to make payments on open claims for many years.

That should appear clear and unambiguous. However, now consider the following: a claim is filed and found to be reimbursable during the years the Fund was accepting claims. The claimant dies in 2011 from the injuries sustained in an accident in 1999 for which benefits were being paid. A death benefit claim is filed on behalf of the deceased claimant. The employer now seeks to continue to receive reimbursement from the Fund claiming the accident that caused the death in 2011 happened in 1999, and therefore, prior to July 1, 2007. The employer says this is not a new claim; it is an old 1999 one because the death relates back to the original injury.

The Workers' Compensation Board and the Appellate Division 3rd Department considered this argument, but found against the employer and denied reimbursement. They reasoned that because a death claim accrues at death and not before, the death claim is a new one, even though this is not a new accident, and as a new claim being filed after July 1, 2010, it was specifically prohibited by the statute: "[N]o carrier or employer…may file a claim for reimbursement from the special disability Fund after July 1, 2010 and no written submission or evidence in support of such claim may be submitted after that date."[3]

That opinion is constant with the way related-death claims are handled by the Board and addressed by the Statute, when the death occurs to a person who is receiving compensation benefits. After a death, there must be a new claim filed for death benefits, even though the death relates to the accident and disability for which the claimant was receiving a compensation award.

This should bring finality to this issue as other deaths occur arising from injuries sustained in accidents that happened prior to July 1, 2007 and for which payments had been reimbursed until the date of the death of the claimant. We can anticipate, however, that there will be many other situations that give rise to issues relating to existing cases and the Fund will continue to defend the cases before the Board, which will be resolving them as they arise.

Endnotes

1. N.Y. Workers' Comp. Law § 15(8)(h)(2) (Consol. 2013).
2. *Id.*
3. *Matter of Connolly v. Consolidated Edison*, No. 518246, 2015 N.Y. App. Div. LEXIS 685 (3d Dep't Jan. 29, 2015). *See also Matter of Krausa v. Totales Debevoise Corp.*, 922 N.Y.S.2d 643 (3rd Dep't 2011).

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

Dark Pool 101

By Matthew N. Bobrow

Dark pools are simply stock exchanges but with one twist. The participants (the traders) are not able to see any information about fellow participants; this includes their names, trade volumes, or stocks traded. The biggest change coming to the U.S. Securities industry this year (if the SEC approves) will likely be the transfer of certain major dark pools from global banks to national stock exchanges.

Currently, global banks' dark pools are national exchanges' biggest customers and also their biggest competition. The development of dark pools was born out of desire by global bank clients for a tool to mask their trades from high-speed traders to ensure a better execution price. Dark pools' exchange-like nature has given banks a whole new business line while decreasing their national exchange per-trade usage costs. The banks' dark pools have become a disruptive technology to the national exchange business.

Credit Suisse currently manages the largest dark pool, followed by UBS and Duetsche Bank. They have endorsed a new proposal by the New York Stock Exchange, or NYSE (owned by Inter-Continental Exchange or ICE) that would give banks lower trading fees and stop the maker-taker incentive system, in exchange for allowing NYSE to control the dark pool. NASDAQ has also made a separate offer.

There were new regulations passed that will come into effect throughout 2015 that will heighten the costs for banks to run their own dark pools and will make it impossible for any smaller institution or consortium. The national exchanges already have systems in place that could, presumably, be modified with relatively little cost, to ensure any new dark pools are compliant with new regulation. Further, national exchanges are subject to a broader and more diverse regulatory scheme than are most national banks.

The new dark pool ecosystem that will begin if the dark pools are transferred to exchanges will lower banks' trading costs while increasing market liquidity, national exchange profits and bank trading volume. The exchanges are already used to being heavily regulated and can adapt their already similarly developed compliance departments and human resources. Further, they have networks of in-house and outside personnel who are experienced at solving technology problems associated with stock trading.

Some of the pitfalls and criticisms of dark pools (e.g., distorting accurate price information) could be mitigated by the creation of a more regulated and central clearinghouse in whichever exchange ends up in control. Also, the expertise of the exchanges should increase the benefits dark pools provide (e.g., protection from high-speed traders).

The future of dark pools may not be set in stone but one thing is: the direction of technology in the securities industry. While branches of the industry may develop new technologies, industry-wide experience dictates where that technology can best be optimized (like any other part of society).

It is very likely that the new environment (if the SEC approves) will lessen concerns about market efficiency and price accuracy, while simultaneously maintaining an important mechanism for market makers and high-volume traders to ensure their ability to execute properly for clients. STAY TUNED: The SEC is expected to announce its approval or disproval in the coming months.

Matthew N. Bobrow is a 3L Law Student at New York Law School where he is a Staff Editor for the *New York Law School Law Review* amd Associate Editor of this publication. He is participating in a training program with a Legal and Compliance rotations at Credit Suisse AG and is Law Clerking with Shafer Glazer LLP.

Understanding the "Undue" in "Undue Influence"

By Anthony J. Enea

Frequently, a potential client or fellow attorney will express to me their strong opinion that a Last Will & Testament is definitely the product of "Undue Influence." While I am often confident that they truly believe this to be the case, in most instances their belief is not supported by the facts, and results from their having placed too much emphasis on the word "influence," and not enough emphasis on the word "undue."

While Undue Influence is one of the most frequently alleged objections to the probate of a Last Will & Testament, it is also one of the most misunderstood and overrelied upon objections to probate. It is an objection whose burden of proof is extremely difficult to meet, and only in rare instances satisfied by the evidence.

Undue Influence is defined in *Black's Law Dictionary* as follows:

> Persuasion carried to the point of overpowering the will, or such a control over the person in question as prevents him from acting intelligently, understanding, and voluntarily, and in effect destroys his, and constrains him to do what he would not have done if such control had not been exercised.... Undue Influence consists (1) in the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority, for the purpose of obtaining an unfair advantage over him; (2) in taking an unfair advantage of another's weakness of mind; or (3) in taking a grossly oppressive and unfair advantage of another's necessities or distress.

As can be seen from the above definition, it is much more than just influencing the testator's decisions vis a vis the beneficiaries and amounts bequeathed in one's Last Will & Testament. Merely encouraging and influencing the testator's decision will not rise to the level needed to prove Undue Influence. It has to rise to the level of breaking one's free will, judgment, or volition.

The definition seems to inherently require someone who is in some form of a weakened state, whether it be physical, medical or emotional. This can result because of one's advanced age, and the infirmities and dependencies (physical and emotional) often associated with aging. However, again because the emphasis is on "undue," it would be necessary to demonstrate the significant level of dependency and weakened state of the testator.

The burden of proving Undue Influence rests upon the objectant to the Last Will & Testament. Connelly v. Conneely, 798 N.Y.S.2d 343 (Sup. Ct. Kings Cty. 2004). It is proved by a preponderance of the credible evidence which demonstrates motive to influence, opportunity to influence, the use of the opportunity, and that moral coercion destroyed the testator's free will. Children's Aid Soc'y of New York v. Loveridge, 70 N.Y. 387, 394 (1877).

In Matter of Burke, 441 N.Y.S.2d 542, 548 (2d Dep't 1981), the Appellate Division, Second Department provided a highly informative description of Undue Influence:

> Undue Influence is seldom practiced openly, but it is, rather, the product of persistent and subtle suggestion imposed upon a weaker mind and calculated, by the exploitation of a relationship of trust and confidence, to overwhelm the victim's will to the point where it becomes the willing tool to be manipulated for the benefit of another.

Matter of Burke emphasized the repetitive and persistent nature of the influence required to reach the requisite level of Undue Influence, as well as the need for the testator to be a person in a weakened condition. Additionally, the Court noted the importance of trust and confidence. Matter of Burke further opined that circumstantial evidence may be used to show persistent suggestions imposed upon a weaker mind. To be sufficient, the circumstantial evidence must be the only reasonable conclusion drawn from the facts. (See Matter of Walther, 159 N.E.2d 665, 668-69 (N.Y. 1959)). However, if the facts can also reasonably support a contrary inference, then the Surrogate must conclude that Undue Influence is not present. (See Matter of Ruef, 167 N.Y.S. 498, 499 (2d Dep't 1917)).

In proving Undue Influence some of the factors to be considered are: (1) motive to influence (2) opportunity to influence, (3) opportunity to influence used and (4) moral coercion destroyed testator's free will. The courts have held that... "without a showing that Undue Influence or fraud was actually exercised upon the decedent, evidence that opportunity and motive existed to exert such influence will not suffice to raise a triable issue as to whether the Will reflected the intent of the testator." (See Matter of Zirinsky, 841 N.Y.S.2d 637, 639 (2d Dep't 2007)).

The potential existence of a "confidential relationship" by and between the alleged influencer and the testator is an issue that necessitates careful examination once the issue of Undue Influence has been raised. Matter of Bach, 519 N.Y.S.2d 670, 671 (2d Dep't 1987), held that the burden of establishing Undue Influence rests upon the objectant to a Will. However, where there is a confidential relationship between the decedent and the beneficiary, the mere bequest alone may permit an inference of Undue Influence if no satisfactory explanation for the bequest is provided. For example, where there is no familial relationship and/or long standing friendship or relationship to the testator.

The types of relationships which are generally categorized as confidential relationships are (a) Attorney-Client (b) Doctor/Nurse-Patient (c) Priest/Cleric-Parishioner (d) Administrator of Nursing-Home-Patient (e) Financial Adviser-Client. If the existence of a confidential relationship is established by the trier of fact, the burden of disproving the existence of Undue Influence will shift to the proponent of the Last Will. The finding of the existence of a confidential relationship significantly and detrimentally impacts the admission of a Last Will to probate.

If the existence of a confidential relationship of the nature described above has been identified, thus shifting the burden to the beneficiary, it is then still necessary to identify and allege the circumstances evidencing the Undue Influence. For example, did the individual with the confidential relationship to the testator: (a) participate in the preparation or execution of the Last Will; (b) did he or she direct the testator to the attorney draftsperson of the Will; (c) does the Will benefit the individual with the confidential relationship to the extent that he or she receives more than he or she would receive in intestacy; (d) does the individual with the confidential relationship to the testator exercise control over the testator's affairs; (e) is the testator dependent upon the alleged individual with the confidential relationship; for example, is there a dependence of a physical and medical nature relevant to the individual's health, safety and well-being. Both the testator's mental and physical health need to be assessed and examined.

In the cases where the bequests under the testator's Last Will favor the testator's attorney/draftsperson, there is an inference of Undue Influence. Matter of Putnam's Will, 177 N.E. 399 (N.Y. 1931).

In the cases where a Last Will excludes the natural objects of the testator's bounty in favor of his or her attorney, said Last Will is automatically viewed with suspicion. If the attorney is unable to provide a satisfactory refutation, then the inference of Undue Influence will be warranted. The attorney must explain that the gift was freely given in a "Putnam Hearing." Matter of Henderson, 605 N.E.2d 323 (N.Y. 1992). The Putnam Inference will also apply to physicians, nurses, clerics and administrators of nursing homes and other senior living facilities.

It should also be noted that generally when Undue Influence is alleged as an objection to probate, it is accompanied by an independent objection that the Last Will is a product of "fraud" practised upon the testator. Fraud is defined in *Black's Law Dictionary* as follows:

> An internal perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury...

The objectant has the burden to demonstrate by clear and convincing evidence that a knowingly false statement, misrepresentation or accusation was made that caused the testator to dispose of his assets differently in the absence of the above fraud. Unlike Undue Influence, fraud must be established by a fair preponderance of the evidence. Matter of Beneway, 71 N.Y.S.2d 361 (3d Dep't. 1947). The objectant must demonstrate actual fraud and not constructive fraud.

In conclusion, while at first blush it may appear that a Last Will is the product of influence exercised upon the testator, the real issue is whether the influence exerted rose to the level of being deemed "undue." Doing so in most cases is a difficult challenge. Undue Influence is relatively easy to allege but difficult to prove.

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Lawyers and Email: Ethical and Security Considerations

By Scott Aurnou

The specter of attorney-client privilege has a long and well-respected history in litigation...but means nothing at all to a hacker. "Delete this email if you are not the intended recipient" or similar language theoretically sounds imposing, but essentially does nothing to protect firm or client data from any nefarious actors who view it (though they may get a good chuckle before reading the "forbidden" email).

In May 2014, LexisNexis published a study pertaining to law firm security awareness versus actual practices with respect to communications and file sharing with clients.[1] Almost 90% of those surveyed used email to communicate with clients and privileged third parties. The vast majority of attorneys surveyed also acknowledged the increasingly important role of various file sharing services and the inherent risk of someone other than a client or privileged third party gaining access to shared documents. Yet only 22% used encrypted email and 13% used secure file sharing sites, while 77% of firms relied upon the effectively worthless "confidentiality statements" within the body of emails to secure them.[2]

Relevant Ethical Standards

The effect of changes to the Model Rules: The ABA Model Rules of Professional Conduct were updated in 2012 specifically to address the effect of technology upon the legal profession, and a number of those changes directly pertain to the need for confidential communications.

The language in Comment 8 to Rule 1.1 (Competence) was amended to emphasize a duty for attorneys to stay up-to-date on technical matters pertaining to the practice of law, generally speaking: "[A] lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*."[3]

Paragraph (c) of Rule 1.6 (Confidentiality of Information) states:

> (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.[4]

Comment 18 to Rule 1.6 relates to the need for a lawyer to "act competently" to prevent the disclosure of "information relating to the representation of a client." It offers a safe harbor provision and factors to determine the reasonableness of an attorney's conduct in protecting the information at issue:

> Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[5]

In addition, Comment 19 to Rule 1.6 specifically relates to electronic communications with clients, stating, "When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients."[6] It also offers a safe harbor provision: "This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."[7]

Therein lies the rub. What is reasonable, given the state of modern snooping technology? Moreover, from whom do the communications need to be kept private? Commercial competitors? Cyber criminals? Government actors? Other interested parties? Comment 19 specifically notes a pair of factors to consider when determining the reasonableness of the expectation of privacy. They are: (1) the sensitivity of the data itself, and (2) the extent to which the privacy of the communication is protected by law or by a confidentiality agreement.[8] A client may also give informed consent to a method not otherwise permitted, though that approach may be asking for trouble if a client changes his or her mind later or disputes whether he or she was properly apprised of the relevant risks.

In addition to the Model Rules, failure to reasonably secure communications with clients can run afoul of state privacy laws[9] and potentially provide an effective basis for a colorable legal malpractice claim.

Pertinent Technology Basics

How does email actually work? By its nature, email is not a terribly secure way to share information. When you send out an email, it goes through a more powerful,

centralized computer called a server on its way to a corresponding email server associated with the recipient's computer or mobile device. It passes through any number of servers along the way from sender to recipient, like a flat stone skipping along the top of a pond. And if that email isn't encrypted, anyone with access to any one of those servers can read it.

What is encryption? Encryption is the use of an algorithm to scramble normal data into an indecipherable mishmash of letters, numbers and symbols (referred to as "ciphertext"). An encryption key (essentially a long string of characters) is used to scramble the text, pictures, videos, etc. into the ciphertext. Depending on how the encryption is set up, either the same key (symmetrical encryption) or a different key (asymmetrical encryption) is used to decrypt the data back into its original state (called "plaintext"). Under most privacy and data breach notification laws, encrypted data is considered secure and typically doesn't have to be reported as a data breach if it's lost or stolen (so long as the decryption key isn't taken as well).

A Few Methods to Secure Email

(1) Encrypted email. Properly encrypted email messages should be converted to ciphertext before leaving the sender's computer or mobile device and stay encrypted until they are delivered to the recipient (remaining indecipherable as they pass through each server along the way). This is referred to as *end-to-end encryption*.

There are plenty of encrypted email offerings from larger commercial companies, as well as a number of new and interesting email encryption services that have become available in the wake of disclosures made by Edward Snowden.[10]

When choosing one, be mindful of where the service you use is located (including where the servers handling the emails on the system actually are). Mr. Snowden used a well-regarded U.S.-based encrypted email provider called Lavabit. Not long after Mr. Snowden's revelations came to light, federal law enforcement officials forced Lavabit to secretly turn over the encryption keys safeguarding its users' private communications. Lavabit's founder tried to resist, but was overwhelmed in federal court.[11] As a result, he shut down the service. Another well-regarded service called Silent Mail followed suit shortly thereafter, as it felt it could no longer ensure its customers' privacy.[12] Both have since relocated to Switzerland and are planning to introduce a new encrypted email service called Dark Mail.[13]

Larger companies offering encrypted email services typically control the encryption keys and will decrypt data before turning it over in response to a warrant or subpoena (including one coupled with a gag order). In addition, email service providers can legally read any email using their systems under Title II of the Electronic Communications Privacy Act, referred to as the Stored Communications Act.[14] Moreover, emails remaining on a third party server for over 180 days are considered abandoned.[15] Any American law enforcement agency can gain access to them with a simple subpoena.[16]

Accordingly, if you choose to use a service based in the United States or another jurisdiction with similar privacy protections, be mindful of who controls the encryption keys.

(2) Secure cloud storage. Another way to securely communicate or share files with a client or privileged third party is to place the communication and/or files in encrypted cloud storage and allow the client or third party to have password-protected access to them. Rather than a direct email with possible attachments, the client or third party would receive a link to the securely stored data. The cloud service you select should be designed for security. Before you ask, DropBox and Google Drive would not be suitable options. There are a number of services offering well-protected cloud storage and it's important to do your due diligence before selecting one. If it all seems a bit much to figure out, two services I would recommend looking into are Cubby[17] and Porticor.[18]

(3) Secure Web portal. A third approach is to place the communications and/or files in a secure portion of your firm's network that selected clients and/or privileged third parties can access. As with the secure cloud storage option noted above, the email sent to the client or third party would have a link back to the secure Web portal's log-in page. An advantage to this approach is that the communications and files do not actually leave your computer network and should be easier to protect.

An additional consideration. A government snoop or competent hacker doesn't necessarily have to target a message while it's encrypted. A message that is protected by strong encryption when it's sent or held in secure cloud storage can still be intercepted and read once it has been opened or accessed using a mobile device or computer that has been compromised. The same holds true for intercepting a message before it's encrypted initially. What steps can you take to protect them?[19] The software on any computer or other device that can potentially access confidential data should be kept as up-to-date as possible; it should be protected against possible data loss if lost or stolen; and all firm personnel should have regular security awareness training with respect to social engineering[20] and other threats.

At the end of the day, there is no single silver bullet to provide "perfect security." But there are genuinely helpful steps (including those noted above) that you can take to comply with pertinent ethical standards and better protect your electronic communications with clients and privileged third parties.

Endnotes

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Resolving Conflicts Among Multiple Surrogates Under the Family Health Care Decisions Act

By Patricia L. Angley

The undiscovered country, from whose
bourn
No traveler returns, puzzles the will,
And makes us rather bear those ills we have,
Than to fly to others that we know not of?

—Hamlet, Act III, Sc. 1

A. Introduction

In order to explore the "undiscovered country" of death and dying in the context of family and surrogate medical decision-making for patients at the end of life, it becomes necessary to first define patient decision-making authority and explore its genesis under the law. In the past one hundred years of legal and medical ethics, patient's rights have expanded to allow patients to meaningfully participate in individual health care decision-making. In contrast to a "doctor-knows-all" paternalistic framework, patient's rights of autonomy and self-determination now include the right to refuse medical treatment, including life-sustaining treatment. In 1914, Judge Benjamin Cardozo first expressed this right of patient self-determination in *Schloendorff v. The Society of the New York Hospital* by stating that "[e]very human being of adult years in sound mind has a right to determine what shall be done with his own body.…"[1] Judge Cardozo's "prescience notion of informed consent"[2] was not fully manifested until the socially turbulent decade of the 1960s and the genesis of the patient's rights movement and the birth of modern medical ethics.[3] The rise of institutionalized and specialized medicine and the fragmented style of the delivery of health care services combined with patients' increasingly diverse backgrounds and cultural beliefs created more "challenges when moral dilemmas arise in the practice of medicine."[4] The most challenging moral dilemmas have arisen in the context of patients' dying and death, the use of palliative care to alleviate pain and suffering and surrogate end–of–life decision-making for seriously ill, incapacitated patients.

Because I could not stop for Death-
He kindly stopped for me—
The carriage held but just ourselves—
And Immortality…

—Emily Dickinson

The contrast between a benevolent, "kindly" personification of Death as opposed to a feared specter characterizes the inherent conflict in the human psyche when faced with mortality and the finality of death. Diverse values, religious beliefs, cultural traditions, community mores, family support or lack of support, level of education and language ability affect a patient or surrogate's ability to comprehend

and synthesize complex information regarding end-of–life medical treatment. When a patient loses decision-making capacity and surrogates assume the role of decision maker, these difficulties are exacerbated by the surrogate's sense of ultimate responsibility to the patient, perhaps a beloved parent or other relative. When multiple surrogates disagree, how are conflicts to be resolved? If death is considered a foe or enemy to be conquered by medical intervention at all costs, then a surrogate faced with a decision to withdraw or withhold life-sustaining treatment may feel the burden of defeat or surrender. We often read of a person's death after a valiant struggle or battle with a specific disease. If a surrogate must make the decisions that result in a patient's death, then is the battle thereby lost? The natural progression of the patient's rights movement has moved this discussion out of the culturally forbidden and morally repugnant areas of human discourse, to the forefront of health care policy, laws and ethics. Illness, vulnerability, weakness and dependence are anathema to the American values of independence, self-determination, and strength. As a society, even though we "strive to control every aspect of our lives, many of us abandon control of life's final passage."[5] Like the ancient Greeks, we fear the sharpened shears of Atropos, who ultimately cuts the thread of life for each of us.[6]

B. Expansion of Patient's Rights Through Court Decisions, Health Care Proxies and the Family Health Care Decisions Act in New York

Three landmark court decisions raised the American consciousness about a patient's right to die and the cessation of life-sustaining medical interventions. In 1976, Karen Ann Quinlan's parents successfully petitioned the New Jersey Supreme Court to be able to remove an artificial ventilator from their young daughter who was in a persistent vegetative state.[7] In its analysis, the court recommended a role for hospital ethics committees to resolve such ethical dilemmas.[8] Next, the important case of Nancy Beth Cruzan reached the United States Supreme Court in 1990.[9] Ms. Cruzan was also in a persistent vegetative state but was sustained by artificial feeding and hydration. The lower Missouri courts refused to permit her family to remove the treatment unless there was clear and convincing evidence of Ms. Cruzan's actual wishes whether she would want

such treatment before she became incapacitated. The justices of the U.S. Supreme Court held that while adult *competent* patients could refuse life-sustaining treatment, states could require that a criteria of standards be followed *before* surrogates could authorize the withdrawing or withholding of life-sustaining treatment for an incapacitated patient. The strictest criteria was that surrogates would have to prove by clear and convincing evidence the patient's actual wishes concerning life-sustaining treatment prior to incapacity. The next standard would permit the surrogate to use substituted judgment whereby the surrogate acts based upon what the surrogate believes the patient's decision might have been based upon the patient's values and life experiences. The least strict standard would permit surrogates to consider the best interests of the patient where "the issue is what sort of decision a reasonable person would make balancing the benefits and burdens" of treatment.[10] Ultimately, the *Cruzan* case was sent back down to the Missouri trial courts and the family successfully met Missouri's criteria of clear and convincing evidence of Ms. Cruzan's actual wishes against life-sustaining treatment and her feeding tube was removed, resulting in her death.

In the wake of the *Cruzan* case, a federal law was enacted to promote the use of advanced directives, such as health care proxies, to memorialize a person's wishes regarding life-sustaining medical treatment. This law, the Patient Self-Determination Act of 1990,[11] codified society's acceptance of patient's rights to decision-making regarding these end-of-life issues.[12] The third case that drew unprecedented national attention to this issue was the Florida case of Terri Schiavo in 2003.[13] Ms. Schiavo was thirty-nine years old and in a chronic vegetative state following anoxic brain injury.[14] This protracted, complicated conflict was between Ms. Schiavo's husband, who wanted to remove his wife's feeding tube in accordance with her prior wishes regarding life-sustaining treatment, and her parents, who wanted her artificial feeding to be sustained because of their hope for her recovery. Mr. Schiavo's authority to make the decision to remove his wife's feeding tube was upheld by the Florida lower courts and the U.S. Supreme Court refused to hear the appeal. Special state legislation was then passed authorizing the governor of Florida to order Ms. Schiavo's feeding tube reinserted. The Florida Supreme Court then decided that the governor's actions were unconstitutional and the Florida lower court judge ordered that the feeding tube be removed on March 18, 2005. Special federal legislation was then passed to authorize the reinsertion of the feeding tube but the reinsertion was denied by the federal district court and further appeals were denied. Ms. Schiavo died on March 31, 2005, thirteen days after the removal of the feeding tube. The rule of law applied in the *Schiavo* case had its genesis in the *Cruzan* case which "established that adult competent patients could refuse life-sustaining therapy and surrogates could make decisions on their behalf according to provisions set out in state law."[15] This value-neutral holding did not fully resolve the conflict between patient self-determination rights regarding end-of-life treatment and society's perception of the sanctity of life and the preservation of that life.

> Our very hopes belied our fears
> Our fears our hopes belied
> We thought her dying when she slept
> And sleeping when she died…
>
> **From "The Death Bed"—Thomas Hood**

In 1990, legislation was enacted in New York State permitting competent adults to appoint and authorize another adult to act as their health care agent or proxy. This agent could make decisions regarding medical treatment should the patient lose capacity as determined by the treating physician.[16] The agent could also make decisions about withdrawing or withholding life-sustaining treatment upon a second physician concurring that the patient had lost capacity. However, the agent may only decide to withhold or withdraw artificial nutrition and hydration if he or she has reasonable knowledge of the patient's wishes regarding such treatment, as written on the proxy form or as otherwise known to the agent. Proposed amendments to the law would also permit an agent to make decisions about withholding or withdrawing artificial nutrition and hydration based upon a patient's best interests.[17] This delegation of authority, and the empowerment of the patient to authorize a trusted individual to communicate the patient's end-of-life wishes to his or her health care provider even when the patient can no longer meaningfully communicate, has expanded patient's rights of self-determination and informed consent to a new level. It has also encouraged individuals to have the difficult conversation about death and the dying process with their loved ones and friends. Written directions in a health care proxy may also provide clear and convincing evidence of a patient's wishes should a conflict arise.[18] However, in contrast to a "living will,"[19] which specifies the use or prohibition of specific treatments under certain circumstances, the delegation of authority to the health care agent under a written proxy may ensure that the "evolutions of a patient's wishes during the course of their life-time"[20] are fully met. This authority may enable the agent to respond more appropriately during the trajectory of a patient's illness and dying process according to the patient's previously articulated or known wishes, values and beliefs. Unfortunately, for a variety of reasons including lack of information, reluctance to address difficult issues of death, illness and incapacity, cultural mores, or fear and distrust of the medical establishment, many adults have not named a health care agent through this mechanism.[21] Indeed, as noted *New York Times* writer Jane Brody states, "most Americans regardless of age seem reluctant to contemplate the certainty that one day their lives will end, let alone discuss how they'd want to be treated when the end is near."[22]

Prior to the enactment of New York's landmark Family Health Care Decisions Act (FHCDA) in 2010,[23] family members and loved ones close to the patient were not

authorized outside of a court order to withhold or withdraw life-sustaining treatment in the absence of clear and convincing evidence of the patient's prior wishes, a health care proxy or living will. The FHCDA empowers certain individuals with the authority to make treatment decisions as surrogates for incapacitated adults and children in the order of priority as follows: 1) a guardian authorized to make health care decisions pursuant to Article 81 of the Mental Hygiene Law; 2) the spouse, if not legally separated from the patient, or domestic partner; 3) a son or daughter 18 years of age or older; 4) a parent; 5) a brother or sister 18 years of age or older; or 6) a close friend.[24] However, there are no clear guidelines in the FHCDA to resolve disputes between surrogates regarding treatment decisions except to refer such disputes to Ethics Review Committees as established under the law.[25]

C. Recognizing and Resolving Conflicts in the Surrogate Decision-Making Process

> His soul had approached that region where dwell the vast hosts of the dead... His soul swooned slowly as he heard the snow falling faintly through the universe and faintly falling, like the descent of their last end, upon the living and the dead.
>
> **From "The Dead"—James Joyce**

Surrogate decision-making under the FHCDA thrusts individuals into, in most cases, making decisions of "life or death" for their family member or close friend. This mantle of responsibility may cause some individuals to "swoon" under this great weight, others may shoulder the burden stoically. In the frequent case of surrogate decision-making by an adult child for a dying parent, "the family experience of the aging and dying of a parent actually contains the history of the siblings and their relationship with each other and the parent."[26] As noted above, the FHCDA merely lists the hierarchy and priority of possible surrogates without specifying how, for example, two siblings with different views resolve conflicts about treatment decisions. The attending physician has the obligation with actual notice of any objection or disagreement to refer the conflict to the Ethics Review Committee *if the objection or disagreement cannot otherwise be resolved*.[27] Assuming that the dying parent's spouse has predeceased him or her or has deferred decision-making to the adult children and there is no court-appointed guardian, the mantle of decision-making authority next rests on "a son or daughter 18 years of age or older."[28] The law does not specify which adult child should become the surrogate. The decision to withhold or withdraw life-sustaining treatment may create an unbearable burden for the adult children. As Lory Alissa Skwerer writes, "…this situation will end in the parent's death. All care for an aging parent is given under that shadow, which means the end of the parent, of any hopes for resolution of conflict in the parent-child relationship and of the parent as a source of emotional and material support. All of these are losses on very basic psychological levels. It also means that the children have moved one generation closer to their own deaths."[29] Conflicts among adult children who become surrogates therefore carry great emotional weight. The resolution of these conflicts between surrogate decision-makers regarding treatment decisions for an incapacitated loved one must therefore first be attempted by the treating physician before referral to the institution's Ethics Review Committee. This attempt should recognize that the "working basis of conflict is confrontation, a clash of interests, an argument, perhaps an ongoing state of active and continuous dissatisfaction."[30]

Under New York law, treating physicians are also required to give seriously ill patients and their health care agents or surrogates information and counseling regarding palliative care and end-of-life options "including, but not limited to, the prognosis, risks and benefits of the various options, including hospice, as well as the patient's legal rights to comprehensive pain and symptom management at the end of life."[31] This requirement to give surrogates information on palliative care to relieve the pain and suffering of dying patients may help to resolve conflicts between surrogates deciding to withhold or withdraw life-sustaining treatments. Even when faced with conflicts, surrogates should desire the ultimate relief of pain and suffering of a dying patient by compassionate palliative care. Surrogates should have access to a patient's medical records and should be informed of the patient's diagnosis, prognosis, the nature and consequence of the treatment and the benefits and burdens of the treatment.[32] Surrogates should also be informed of the treating physician's recommendation, if any, within the context of the patient's goals of care, care plan and known preferences.[33] All health care professionals should aspire to achieve ethics competencies that promote sound outcomes, including learning "how disagreements arise in decision-making about life-sustaining treatment and in care near the end of life and how to prevent and resolve conflicts with patients, among loved ones and among professionals."[34] In describing these competencies, the authors of *The Hastings Center Guidelines For Decisions on Life-Sustaining Treatment and Care Near the End of Life* recommend that health care professionals know how "to initiate and participate in conflict resolution."[35] The authors further recognize the deep emotions and psychological dimensions of this decision-making process and its effect on dying patients, their surrogates and the treating professionals. These emotions may include one or more of individual coping strategies, the belief in hope, the possibility of ambivalence or denial, the realities of grief, loss and existential suffering and the possibility of spiritual and religious conflict, including religious objections and moral distress.[36] Conflicts about treatments, especially withholding or withdrawing life-sustaining treatment, may arise when multiple surrogates cannot resolve these deep-seated and fundamentally human emotions. When attempting to resolve these conflicts, the treating physician, and hopefully, the palliative

care team, should "[a]ddress fears, clarify priorities, and strengthen relationships with loved ones, all components of a good death."[37] It is clear that if the patient's preferences, beliefs and values are known prior to incapacity, then surrogates should follow those preferences first and foremost.[38] In the context of specifying those preferences, persons should identify and clarify "one's values based on evolving goals within the context of past experiences and individual definitions of quality of life.…"[39] In the absence of earlier identification and clarification, surrogates should make decisions in the best interests of the patient based upon an objective assessment of the relative benefits and burdens of available treatment options.[40]

Prior to referring conflicts among surrogates to the institutional Ethics Review Committee, a treating physician should make a best effort to resolve conflicts by first holding a family meeting. Physicians and the palliative care team should facilitate meaningful dialogue in comprehensible language, mindful of any special needs the surrogates may have (language barriers, cultural norms, distance barriers, religious or spiritual needs). This dialogue should include the diagnosis, prognosis and the benefits and burdens of the proposed treatment or withdrawal of treatment for the patient. Dr. Haider Javed Warraich describes that in such a meeting the "burden that family members feel when making medical decisions as proxies is immense."[41] The surrogates may benefit by the physician asking, "Tell me more about your [loved one]."[42] Assuming that multiple surrogates are able to participate in this dialogue, Dr. Warraich suggests that this conversation may "take them away from a place where they feel solely responsible for the trajectory of their relative's life to one where they simply communicate what the patient would want out of [their] life."[43] The physician should describe the standards for decision-making in the FHCDA: first, in accordance with the patient's wishes, including religious and moral beliefs; or if the patient's wishes are not known, then in accordance with the patient's best interests.[44] The physician should further expand upon the definition of a patient's best interests in accordance with the FHCDA: "the consideration of the dignity and uniqueness of every person; the possibility and the extent of preserving the patient's life; the preservation, improvement or restoration of the patient's health or functioning; the relief of suffering; and any medical conditions and such other concerns and values as a reasonable person in the patient's circumstance would wish to consider."[45]

If conflicts still persist, any person involved in the process can request an ethics consultation from the Ethics Review Committee whereby it "should help patients, families and clinicians with an analysis of the choices they face so that a better decision can be made."[46] If after meaningful, multiple attempts at conflict resolution fail, then the conflict is referred to the Ethics Review Committee for an advisory opinion or an ultimate resolution.[47] Knowledge, training and compassion among Ethics Review Committee members about interdisciplinary team practice, including palliative care, communication and good decision-making is imperative.[48] The FHCDA "establishes an authoritative function…by investing [the Ethics Review Committee] with legal authority to make binding decisions on certain matters."[49] These matters include the ability to make a binding decision when surrogates disagree about withholding or withdrawing life-sustaining treatment.[50] Therefore, in the context of this type of conflict among surrogates, the Ethics Review Committee has the power to ultimately resolve the issue by a consensus of its members.

> Mrs. Wilcox had taken the middle course, which only rarer natures can pursue…it is thus, if there is any rule, that we ought to die neither as victim or fanatic, but as the seafarer who can greet with an equal eye the deep that he is entering, and the shore that he must leave…
>
> **From *Howard's End*—E. M. Forster**

D. Conclusion

The expansion of patients' rights and self-determination has evolved tremendously over the past one hundred years. Our society has foresworn reliance on medical paternalism in the decision-making process and continues to expand upon a patient-centered process. Part of that expansion includes the right to name a health care agent to communicate one's wishes to a physician after the loss of capacity, especially wishes concerning life-sustaining treatment. In addition, patients facing serious illness have a right to receive information on palliative care to relieve suffering. Discussions about end-of-life issues have become more common and have emerged from the shadows of forbidden discourse. Numerous books and articles offer individuals advice on end-of-life planning and provide the mechanisms to initiate difficult discussions among family members and friends. The enactment of the FHCDA further expands patients' rights and empowers surrogates to make medical decisions for incapacitated patients, including decisions about withholding or withdrawing life-sustaining treatment. The FHCDA recognizes the possibilities for conflicts among multiple surrogates and provides the mechanism of referring such conflicts to the institutional Ethics Review Committee. However, it is clear that the treating physician and medical team bear the responsibility to become competent in recognizing and resolving such conflicts first by sensitive and compassionate communication of the patient's condition in light of the patient's wishes, or in the patient's best interests. This communication may help multiple surrogates reach a consensus to help their loved one reach the deep that they are entering and bid farewell to the shores left behind.

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Workplace Violence—An Employer's Duty to Protect Employees from Harm

By Howard S. Shafer

Introduction

Approximately 2 million employees are victims of workplace violence each year.[1] Employees are exposed to violence ranging from violent actions of third parties or co-workers to harmful threats from spouses. Workplace violence is an issue that not only affects the safety of the employee, but also touches on employers' liability to their employees. Moreover, recent shootings and stabbings have opened up a debate on the duty owed by an employer to protect an employee.

On September 26, 2014, Alton Nolen, a former employee of Vaughn Foods, was suspended from his job for unknown reasons.[2] Following his suspension, Nolen went home to retrieve a knife and returned to his workplace to injure his co-workers.[3] Nolen beheaded one co-worker and violently stabbed another co-worker.[4] Officials remain unaware as to the reason behind these attacks. In order to address this type of issue, New York has implemented workers' compensation laws and asserted a common law duty for employers to protect against employees who deliberately harm others.[5]

Employer's Duty

At common law, employers owe no duty to protect employees from harm in the workplace. New York state laws and federal regulations do require standards for safe work environments. For example, New York Labor Law Section 200 mandates that persons employed in the workplace be provided with a safe place to work.[6] OSHA provides similar protections.

With no common law or statutory framework to impose a duty, workplace violence and an employer's duty is an area of the law which is developing.

In New York, courts have held that an employer can assume a duty to protect an employee from harm where one does not exist. In *Ruiz v. Griffin,*[7] plaintiff brought a wrongful death suit against her husband's employer for negligently protecting her husband. Timothy Ruiz, plaintiff's decedent, was an employee of defendant Old Navy. During the course of his employment, he received anonymous threats and acts of vandalism against his car. As a result, Old Navy employed loss prevention agents to escort him from the store to his car. Defendant Griffin was jealous of Ruiz's friendship with a coworker and fatally shot Ruiz as he was walking to his car. Ruiz's loss prevention agents had stopped to retrieve a cigarette and Ruiz was unaccompanied at the time of the shooting. Plaintiff submitted evidence to raise triable issues of fact as to whether Old Navy knew or should have known of a likelihood that a third person might endanger her husband's safety. Plaintiff also raised an issue as to whether Old Navy satisfied the duty, if there was a duty, to offer protection against criminal activity.

This case did not impose liability on the employer. Instead, the court granted the plaintiff leave to amend the claims to assert causes of action which could give rise to the employer's liability. It should be noted that the motion to amend the claims was unopposed.

Violence in the Workplace—A Statutory Framework For Public Employers

In response to the rising number of violent workplace crimes, New York, like many other states, has enacted legislation to address workplace violence through the Workplace Violence Prevention Act (WVPA).[8] Rules have also been promulgated by the Commissioner of the New York State Department of Labor to address the issue.[9]

The WVPA applies to public employers with more than 20 employees. In broad terms it requires a risk evaluation and determination; a written violence protection program; employee information and training; and a notice procedure for the reporting of imminent dangers or threats.

Pursuant to the authority granted in the statute, the Commissioner did implement rules, codified at 12 NYCRR §800.6, but only applicable public employers.

Neither the statute nor the rules spell out the consequences to the public employer for failure to comply. However, it does grant the Commissioner would have the authority to issue penalties as with any other Labor Law violation. Violation of any provision of the Labor Law, the Industrial Code, or any rule, regulation, or lawful order of the Department of Labor, is a misdemeanor and is punishable by fine or imprisonment, or both. The Labor Law also provides for the imposition of civil penalties for each violation of labor law governing the employment of minors under 18 years of age by an employer. The penalties are fines of up to $1,000 for the first violation, $2,000, for the second, and $3,000 for the third and subsequent violations. The largest penalty for injury or death is triple the maximum penalty allowed under the law for such a violation.

It doesn't end there. The Federal Fair Labor Standards Act authorizes the Secretary of Labor to assess a civil money penalty of up to $10,000 for each violation of the

labor provisions regarding minors or any of its regulations. This penalty is in addition to those provisions for fines, imprisonment, or restraint by injunction.

Workers' Compensation and Violence in the Workplace

Generally, the New York Workers' Compensation Law as a whole affords damages to injured employees for acts occurring at the place of employment.[10] Additionally, Section 11 of the New York Workers' Compensation Law serves to protect the interests of employers and injured workers in cases of workplace injury and violence by barring third-party actions against them except in extremely limited circumstances, and limits an employer's liability for an employee's on-the-job injury to workers' compensation benefits.[11]

In *Wilson v. Danka Corp.*,[12] a co-employee sexually and physically assaulted plaintiff. This injury occurred when both individuals were on a work trip for their employer, Danka Corporation. Plaintiff alleged that defendant employer violated its duty to protect her safety during employment as well as failed to reprimand the assaulter for his attack on plaintiff. The court determined that an employer cannot be held for tortious acts committed by the employee for motives that are unrelated to the furtherance of the employer's business. The court also barred plaintiff's breach of duty claim by stating that workers' compensation is the exclusive remedy available to employees who are injured during the course of their employment. Since the injury occurred on a work trip, plaintiff was not allowed to bring a negligence claim against the employer. This case demonstrates the protection afforded to employers by the Workers' Compensation Laws.

Conclusion

Currently, only public employers in New York are subject to the WVPA. Nevertheless, even private employers can assume a duty to their employees where none exists based upon their conduct. Except in very limited circumstances, the New York State Workers' Compensation Law would protect an employer from a civil action by a covered employee. The state of the law is, however, in flux. With the media attention to workplace violence and the existing statute covering public employers, similar obligations will likely be imposed upon private employers.

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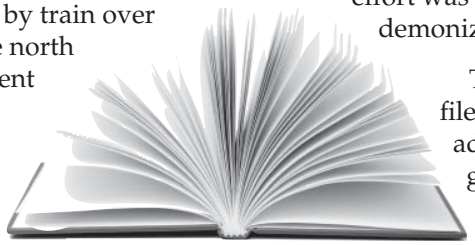
Book Reviews

The Dream of the Celt

An historical fiction novel, by Mario Vargas Llosa (Translated from the Spanish by Edith Grossman); New York, Farrar, Straus and Giroux, 2012

Reviewed by Jim Riley

I attended the delightful meeting of the Trial Lawyers Section of the New York State Bar Association in Kerry County, Ireland in the Summer of 2013. One afternoon, I took a somewhat unorthodox side trip by train over to the town of Tralee and then a cab ride north to Banna Strand. It is usually a magnificent miles long beach, but on that day it was cold, windswept and lonely.



Nearby, in the adjoining dunes and beach grass, one finds a somewhat forlorn monument—a dark obelisk with some repairs needed to the foundation stones which form the base. This monument pays tribute—in Gaelic, English, and German—to Irish patriot Roger Casement who was dropped there on April 21, 1916 by German submarine U-19 (the original sub to be used was the U-20 that sank the Lusitania but it had engine problems). He was to provide assistance to the Irish patriots about to participate in the Easter uprising. Almost immediately thereafter, Casement and two companions in this effort were captured by the Royal Irish Constabulary.

Irish poet W.B. Yeats wrote, "I say that Roger Casement did what he had to do. He died upon the gallows, but that is nothing new." With all due respect to Yeats, there was much more involved. Casement, actually Sir Roger Casement, a remarkable Irishman, who had been knighted as a member of the British Foreign Service for his phenomenal accomplishments on behalf of human rights and the indigenous populations of the Congo and the Putamayos in Amazonia, was in all likelihood executed not because he was a traitor but because he was gay. If not the direct reason, the fact that Casement, to his distinct disadvantage, left journals detailing his sexual experiences with native persons—the Black Diaries—certainly hindered the efforts of both his counsel and supporters in trying to prevent his hanging.

Mario Vargas Llosa was awarded the Nobel Prize in Literature in 2010; in the same year he published *The Dream of the Celt,* a remarkable work about Roger Casement subsequently translated into English by the masterful Edith Grossman. There is a good deal of legal procedure throughout all aspects of this fine work of historical fiction.

Casement was an Irish-born Protestant who, during his lifetime, accomplished phenomenal advances in human rights for rubber plantation workers and indigenous peoples of the Congo under Belgium's colonial rule and on behalf of the indigenous people of Peru and Amazonia under Spanish colonial rule. In doing this, he took on no less a personage than the King of Belgium who was directly benefitting from those Congolese enterprises; those who were benefitting from the South American efforts were similarly "connected" to the European power basis.

Even before the Black Diaries were discovered, every effort was made by those accused by Casement to demonize him as his investigations unfolded.

The abuses, which he investigated and filed formal reports on and successfully advocated against, were nothing less than genocidal. Rubber plantation workers in both regions were regularly subjected to drastic punishments including the cutting off of limbs, jailing and wholesale homicide for such offenses as failing to meet rubber collection quotas.

Llosa describes these circumstances and the brave and determined efforts of Casement to investigate and report on these wrongs with literary alacrity; the book is nothing short of a masterpiece. Within, there are several central themes which Llosa describes in wonderful manners. First, Casement was an extraordinary advocate. He was capable and persistent to the extent that his actions would make anyone proud—including attorneys—that there are human beings, albeit perhaps only some, who make careers of fighting extrinsic evil. Second, Casement was brave—taking on entrenched and powerful forces such as Leopold I King of Belgium. Third, Casement, later in life, transferred both his observations and his concerns about colonial oppression back to his native Ireland, thus joining the Irish patriot movement. From these efforts comes the title of Llosa's book—*The Dream of the Celt*—which implied the potentiality of a free and united Ireland.

Eventually, Casement became involved in the planning of the Easter uprising in 1916 and engaged in some unusually creative strategies in support of that effort. One might argue in his defense that "all is fair in love and war," and war includes revolution of the Irish against British rule. Thus, he enlisted the aid of the German government by seeking to have Irish fighters, who had been captured during World War I by the Germans, returned to Ireland with arms to support the Irish liberation efforts.

In the end, the efforts to secure such aid from the Germans, and to convince the Irish prisoners-of-war to join up, proved abortive. The Germans decided to deliver Roger Casement back to the southwest of Ireland by submarine for disembarkation by rowboat onto Banna

Strand. Casement always asserted that he intended to inform the Irish patriots of his lack of success and to advise that they should delay the planned Easter Sunday action. The rowboat, which carried Casement and another soldier, Captain Robert Monteith,[1] capsized as it headed towards the shore. Both Casement and Monteith were captured and stood trial for treason.

The fourth theme of Llosa's work is the fact that Roger Casement was gay. We know this because Casement left behind his journals which detail his sexual experiences over time with native individuals in both the Congo and Amazonia as well as with others while at home in England and Ireland. Llosa does not overplay his hand as an author in addressing these facts but he does let us know that such experiences were occurring.

In the end, Casement's Black Diaries were utilized by the British government to undermine all legal and popular efforts in England and Ireland to save Casement from execution. Although Casement's supporters made a case that the journals were fabrications by the British secret service, it was not successful. It is now generally accepted that the journals were Casement's own product and proved to be his fatal undoing.

Llosa portrays Casement as a wonderful, gifted, gentlemanly human being. It is apparent that Llosa appreciates his subject. He also acknowledges, quite poignantly, that "The story of Roger Casement shoots up, dies out, and is reborn again after his death like those fireworks that after soaring and exploding in the night in a rain of stars and thunder, die away, are still, and moments later are resuscitated in a trumpet fanfare that fills the sky with fires." [p.353]. This phenomenon continues to the present but Casement does deserve consistent center stage in modern Irish history.

Much of this ambivalence as described, as to both the place and centrality of Roger Casement as an extraordinary human being and Irish patriot, would dissipate if the unnecessary factor that Casement was gay is removed from all evaluative equations. I note gently that the wonderful cab driver who drove me out to Banna beach and helped me locate the monument at one point said quietly to me that the fact that he was gay did not help his situation.

Sir Roger Casement, of course, should be viewed and judged by what he accomplished in his whole life, and not solely with one specific individual characteristic such as his sexual orientation.

In such event, among other societal advances, the composition of traditional St. Patrick's Day parades may even change to rightfully accommodate contingents of LGBT persons and their friends and supporters in tribute to one of the greatest Irishmen, and the Irish causes and humankind he served.

Endnote

1. Actually, three individuals were released ashore in Banna Strand, Roger Casement, Capt. Robert Monteith and a third individual surnamed Bailley, who in turn furnished testimony in support of the British prosecution of Casement and Montieth. For those efforts, the only names which appear on the monument in the dunes are those of Casement and Monteith.

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* * *

The Education of a Lawyer

by Gary Muldoon

Reviewed by Richard A. Klass

While there are a number of books written by attorneys that describe their experiences in law school, being a neophyte in law, and law practice as a career, this book brings together the author's vast amount of experience with his advice for life lessons.

The Education of a Lawyer is a collection of short, one-two page articles about different topics that the serious law student or lawyer should consider before venturing into the legal profession. As the subtitle of the book states, *The Education of a Lawyer* provides the reader with monographs about which skills would be essential to developing into a great attorney and offers uncommon, good advice on how to build a successful law practice.

The book is organized in the chronological order of the life of an attorney. Beginning with pre-law activities, the author recommends movies to see and books to read for background on what it means to be a lawyer. Then, there is a description of life in law school with a good list of dos-and-don'ts. The book then moves on to good advice for landing a job in the legal profession. Finally, the book discusses good practices of being a lawyer, including how to treat others and how to be successful in practice.

Mr. Muldoon's career as an attorney in private practice in diverse fields of law, including criminal and civil appeals, family law, real estate and estate law located in Rochester, New York, allows him to offer a unique perspective that it not too common today. As opposed to the past, where there were more general practitioners, the legal field has been one of specialization. Mr. Muldoon conveys to the reader that, regardless of any particular specialty, there are pieces of essential advice that transcend all, including:

Civility: Throughout the book, and in various ways, Mr. Muldoon makes the point that being civil and courteous to others is not only recommended but one of the ingredients of a successful attorney.

Writing skills: From preparing work in law school to writing a resume for one's first job to drafting a legal brief, Mr. Muldoon writes about the importance of good writing skills. He emphasizes that proofreading and editing are essential in developing one's writing skills.

Client relations: Not only is it important to respect others but it is critical for the practitioner to respect himself. The book contains examples of this level of self-respect by focusing the reader on when it is the right time to "say goodbye" to a bad client, how to avoid and deal with disciplinary complaints, and how to operate one's practice to maximize income.

Law practice management: Delving into the mundane, Mr. Muldoon discusses topics concerning the day-to-day practice of law, including how to organize one's office. He makes specific mention of some poor practices, including one of this reviewer's "pet peeves"—the distraction of the cell phone.

Throughout the book, Mr. Muldoon includes a myriad of famous aphorisms to help draw the points he is making in his articles. The reviewer's favorite one, describing some occasions on dealing with opposing counsel, is when Sir Winston Churchill defined a "fanatic" as "one who can't change his mind and won't change the subject." Also, the use of personal "war stories" by Mr. Muldoon are helpful in illustrating the points he is trying to convey to the reader.

New York State Bar Association Committee on Professional Ethics Ethics Opinions 1001-1012

Ethics Opinion 1001 (3/28/14)

Topic: Sale of Third-Party Advertising in Law Firm Brochures and Rules Governing Advertising Brochures with Educational Content

Digest: Law firms that distribute brochures with educational content on legal issues of importance to the public may sell advertising in those brochures to third parties, including other law firms, as long as the law firm does not charge rates for the advertising suggestive of improper referral or fee-splitting arrangements. Whether the brochure constitutes lawyer advertising depends on the entirety of the brochure and not only those portions promoting the firm.

Rules: 1.0(a); 1.5(g), 7.1(d), (e), (f), (k), (l), (m), 7.2(a)

Question

1. The inquiring law firm asks whether the law firm may accept a fee for allowing third parties to advertise in the firm's monthly brochure, which is distributed free of charge through a variety of outlets and contains both articles of legal interest in the areas in which the law firm practices and advertisements, identified as such, for the law firm's services. We see no obstacle in the Rules of Professional Conduct to such a practice subject to the caveats below.

Background

2. The inquirer is a New York law firm that offers professional services in several practice areas. On a monthly basis, the law firm publishes a newsletter containing information about a variety of legal subjects on which the firm concentrates, which is distributed free of charge through several means to clients and non-clients. The content of this newsletter provides analysis of legal issues of importance in the practice areas the law firm offers, but the articles typically conclude with an invitation to call the law firm for additional information. Some articles prominently feature a successful representation by the law firm. The newsletter also prominently features advertisements for the law firm, offering, among other things, free legal consultations, "reasonable" fees, and payment plans for the firm's services. The back cover of the newsletter consists entirely of an advertisement for the firm.

Analysis

3. The law firm's sole question is whether the law firm may accept advertising for the newsletter from other professionals, including law firms, medical professionals, and others. The law firm states that it will charge a straight fee for this advertising, without any arrangement indicative of referrals, fee-sharing, or other illicit agreements between service providers. The inquiry, then, is essentially whether a lawyer who engages in advertising on the lawyer's own behalf through a regular publication of interest to the public may also sell advertising in the same publication, without any kind of agreement between the publishing law firm and the advertiser. In our view, if the publication complies with New York Rule of Professional Conduct 7.1, then the law firm may provide space in its newsletter to others provided no impermissible conditions accompany the transaction.

4. In so opining, we rely on the law firm's representation that improper factors do not influence the value the law firm receives, if any, for the advertising. For instance, solely for the purpose of promoting good relationships, a law firm may decide to offer at no cost an advertisement for a former colleague who is starting a new law practice, or for a non-lawyer service provider whom the law firm sincerely considers worthy of consideration by persons who receive the brochure. Our concern is not with the price of the advertising but with any explicit or implicit understanding between the publisher and the advertiser suggestive of a fee-splitting or referral arrangement that would violate other Rules of Professional Conduct, including, for example, Rule 1.5(g) and Rule 7.2(a).

5. Although not the subject of the firm's inquiry, we would be remiss if we failed to note that, in our view, the firm's entire newsletter, as presented to us, constitutes "advertising" within the meaning of the Rules of Professional Conduct. Rule 1.0(a) defines "advertisement" to mean "any public or private communications made by or on behalf of a lawyer or law firm about the lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." Whether a brochure constitutes lawyer advertising depends on the entirety of the brochure and not only those portions promoting the firm. That portions of the newsletter are primarily educational in nature is

not dispositive, especially when nine of the twelve pages contain advertisements for the law firm, including the entire back cover; almost all the articles end with an invitation to call the law firm for advice; and several articles begin with questions targeting persons with potential issues and identifying the firm as a firm that may assist with those issues.

6. This means that the provisions of Rule 7.1 apply to the entire newsletter. Among other things, the words "Attorney Advertising" should appear in some form on the first page of the brochure. Rule 7.1(f). These words must be "clearly legible and capable of being read by the average person." Rule 7.1(l). Statements "characterizing the quality of the lawyer's or firm's services" or that are "reasonably likely to create an expectation about the results the lawyer can achieve"—which at least some of the articles in the newsletter can be read to do—must be "accompanied by the following disclaimer: "Prior results do not guarantee a similar outcome." Rules 7.1(d) & (e). Rule 7.1(k) requires the law firm to maintain a copy of the advertisement for at least three years. Rule 7.1(m) says that any fee arrangement offered in an advertisement published at least monthly must be held open until the next issue. This is not intended as an exhaustive list of the issues the inquirer should examine in light of Rule 7.1, which we urge the inquirer to review carefully in publishing future issues.

7. Otherwise, we see no problem with a law firm selling or otherwise offering advertising space in its newsletter to other professionals provided that no other arrangement, such as a referral or other fee, attends the transaction. In our recent Opinion 981, we opined that a law firm may place advertisements for a non-legal service provider in the lawyer's office (in this instance, a home security firm), and that the non-legal service provider may pay the lawyer a fee if someone, whether or not a client of the lawyer, happens to retain the third party as a result of the advertisement being placed in the lawyer's office. We have otherwise concluded that a variety of cross-selling techniques are permissible provided that the lawyer complies with Rule 7.1 and does not transgress rules of fee-splitting, referrals and similar improper practices. See, e.g., N.Y. State 947 (2012) (acquisition of mailing lists); N.Y. State 937 (2012) (cooperative arrangement with a hospital for promotional gifts); N.Y. State 915 (2012) (linking of non-legal websites to a lawyer's website).

Conclusion

8. Law firms that distribute brochures with educational content on legal issues of importance to the public may sell advertising in those brochures to third parties, including other law firms, as long as the publishing law firm does not charge rates for the advertising suggestive of improper referral or fee-splitting arrangements. Whether a brochure constitutes lawyer advertising depends on the entirety of the brochure and not only those portions promoting the firm.

(27-13)

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Opinion 1002 (3/31/14)

Topic: Lawyer's ethical obligations when in possession of lawfully obtained wills containing confidential information in which unknown third parties have an interest

Digest: Lawyer appointed as executor to estate of deceased lawyer who had custody of client and non-client wills may access and disclose confidential information in the wills insofar as necessary to learn identity of testator, executor, or beneficiary/ies in order to dispose of wills properly.

Rules: 1.6(a), 1.15(c)

Facts

1. The inquirer is a lawyer who works as a prosecutor and has been named his father's executor. The inquirer's father was an attorney who had a law firm that dissolved. After the firm's dissolution, the inquirer's father operated as a solo practitioner. The inquirer's father safeguarded wills from his dissolved law firm, and in addition agreed to preserve client wills of other attorneys who either retired, died, or whose firms dissolved. While a solo practitioner, the inquirer's father hired his former secretary to help him in locating and returning original wills to former clients and others who entrusted wills to him, and a large number of wills were so disposed. The inquirer's father also had made provision with another attorney to take over his few remaining clients, but not the remaining wills in his possession. The inquirer seeks guidance for ethical obligations applicable to himself as executor in disposing of several hundred wills, mostly from the 1980s, belonging both to former clients of his father and non-clients.

Questions

2. This inquiry requires us to consider three questions. Does the lawyer have an ethical obligation to notify persons with an interest in the wills that he possesses them? Is the lawyer ethically prohibited from inspecting the wills to identify the executors/

executrixes and beneficiaries for notification purposes? How may the lawyer ethically dispose of the wills?

Opinion

3. Although a lawyer who, incident to the lawyer's practice, comes into possession of property in which a third party has an interest has an ethical obligation under Rule 1.15(c) to promptly notify such third party that he or she has possession of the property, the lawyer-executor here does not have such an ethical obligation because he did not come into possession of the wills incident to his practice. Rule 1.15(c) of the Rules of Professional Conduct requires lawyer to "promptly notify a client *or third person of the receipt of* funds, securities, or other *properties in which the* client *or third person has an interest*[.]" (Emphasis added). Rule 1.15(c) further directs the lawyer to preserve such property, keep complete records and render appropriate accounts, and to promptly pay or deliver the property as requested by the client or third person. The requirements of Rule 1.15(c) expressly apply to a lawyer who receives property in which a third person, who is not the client of the lawyer, has an interest. Subsections (a) and (b)(1) of Rule 1.15 each expressly apply to property or funds of another within the lawyer's possession "incident to the lawyer's practice of law." While that express qualification is not repeated in Rule 1.15(c), we are persuaded that it must necessarily be inferred from the context, including the preceding subsections.

4. Here again, however, it is clear that the inquirer did not come into possession of the wills incident to his practice. Even his father was only safekeeping at least some of the wills prepared by other lawyers. We see no notification obligation under the Rules of Professional Conduct that applies to the inquirer, who merely serves as his father's executor because of the familial relationship, not incident to his practice of law.

5. Turning to the question of confidentiality, in order to make notifications and thereby dispose of the wills that were in his father's possession, he may need to inspect them to identify the testators and/or executors/executrices entitled to receive the wills. The lawyer may ethically do so. Although the wills may contain confidential information protected by the rules of ethics as between the client and the lawyer who prepared the wills, the executor is not prohibited from accessing or disclosing such information to the extent necessary to properly dispose of the wills.

6. We start with our review of a somewhat similar situation in N.Y. State 341 (1974), where a lawyer had a client relationship with the testators of some wills, giving rise to the protections of client confidentiality provided by the Code of Professional Responsibility. Then the lawyer joined a firm, but not all of the lawyer's client relationships continued. Thus, at least for some of the wills in the firm's possession, the relationship was custodial, not professional. The deceased lawyer here likewise had a professional relationship with the makers of some of the wills but only a custodial, nonprofessional relationship with others.

7. This Committee concluded that a lawyer who receives wills from an attorney who retires from the practice of law "holds them only as a custodian. It is generally unethical for him to examine the wills or files without the clients [*sic*] consent." This was because, we assumed, the wills likely contain information that was obtained by the lawyer under an ethical obligation to keep the information confidential. We concluded that the firm was required to notify the lawyer's clients of his retirement. We recognized that the client has two rights when a lawyer retires: "First, to retake the will whenever he retires, or direct the ultimate disposition of it, and, second, to have his confidences concerning the will and information relating to it respected." *Id.*

8. Rule 1.6(a) establishes the client's right to protect confidential information shared with his lawyer. We assume it would apply, at least in part, to information shared by a testator client with a lawyer where, for example, it was requested or intended that the information not be divulged except in certain ways and/or where disclosure would harm the testator. By its plain language, however, Rule 1.6(a) only applies to confidential information "gained during or relating to the representation of a client." Because the inquirer did not receive the wills from a client or during the representation of a client, but as his father's executor, Rule 1.6(a) does not apply to him. Even if it were applicable, Rule 1.6(a) permits disclosure where the client has given informed consent to disclosure or where "disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." The purpose of preparing a will is that the testamentary commands and desires eventually be made known in the appropriate circumstances, but not otherwise in many or most cases.

9. For these reasons, we conclude that Rule 1.6(a) does not prohibit the inquirer from accessing or disclosing the confidential information in the wills insofar as reasonably necessary to dispose of the wills. The inquirer should first attempt to identify

and contact surviving testators in order to avoid disclosure to other parties where unnecessary.

10. We emphasize that the lawyer should proceed carefully in order to only review or disclose information to the extent necessary for proper will disposal. *Cf.,* N.Y. State 749 (2001) (lawyers may not ethically use available technology to surreptitiously examine and trace email and other electronic documents because such would, among other things, be prejudicial to the administration of justice); N.Y. State 700 (1998) (ethically improper for lawyer to exploit unauthorized communication of confidential information because doing so would, among other things, be prejudicial to the administration of justice). We add that we do not see any ethical reason why the lawyer could not transfer the wills to another custodian, such as a lawyer who could better serve the purpose of proper and timely notification of executors, at least where to do so would be appropriate in discharging the executor's duties and not for an improper purpose proscribed by the Rules. However, transferring them to someone who is not a lawyer and thus not subject to these constraints, combined with other risk factors, might not be viewed has having been impliedly authorized under Rule 1.6(a).

Conclusion

11. To the extent that the lawyer must notify the testators, or executors, or beneficiaries of each of the wills that he possesses that he is holding such property, in order to dispose of them properly, the lawyer may inspect the wills and may transfer them to another custody under certain conditions.

(61-12)

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Opinion 1003 (3/31/14)

Topic: Law Firm Name

Digest: A lawyer who practices under his full name may use a law firm name that includes only the lawyer's middle name initials and last name, without including his first name.

Rules: 7.5(b), (e)

Facts

1. The inquirer's name is John P.J. Jones (fictional name), which is listed on his stationery, business card, and email signature line. The inquirer states that the primary reason he includes his middle initials is that there are other attorneys by the name John Jones.

2. The inquirer plans to leave his current firm and start a solo practice. He has researched available law firm names, including available domain and business entity names, and has found that there are other attorneys named John Jones and that domain names for that name have been taken.

3. The inquirer has determined that "P.J. Jones Law Offices," "The Law Offices of P.J. Jones," or "P.J. Jones Law" would be the best available options for purposes of a domain name, firm name, and marketing because an attorney search of "P.J. Jones" will then usually lead to him first.

4. The inquirer notes that while he wishes to use one of the above proposed firm names, he still plans to practice using his full name, John P.J. Jones, as he has in the past and presently does.

Question

5. May a lawyer practice under a law firm name that includes only the lawyer's middle name initials and last name, without including his first name?

Opinion

6. Rule 7.5(b) of the New York Rules of Professional Conduct provides, with certain limited exceptions, that a "lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm.…" As we have noted many times, this rule serves to protect the public from being deceived as to the identity, responsibility or status of those who use the firm name. *See* N.Y. State 920 (2012); N.Y. State 732 (2000) (applying trade name prohibition in former Code of Professional Responsibility).

7. In N.Y. State 740 (2001), this Committee opined that "[u]sing a name that is not the legal name of one or more partners or former partners in the law firm constitutes [the] use of a trade name" within the meaning of the language contained in Rule 7.5(b). Therefore, we concluded that a lawyer may not place an advertisement in the Yellow Pages in which the lawyer uses the firm name "A," or inserts the letter "A" before the firm name, in order to insure favorable placement.

8. In N.Y. State 920, a solo practitioner believed that his last name was too long and inquired whether he could call his law firm by his initials, "[JDR Law]." We concluded that "[b]ecause the lawyer's initials do not constitute the lawyer's legal name, they would constitute a trade name, and therefore the lawyer is prohibited from practicing under

that name." Similarly, in N.Y. State 948 (2012), we opined that a law firm name may not include a variant on the lawyer's name that is created by conjoining the lawyer's initials with an abbreviation of the lawyer's surname. We concluded that the first portion of the proposed firm name that included the conjoined and abbreviated form of the lawyer's name "deviate[d]…substantially from the lawyer's actual name, and in that respect is similar to firm names found impermissible in [our prior] opinions…." N.Y. State 948; see also N.Y. County 677 (1990) (firm name may not include first name of one partner and contraction of surname of another partner, as such a name would violate requirement that lawyers practice only under names of lawyers in the firm).

9. In N.Y. State 948 we acknowledged, however, that "[s]ome variations on names may deviate so slightly from the original as not to offend Rule 7.5(b)." *Cf.* N.Y State 872 (2011) (permissible to use English translation of foreign first name in informal communications, and on business cards and website, if not misleading and if compliant with statutes and court rules). Applying our above precedents, we conclude that the slight name variation proposed by the inquirer here, which maintains his full surname and the initials of two of his three given names and does not add anything to his legal name, does not offend Rule 7.5(b)'s prohibition against the use of trade names. Therefore, the inquirer can drop his first name to formulate a firm name that includes his middle name initials and legal surname. This assumes, however, that the inquirer can ensure that the proposed firm name does not violate the additional prohibition in Rule 7.5(b) against practicing under a firm name that is "misleading as to the identity of the lawyer or lawyers practicing under such name."

10. As we noted in N.Y State 872, the inquirer must also abide by any statutes, court rules, and judicial guidelines that govern an attorney in these circumstances. *See, e.g.*, Judiciary Law § 468 ("Official registration of attorneys to be kept by the chief administrator of the courts"); Part 118 of the Rules of the Chief Administrator of the Courts ("Registration of Attorneys").

11. With regard to domain names, we note that under Rule 7.5(e) "[a] lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm" provided certain conditions are met. As further explained in Cmt. [2] to Rule 7.5, "[a]s long as a law firm's name complies with other Rules, it is always proper for a law firm to use its own name or its initials or some abbreviation or variation of its own name as its domain name."

Conclusion

12. A lawyer who practices under his full name may use a law firm name that includes only the lawyer's middle name initials and last name, without including his first name.

(31-13)

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Opinion 1004 (4/1/14)

Topic: Attorney's Obligations Regarding Excessive Fee of Counter-Party's Attorney

Digest: Where a contract provides that one party pay the counter-party's attorney's fee and that fee is excessive, the attorney for the first party is not ethically prohibited from participating in the transaction. Whether the attorney has an obligation to report the excessive fee of another attorney depends on the circumstances.

Rules: 1.5(a), 8.3, 8.4(a)

Facts

1. The inquirer's client is entering into a commercial loan with a bank, and one of the standard terms of the loan is that the borrower pay the bank's attorney's fee. The inquirer characterizes the contemplated transaction as "standard with some nuances." He states that the nuances will not require a great deal of extra drafting beyond the boiler plate document. The inquirer believes that the bank attorney's proposed fee is "at least double the normal fee" charged for this type of transaction. He asked the bank's attorney to reduce his fee, but that attorney refused.

Questions

2. Assuming that an attorney's fee—to be paid by the counter-party—is excessive, can the counter-party's lawyer continue to participate in representing his client in this transaction and must that lawyer report the conduct of the fee-charging attorney?

Opinion

3. As the question of whether the bank's attorney's fee is excessive does not involve the inquirer's own conduct, we are not in a position to resolve that issue. It is worth noting, however, that Rule 1.5(a) sets forth the ethical standard governing the amount of legal fees that can be reasonably charged. It provides that

> A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense. A fee is exces-

sive 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.

Cmt. [1] to Rule 1.5 observes that the factors specified in paragraphs (a)(1) through (a)(8) are not exclusive and that each factor will not always be relevant. While it has been noted that factor (a)(3) ("the fee customarily charged in the locality for similar legal services") is an important factor, *see* Simon's New York Rules of Professional Conduct Annotated, 2013 Edition, p. 131, it has also been noted that factor (a)(7) ("the experience, reputation and ability of the lawyer or lawyers performing the services") is usually "the most important factor." *Id.* at 134.

4. We further note that the fact that the fee sought by the bank's attorney is roughly double the fee often charged for similar transactions does not render the fee *per se* excessive. A high fee is not necessarily an excessive fee. That is because the excessiveness determination requires a consideration of all the relevant factors. For example, we know nothing about "the experience, reputation and ability of the lawyer" performing the services (*see* Rule 1.5(a)(7)), a critical factor. And the inquirer acknowledges that the prospective transaction does involve "some nuances"; Rule 1.5(a)(1) indicates that the "novelty and difficulty of the questions involved" is relevant to the appropriateness of the fee. An experienced attorney handling a difficult nuance has more leeway to charge a higher fee.

5. Even if the fee is excessive, the inquirer can still ethically participate in the transaction. While Rule 8.4(a) prohibits an attorney from assisting or inducing another to violate the Rules of Professional Conduct, the inquirer did not provide any such assistance or inducement. In Opinion 809, this Committee concluded that a lawyer did not aid in the unauthorized practice of law (as then prohibited by DR 3-101(A) of the Code of Professional Responsibility) where the lawyer, to carry out the representation of one client in a transaction, dealt with a non-lawyer who had been engaged by the client's counter-party. We reasoned that the inquiring lawyer had not caused or encouraged the counter-party's representational situation and was merely continuing to represent his own client in the transaction. The same logic applies to the present inquirer. He did not cause or encourage the counter-party's lawyer to charge a potentially excessive fee. On the contrary, he attempted to negotiate a lower fee.

6. Moreover, even if the fee is excessive, the inquirer does not necessarily have to report the conduct of the bank's attorney. That is because attorneys need not report all ethical violations of which they become aware. Instead, Rule 8.3, which governs the reporting of professional misconduct, provides, in relevant part, that "(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct *that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer* shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation" (emphasis added). *Cf.* Cmt. [2] to Rule 8.4 ("Many kinds of illegal conduct reflect adversely on fitness to practice law. Illegal conduct involving violence, dishonesty, fraud, breach of trust, or serious interference with the administration of justice is illustrative of conduct that reflects adversely on fitness to practice law. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation"). Thus, even if the inquirer concludes that the bank's attorney's fee is excessive, he is only obligated to report the conduct of the bank attorney if he concludes, under all the circumstances, that the setting of the fee reflects adversely on that attorney's fitness to practice law or involves dishonesty.[1]

Conclusion

7. Where a contract provides that one party pay the counter-party's attorney's fee and that fee is excessive, the attorney for the first party is not ethically prohibited from participating in the transaction. Whether the attorney has an obligation to report the excessive fee of another attorney depends on the circumstances

Endnote

1. Of course, if the inquirer believes that the bank's attorney's fee is excessive, he is permitted to report the bank's attorney.

(47-13)

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Opinion 1005 (4/2/14)

Topic: Whether using the phrases "I KNOW HOW TO WIN FOR YOU" or "unsurpassed litigation skills," violates Rule 7.1

Digest: Neither the statement "I KNOW HOW TO WIN FOR YOU" or "unsurpassed litigation skills" in lawyer advertising is permissible under Rule 7.1 because the statements are misleading, and neither statement can be factually supported as of the date on which it is disseminated.

Rules: 7.1

Question

1. Two inquirers have asked about the use of specific phrases to advertise their services. The first asks whether she may use the phrase "I KNOW HOW TO WIN FOR YOU" in print and other advertising. A second inquirer asks whether the law firm can use the words "unsurpassed litigation skills" on its website.

Opinion

2. Each inquiry concerns a form of lawyer advertising. Whether each is permissible primarily is governed by Rule 7.1 in New York's Rules of Professional Conduct (the "Rules"). In general, Rule 7.1 prohibits the use or dissemination of an advertisement that "contains statements or claims that are false, deceptive or misleading." Rule 7.1(a)(1).

3. Determining whether the proposed advertising is ethical requires an assessment of whether the phrases violate Rule 7.1(a)(1) (prohibiting advertising that is "false, misleading or deceptive"), or 7.1(d) and (e) (together, permitting statements that "compare the lawyer's services with the services of other lawyers" or describe "the quality of the lawyer's or law firm's services" provided the statements do not violate Rule 7.1(a), can be factually supported by the lawyer or law firm as of the date on which the advertisement is published or disseminated, and are accompanied by the disclaimer "Prior results do not guarantee a similar outcome").

4. Comment [3] to Rule 7.1 provides that "[a] truthful statement is misleading if it omits a fact necessary to make the lawyer's communication…not materially misleading…[or if there is] a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services, or about the results a lawyer can achieve, for which there is no reasonable factual foundation." For example, this Committee concluded a proposed advertisement that stated "We will stop your foreclosure" was impermissible because a layperson was likely to read the phrase literally to mean that the lawyer could cease and terminate a foreclosure, rather than merely delay its progress and assist with a negotiated settlement. N.Y. State 921 (2012). Cmt. [12] to Rule 7.1 explains that descriptions of characteristics of a lawyer or law firm that compare its services with other firms and cannot be factually supported could mislead potential clients, and therefore it could be improper for a lawyer to advertise that he or she is the "Best." Rule 7.1, Cmt. [12].

5. Neither of the proposed statements is permissible under Rule 7.1. The statement "I KNOW HOW TO WIN FOR YOU" is misleading because it suggests that the lawyer can win any potential client's case regardless of the facts of the case or legal support for the prospective client's position, and this statement cannot be factually supported by the lawyer. Similarly, advertising on a website that a lawyer has "unsurpassed litigation skills" is misleading because it compares the skills of the lawyer with others without factual support, similar to listing a lawyer as the "Best" in the example provided in Cmt. [12] to Rule 7.1. *See* N.Y. State 877 (2011) (a statement that describes or characterizes the "quality" of a lawyer's work must be "factually supported" at the time it is disseminated and accompanied by the disclaimer provided in Rule 7.1(e)). Merely posting the disclaimer that "Prior results do not guarantee a similar outcome" will not cure the ethical infirmity of the proposed advertising.

Conclusion

6. The statement "I KNOW HOW TO WIN FOR YOU," and the statement "unsurpassed litigation skills," may not be used in lawyer advertising. Both statements are misleading in suggesting a result or skill level that cannot be factually supported

as of the date on which the statements are published or disseminated, and therefore both violate Rules 7.1(a) and 7.1(e).

(43b-13)

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Opinion 1006 (4/2/14)

Topic: Settlement agreements; restrictive covenants; prohibiting solicitation of new clients having similar claims; prohibiting the referral of such claims to other counsel

Digest: A lawyer may not settle or offer to settle a claim on the understanding that the lawyer for the claimant will thereafter (a) refrain from soliciting clients for the purpose of bringing similar claims against the settling party, or (b) refrain from referring potential claimants with similar claims to other counsel.

Rules: 5.6(a)(2); 1.6; 1.9(c)

Facts

1. The inquiring attorney represents an organization against which one of its employees has asserted certain claims. The matter is in the process of being settled. The organization fears that similarly situated employees may assert additional claims. As part of the settlement negotiation, the inquirer proposes to seek assurances from the claimant's lawyers that they will not solicit or refer further clients from among those similarly situated employees, although the inquirer accepts that if a further employee approached the attorney without being solicited, the attorney would have the right to represent that individual.

Questions

2. May a lawyer settle or offer to settle a claim on the understanding that the lawyer for the claimant will not thereafter solicit new clients for the purpose of bringing similar claims against the settling party?

3. May a lawyer settle or offer to settle a claim on the understanding that the lawyer for the claimant will not thereafter refer prospective clients to other lawyers for the purpose of bringing similar claims against the settling party?

Opinion

4. Rule 5.6(a)(2) of the New York Rules of Professional Conduct (the "Rules") states: "A lawyer shall not participate in offering or making… an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy." Policies cited as underlying this rule include enhancement of the public's access to lawyers and avoidance of conflicts.[1] In interpreting Rule 5.6, we are guided also by interpretations of its predecessor rule, DR 2-108 of the former Code of Professional Responsibility (the "Code"). Although DR 2-108 was controversial, its essential terms were carried forward into Rule 5.6.[2]

5. The lawyer whose "right to practice" is at issue here is the lawyer representing the settling claimant, rather than the inquirer who represents the organization that is the target of the actual and potential claims. This distinction, however, is not important to our inquiry, because Rule 5.6 provides that no lawyer may "participate in offering or making" a settlement agreement that restricts *any* lawyer's right to practice. *See* N.Y. State 730 (2000) (predecessor rule applied "equally to a lawyer who would propose or offer such an agreement and to a lawyer who would accept it").

6. This Committee last examined restrictive settlement agreements in N.Y. State 730 (2000), which construed DR 2-108. The question there was whether an attorney for an employment discrimination plaintiff could agree as part of a settlement not to disclose broad categories of information, including facts about the business and operations of the defendant corporation and "any matters relating directly or indirectly" to the settlement agreement. We concluded that such terms would violate DR 2-108. We reasoned that although the terms would not "directly" restrict the inquirer's right to practice law or to represent similar clients, they would nonetheless violate the rule "if their practical effect is to restrict the lawyer from undertaking future representations and if they involve conditions or restrictions on the lawyer's future practice that the lawyer's own client would not be entitled to impose."[3]

7. We recognized in N.Y. State 730 the permissibility of standard agreements not to disclose settlement terms, reasoning that such agreements bolster the client's independent right to require that the lawyer keep information confidential, and do not "effectively restrict the lawyer from representing other clients." In contrast, we found the more sweeping nondisclosure terms at issue in N.Y. State 730 to be impermissibly overbroad in that they "would restrict the lawyer's right to practice law by requiring the lawyer to avoid representing future clients in cases where the lawyer might have occasion to use information that was not protected as a confidence or secret…but was nevertheless covered by the settlement terms."[4] The scope of information protected as a "confidence or secret" under the prior Code is largely carried forward un-

der the Rules as "confidential information," which is protected for current clients under Rule 1.6 and for former clients under Rule 1.9(c). This category of confidential information is broad enough to give the parties considerable leeway in extending the reach of permissible nondisclosure clauses.[5]

Agreements Barring Solicitation

8. Solicitation of clients, once prohibited as an ethical matter, is now permitted subject to various constraints including those of Rule 7.3. Solicitation of clients in compliance with the Rules is an aspect of law practice that may be important or even crucial to a lawyer's ability to engage meaningfully in the profession. On that premise, the reasoning of N.Y. State 730 guides the resolution of this inquiry as well. While a lawyer's agreement not to solicit further clients would not "directly" restrict that lawyer's right to practice law by precluding representation of clients who find the lawyer on their own, such an agreement could nonetheless have the practical effect of substantially restricting the lawyer's ability to undertake future representations. Accordingly, it is impermissible for any lawyer to settle or offer to settle a claim on the understanding that the lawyer for the claimant will not thereafter solicit new clients for the purpose of bringing similar claims against the settling party.[6]

9. The contrary result was reached in *Feldman v. Minars*, 230 A.D.2d 356, 658 N.Y.S.2d 614 (1st Dept. 1997), but that opinion is of limited weight here. In *Feldman*, the court held that plaintiff's law firm should be disqualified, based in part on the firm's solicitation of the plaintiffs in violation of a prior settlement in which the firm had agreed not to "encourage any other parties or attorneys to commence such action or proceeding." The firm sought to be relieved from that prior agreement on the ground that it violated public policy as expressed in DR 2-108. The court rejected that argument on a number of grounds, most of which do not apply here.[7] However, the court also briefly addressed the ethical issue at hand:

> Even assuming, arguendo, that a settlement agreement that forbids an attorney to represent other clients against the settling defendants in similar litigation is against public policy, as expressed in the Code of Professional Responsibility, an agreement not to *solicit* clients is not likewise against public policy.

Feldman, 230 A.D.2d at 359 (original emphasis). The basis for that conclusion was suggested in the sentence that followed: "In fact, until recently, solicitation of clients, even without an agreement, was barred by applicable disciplinary rules." *Id*. But as noted above, solicitation of clients, when done in accordance with applicable rules, is no longer ethically suspect. A settlement agreement effectively restricting the right to practice is impermissible, and it does not matter that the restriction would be achieved only through limits on otherwise appropriate solicitation. *See* N.Y. State 730 at n.2 (noting that *Feldman* decision had been strongly criticized insofar as it found "that an agreement not to solicit clients would not violate the rule").

Agreements Barring Referral

10. The second question concerns potential claimants whom the claimant's lawyer has not solicited, but who have on their own volition approached the claimant's lawyer for representation, information or guidance. The inquirer recognizes that it would be improper for a settlement agreement to provide that the lawyer may not *represent* such a person, but nonetheless asks whether an agreement could provide that the lawyer may not *refer* the person to be represented by another lawyer.

11. Referral of prospective clients to other lawyers is, like solicitation of clients, integral to the practice of law. If a lawyer who is approached by a prospective client does not, for whatever reason, end up representing that person, the lawyer can nonetheless perform an important service by referring the prospective client to some other lawyer appropriate to the task. To perform this service well, the lawyer may need to ask the prospective client for information that will give rise to certain duties of legal ethics. *See* Rule 1.18 (duties as to confidentiality and conflicts). Then the lawyer will need to exercise legal judgment in assessing which other lawyers would be well suited to provide the representation. All of this helps achieve what Comment [1] to Rule 7.1 calls the "important functions of the legal profession…to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." Accordingly, a settlement agreement precluding future referrals would impermissibly restrict the lawyer's right to practice law. *See* Colorado Opinion 92 (1993) (stating that improper restrictions in settlement agreements may include prohibiting settling lawyer's "referral of potential clients to other counsel"); D.C. Opinion 35 (1977) (unethical for lawyer to agree to settlement term prohibiting referral to other lawyers of potential clients with claims against settling defendant).

Conclusion

11. The questions are answered in the negative. A lawyer may not settle or offer to settle a claim on the understanding that the lawyer for the claimant will

thereafter (a) refrain from soliciting other clients for the purpose of bringing similar claims against the settling party; or (b) when contacted by potential claimants, refrain from referring such persons to other counsel.

Endnotes

1. According to ABA 93-371 (1993), which we cited in N.Y. State 730 (2000):

   > The rationale of Model Rule 5.6 is clear. First, permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals. Second, the use of such agreements may provide clients with rewards that bear less relationship to the merits of their claims than they do to the desire of the defendant to "buy off" plaintiff's counsel. Third, the offering of such restrictive agreements places the plaintiff's lawyer in a situation where there is conflict between the interests of present clients and those of potential future clients.

2. *See* N.Y. City 99-03 (citing sources arguing that the rule is justified, and others arguing that it is not); Proposed Rules and COSAC Commentary, September 30, 2005, Reporter's Notes at 373 (noting "considerable controversy" about DR 2-108 in that "both the breadth of the prohibition and the public policy benefits of the Rule have been subject to debate," citing court cases, and reporting that Committee on Standards of Attorney Conduct "considered many various possible alternatives to the language of this Rule, but determined to retain the language of the current New York Disciplinary Rule"), available at http://www.onbar.org/news/COSAC_Rules/Rule5.6.pdf; Reporter's Notes, NYSBA Proposed Rules of Professional Conduct at 185 (Feb. 1, 2008) (explaining that Rule 5.6 was intended to be "substantively identical" to the former DR 2-108).

3. *Accord* D.C. Opinion 335 (2006) (surveying ethics opinions, including N.Y. State 730, in which an "underlying rationale… is that the prohibited provisions restrict the lawyer's right to practice by effectively preventing him or his firm from representing clients in certain kinds of cases against the settling party"); Colorado Opinion 92 (1993) (stating that the rule may be violated by restrictions "less onerous than a complete prohibition against subsequent representation of clients against a settling party defending a claim," and citing ethics opinions recognizing "impropriety of practice restrictions that fall short of an out-right bar to future or ongoing representation").

4. *Accord* D.C. Opinion 335 (2006) ("A settlement agreement may provide that the terms of the settlement and other non-public information may be kept confidential, but it may not require that public information be confidential."); South Carolina Opinion 10-04 (stating that Rule 5.6 "prohibits settlement agreements that reach information not reached by [Rule] 1.6," and suggesting that lawyers generally should not become parties to their clients' settlement agreements); ABA 00-417 (distinguishing agreements not to reveal confidential information from agreements not to use it, and concluding that Rule 5.6 does not prohibit the former because a "settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the representation is no more than what is required by the Model Rules absent client consent, and does not necessarily limit the lawyer's future practice in the manner accomplished by a restriction on the *use of information* relating to the opposing party in the matter"); Colorado Opinion 92 (1993) (agreement conditioned upon "nondisclosure of the amount and terms of the settlement, provided this information is not already a matter of public record…[does] not materially restrict a lawyer's ability to practice law").

5. Subject to certain exceptions, the category includes all information which the client has requested be kept confidential. *See* Rule 1.6(a). As to a related rule prohibiting employment agreements that restrict the right of a lawyer to practice after termination of the employment, we have noted that "as a practical matter, because the definition of confidential information in Rule 1.6 is so broad, most contractual confidentiality provisions are not likely to exceed the scope of a New York lawyer's confidentiality obligations under the Rules." N.Y. State 858 ¶10 (2011).

6. Other jurisdictions have reached similar results. *See* Texas Opinion 505 (1994) ("To the extent that [solicitation] is permitted under the State Bar Rules, and other applicable state and federal statutes, solicitation is part of the practice of law and therefore cannot be more severely restricted in a settlement agreement [than] it is restricted in the Rules and applicable law."); South Carolina Opinion 10-04 ("Rule 5.6(b) protects a lawyer's access to the legal market, and that protection is implicated by advertisements and solicitations equally.").

7. The court reasoned that "failure to enforce a freely entered-into agreement would appear unseemly, and the 'clean hands' doctrine would preclude the offending attorneys from using their *own* ethical violations as a basis for avoiding obligations undertaken by them." *Feldman*, 230 A.D.2d at 361. It continued that even if the settlement agreement were against public policy of the State, the violation could be addressed by the appropriate disciplinary authorities rather than by invalidating the agreement. *Id*. For both these reasons, an agreement may be enforceable even if it violates a rule of legal ethics. *See* N.Y. City 1999-3 (settlement agreement restricting practice ethically impermissible "even if such an agreement may be enforceable as a matter of law"). Also the *Feldman* court approvingly cited an article calling the relevant ethics rule "an anachronism, illogical and bad policy." *Feldman*, 230 A.D.2d at 360 (citing Gillers, *A Rule Without A Reason, Let the Market, Not the Bar, Regulate Settlements that Restrict Practice,* 79 ABA J 118 [Oct. 1993]). But as noted above, New York later adopted Rule 5.6 despite such policy criticisms.

(40-13)

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Opinion 1007 (4/3/14)

Topic: Advertising a lawyer's listing in "Best Lawyers"

Digest: A lawyer may advertise his or her inclusion in "Best Lawyers" provided that the lawyer's assessment of the methodology used to determine inclusion demonstrates that it is an unbiased, nondiscriminatory and defensible process.

Rules: 7.1

Question

1. The inquirer states that he will be nominated for inclusion in the 2015 "Best Lawyers" publication for the New York Area, but is concerned that inclusion in "Best Lawyers" may violate Rule 7.1 because the listing implies that he has skills or results that are better than other lawyers without a basis in objective criteria. The inquirer notes that the listing in "Best Lawyers" might be considered a statement comparing him to other attorneys or implying to the public that he is one of the best attorneys without any presentation of objective criteria, and

he suggests he may not be the "best" attorney as compared to others.

Opinion

2. The inquiry concerns a form of lawyer advertising. Whether advertising that a lawyer is listed in "Best Lawyers" is permissible is governed by Rule 7.1 in New York's Rules of Professional Conduct (the "Rules"). In general, Rule 7.1 prohibits the use or dissemination of an advertisement that "contains statements or claims that are false, deceptive or misleading." Rule 7.1(a)(1).[1]

3. "Best Lawyers" publishes lists that may constitute professional ratings of lawyers in various geographic areas and areas of legal practice. Rule 7.1(b) provides that an advertisement may include information as to "bona fide professional ratings." A rating is not "bona fide" unless it is "unbiased and nondiscriminatory." Rule 7.1, Cmt. [13].

> [The professional rating] must evaluate lawyers based on objective criteria or legitimate peer review in an manner unbiased by the rating services economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group."

Rule 7.1, Cmt. [13]. Thus, determining whether the "Best Lawyers" listing is a "bona fide professional rating" requires a fact specific inquiry into the methodology used by the publication to create the list.

4. The "Best Lawyers" publication explains that its list is based on peer-review and attempts to depict the consensus opinion of "leading lawyers" about the professional abilities of colleagues in the same geographical and legal practice areas. Nominations are open to anyone, although the primary sources for nominations are clients, other lawyers and marketing teams. In-house lawyers are not eligible to be nominated. Lawyers included in the previous "Best Lawyers" edition are automatically nominated into their practice area(s) for the next peer-review process. The ballots are distributed to lawyers currently listed based on the voter's practice area(s) and geographic regions. The ballots ask if the respondent were unable to handle a case himself or herself, how likely would the respondent be to refer it to nominee, and requests a response rating on a scale of "1" to "5," where "5" is the highest. Lawyers may not vote for themselves, and their names will be removed from their own ballots. Voters can complete ballots for lawyers in their own firm, but these votes do not weigh as heavily as votes from outside the firm. Best Lawyers staff reviews the votes and comments, selected lawyers are checked against state bar association sanction lists to ensure the nominees are in good standing, and then the listed lawyers are notified of their inclusion and the list is released to the public.

5. We have opined that for a rating to be "bona fide and nondeceptive it should at least be unbiased, nondiscriminatory and based on some defensible method." N.Y. State 877 (2011); see also Rule 7.1, Cmt. 13. While we will not opine on whether a "Best Lawyers" listing is "bona fide," the Committee has not identified a disqualifying defect in the methodology used. The lawyer must assess whether the methodology is unbiased, nondiscriminatory and defensible. The lawyer's assessment should consider that nominations are open to everyone, and making an assessment of the following: (1) that the "leading lawyers" who participate in voting are limited to the lawyers who are currently listed in the publication; (2) the question posed to voters and the "1' to "5" ranking system; (3) the weighting of votes completed by lawyers in one's own firm as compared to those outside the firm; (4) the review conducted by "Best Lawyers" staff; and (5) the automatic nomination of lawyers previously included in the publication. In addition, although it does not appear that inclusion is biased by direct economic interest in the form of the receipt of payment from the listed lawyers, an assessment of the bona fides of inclusion in "Best Lawyers" might also consider that automatic nomination of lawyers previously listed in the publication ensures the nomination of lawyers to whom Best Lawyers has sold additional marketing materials associated with the listing, including special reprints and enhanced advertising.

6. The inquirer also questioned whether advertising that he is listed in "Best Lawyers" may constitute a statement comparing the lawyer to other attorneys or implying that he is one of the best attorneys. Rule 7.1(d)(2) permits advertising that compares the lawyer's services with the services of other lawyers and Rule 7.1(d)(4) permits advertising that describes or characterizes the quality of the lawyer's or law firm's services provided that the statement "can be factually supported by the lawyer or

law firm as of the date on which the advertisement is published or disseminated." Comment [12] explains that descriptions of characteristics of a lawyer or law firm that compare its services with other firms and cannot be factually supported could mislead potential clients and therefore it would be improper for a lawyer to advertise that he or she is the "Best." Rule 7.1, Cmt. [12].

7. We believe that describing a lawyer as the "Best" can be distinguished from inclusion in a "Best Lawyers" listing. Rather than stating that any particular lawyer is the "best," the magazine publishes a long list of attorneys selected according to a nomination and voting methodology that is described in the publication, without ranking the attorneys or making any specific statement about a particular lawyer's skills as compared to those who are not listed. The listing is simply a factual statement that the compilers of the listing have selected the lawyer based on the disclosed methodology. Even if the rating is construed as a comparison of the quality of the lawyer's services to others, the lawyer's determination that the rating is "bona fide" satisfies the requirement under Rule 7.1(e)(2) that the statement be factually supported as of the date that it is published or disseminated.

Conclusion

8. A lawyer may advertise his or her inclusion in "Best Lawyers" provided that an assessment of the methodology used to determine a lawyer's inclusion reveals that it is an unbiased, nondiscriminatory and defensible process. Advertising a lawyer's inclusion in the publication is distinguishable from making a statement in advertising that cannot be factually supported and is misleading. If the listing constitutes a comparison of lawyers' skills, a lawyer's determination that it is a "bona fide" rating satisfies the requirement that the statement be factually supported on the date that it is published or disseminated.

Endnote

1. The Committee responds to inquiries regarding an inquirer's own conduct, rather than the conduct of a third party. In the scenario described above, inclusion in the "Best Lawyers" listing does not constitute an "advertisement" under Rule 1.0(a). A lawyer's inclusion in the "Best Lawyers" list is determined by the publication, and does not occur due to any direct affirmative effort by the lawyer to be included in the listing. At the same time, if the "Best Lawyers" listing violates Rule 7.1, then the lawyer or the lawyer's firm would violate the Rule by making reference to the listing in any marketing material.

(43-13a)

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Opinion 1008 (4/24/2014)

Topic: Representing new clients adverse to a current or former client

Digest: Whether a law firm may represent new clients against an entity that the law firm has represented in the past depends on whether the entity is a current or former client, which is a mixed question of fact and law. A law firm may not oppose a current client in any matter, related or unrelated, absent the current client's informed consent, confirmed in writing. However, a law firm may oppose a former client in any matter that is not substantially related to the firm's legal work for that former client. Even if the entity is no longer a client, a law firm has a continuing duty to protect confidential information of that entity.

Rules: 1.6(a); 1.7(a) & (b); 1.9(a) & (c)

Facts

1. Inquirer is a law firm ("Law Firm") that desires to represent some new clients ("New Clients") against an entity that the Law Firm considers to be a former client (the "Entity"). The Entity objects to the representation. The Entity and the Law Firm have jointly prepared and submitted a detailed set of facts that we accept for purposes of this opinion. According to the jointly submitted statement of facts, the Entity at one time leased a gas station. The gas station's owner later sued the Entity and a co-defendant ("Co-Defendant") for breaching the lease agreement (the "Lease Action"). The owner sought to recover the costs of removing gasoline storage tanks and remediating the premises. The Law Firm defended the Entity in the Lease Action.

2. The defense in the Lease Action was controlled by the Entity's Co-Defendant, which had purchased the Entity's interest in the property before the Lease Action began. The purchase was made pursuant to a Purchase and Sale Agreement ("PSA") covering scores of gas stations. The Law Firm worked closely with the Co-Defendant's counsel on the Lease Action. The Lease Action eventually settled.

3. Recently, the Law Firm agreed to represent the New Clients against the Entity and/or its Co-Defendant. Specifically, the New Clients claim that the Entity and/or its Co-Defendant operated various gas stations (though not the one involved in the concluded Lease Action) in a manner that damaged the New Clients' property. The Entity at one time owned these other gas stations, but sold them to Co-Defendant pursuant to the PSA before the Lease Action was filed.

4. The Entity has asked the Law Firm to withdraw from representing the New Clients, on two grounds: (a) the Law Firm never sent a termination letter to the Entity, which therefore contends that it remains a current client; and (b) even if the Entity is a former client, it contends that the new matter is substantially related to the Lease Action in which the Law Firm defended the Entity. Specifically, the Entity says that the matters are substantially related because the Law Firm acquired confidential information during the Lease Action regarding: (i) the Entity's negotiating strategy in the Lease Action, (ii) the Entity's interpretation of the PSA, (iii) the relationship between the Entity and its Co-Defendant in the Lease Action, and (iv) the future obligations of the environmental/remediation contractor assigned to the PSA properties by the Entity.

5. The Law Firm counters that (a) the Entity is a former client because the Law Firm has not performed any legal services for the Entity since October 2012, and (b) the New Clients' matter is not substantially related to the Lease Action. Specifically, the Law Firm contends that the New Clients' claims are not substantially related because the present claims involve a different lease agreement and different gas stations. The Law Firm recognizes that the New Clients' matters might involve theories of recovery under the PSA, but the Law Firm says the PSA would potentially be a discoverable document. In sum, the Law Firm argues that the present and former matters are not substantially related because the Law Firm did not acquire any confidential information from the Entity in the Lease Action that New Clients could use to the Entity's disadvantage in the present dispute.

Question

6. If a law firm represented an entity in a matter and has not performed any legal services for the entity for more than a year, but the law firm has not sent a termination letter to the entity, may the law firm represent new clients against the entity, over the entity's objection, in a new matter that is related in some ways to the original matter?

Opinion

7. The inquiry raises three sets of issues: (i) conflicts with current clients; (ii) conflicts with former clients; and (iii) duties of confidentiality to former clients. We will address these issues in turn. We address only whether the representation is permitted under the New York Rules of Professional Conduct (the "Rules").[1] We are not taking into account additional factors that a court might consider if deciding a motion to disqualify, and we are not predicting how a court would rule if such a motion were eventually filed. Our jurisdiction extends only to interpreting the Rules; we do not opine on legal questions such as whether there is warrant for disqualification.

A. Conflicts with Current Clients: Rule 1.7

8. The threshold question is whether the Entity is a current client or a former client. Rule 1.7(a)(1) generally prohibits a law firm from opposing a current client in any matter, related or unrelated, absent compliance with Rule 1.7(b), which among other things would require the client's informed consent confirmed in writing.[2] If the Entity remains a current client of the Law Firm, therefore, the Law Firm may not oppose the Entity on behalf of New Clients because the Entity is objecting rather than consenting to the representation. But if the attorney-client relationship between the Law Firm and the Entity has ended, then we would instead apply Rule 1.9, which governs conflicts with former clients.

9. The Rules of Professional Conduct do not define when an attorney-client relationship ends. On the contrary, Scope ¶ 9 says that "principles of substantive law external to these Rules determine whether a client-lawyer relationship exists." Thus, whether the attorney-client relationship between the Law Firm and the Entity has ended depends in part on questions of law beyond our jurisdiction. Scope ¶ 9 also says: "Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." We also lack sufficient facts to determine whether the Entity remains a current client of the Law Firm.

10. We note, however, that the Law Firm's failure to send a termination letter to the Entity does not by itself prove that the attorney-client relationship continues. A termination letter (or email) from a lawyer to a client clearly notifying the client that the attorney-client relationship has ended will often be a good practice, and in some circumstances may be dispositive. But an attorney-client relationship may also terminate without a termination letter. *See, e.g., Revise Clothing, Inc. v. Joe's Jeans Subsidiary, Inc.*, 687 F. Supp. 2d 381, 389-91 (S.D.N.Y. 2010) ("'In what is perhaps the most typical situation, an attorney-client relationship…is terminated, simply enough, by the accomplishment of the purpose for which it was formed in the first place,'" and a rule "that requires a law firm announce the conclusion of its engagement…would conflict with the principle…that the relationship is terminated upon the accomplishment of the purpose for which it was created"); *Miller v. Miller*, 203

A.D.2d 338, 339, 610 N.Y.S.2d 88, 89 (2d Dep't 1994) ("When the Family Court matter concluded, so did the attorney-client relationship"); Restatement (Third) of the Law Governing Lawyers § 31(2)(e) (2000) ("a lawyer's actual authority to represent a client ends when…the lawyer has completed the contemplated services").

11. The passage of time is another indicator of whether a person remains a current client, but it is not dispositive. Other circumstances, such as a longstanding pattern of representation over the years or the client's reasonable belief that a lawyer needs to perform additional legal work to fulfill the purpose of the representation, could also preserve an attorney-client relationship, even if the Law Firm has no specific pending assignment for the Entity at a given moment.

12. Here, despite the lack of a termination letter, several circumstances—including the fact that the Law Firm has concluded its work on the Lease Action and has not handled (or been asked to handle) any new matters for more than a year—suggest that the Entity is a former client. The parties have not identified any countervailing factors, such as a longstanding pattern of representation over the years, or the Entity's reasonable belief that the Law Firm needs to perform additional legal work to fulfill the purpose of the earlier representation. If such factors exist, they could count in favor of the Entity being a current client.

13. Although we have set forth some relevant factors, we do not have all the facts relevant to whether the Entity remains a current client of the Law Firm, and in any event we lack authority to reach what is ultimately a legal determination on that issue. If the Entity remains a current client of the Law Firm, then the Entity is entitled to the protections of Rule 1.7(a)(1). In that case the Law Firm may not oppose the Entity in any matter, related or unrelated, unless the conflict is consentable under Rule 1.7(b)(1) and the Law Firm obtains the Entity's informed consent, confirmed in writing, under Rule 1.7(b)(4).

B. Conflicts with Former Clients: Rule 1.9

14. If the Entity is not a current client, then it is a former client. Under Rule 1.9(a), a lawyer may not represent a client with interests "materially adverse" to those of a former client in a matter "substantially related" to the matter the lawyer handled for the former client, unless the former client gives informed consent, confirmed in writing. Here, the interests of New Clients in the current matter are "materially adverse" to the interests of the Entity, and the Entity has not consented (and in fact has objected) to the Law Firm's representation of New Clients. Given the former client's objection, the only open question is whether the current matter is "substantially related" to the former matter (the Lease Action).

15. Guidance on this question is found in Comment [3] to Rule 1.9. The first sentence says that matters are "substantially related" if (i) they involve the "same transaction or legal dispute" or (ii) a reasonable lawyer would perceive "a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." Here, the new matter is plainly not the "same transaction or legal dispute" as the old one, but the new and old matters could still be substantially related based on the risk that confidential information acquired by the Law Firm in the old matter would materially advance the position of New Clients in the new matter. We therefore turn to the balance of Comment [3], which discusses how even distinct matters may be substantially related through confidential information.

16. Some parts of Comment [3] address what "normally" or "ordinar[il]y" happens, rather than whether the lawyer *actually* obtained confidential information in the particular case. It makes sense that what normally happens should trigger the protections of Rule 1.9(a). As Comment [3] notes, the purpose of those protections would be defeated if a party seeking disqualification had to reveal its confidential information in order to protect it:

> A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

17. The relevance of what normally or ordinarily happens is reflected in the Comment's example of a matter deemed to be substantially related even though the example identifies no particular actually acquired confidential information: "[A] lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations…." Rule 1.9, Cmt. [3].

18. On the other hand, the *actual* receipt of confidential information in the prior matter would seem even

more compelling than a mere likelihood of its receipt. "*A fortiori*, matters are also substantially related if the lawyer in question actually and knowingly obtained (and now possesses) confidential factual information that would materially advance the prospective client's position in the subsequent matter." N.Y. State 992 ¶7 (2012). This view is supported by the following language from Comment [3]:

> [A] lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce…. [K]nowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

19. Comment [3] also suggests various reasons that current and former matters might *not* be substantially related:

    - The environmental lawyer mentioned above "would not be precluded…from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.
    - "Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."
    - "Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related."
    - "In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation."

20. The inquiring Law Firm should apply the precepts of Rule 1.9(a) and Comment [3] to the various kinds of information that the Entity contends demonstrate a substantial relationship between the Lease Action and the current matter, and to other kinds of potentially relevant information as well, such as the practices of the Entity in maintaining gas stations.

21. If any of these kinds of information would "materially advance" New Clients' position against the Entity, that would make the matters substantially related and preclude the new representation. However, the "materially advances" inquiry is fact-intensive, so we cannot reach a definitive conclusion as to whether the matters are substantially related.

C. Confidentiality Duties to Former Clients: Rule 1.9(c).

22. Whether or not the present and former matters are substantially related, the Law Firm has a continuing duty of confidentiality to the Entity pursuant to Rule 1.9(c), which "generally extends the confidentiality protections of Rule 1.6 to a lawyer's former clients." Rule 1.9, Cmt. [8]. Specifically, Rule 1.9(c) provides that a lawyer (1) shall not "*use*" confidential information "to the disadvantage of the former client" unless the Rules "would permit or require [such use] with respect to a current client" or the information has become "generally known" and (2) shall not "*reveal*" a former client's confidential information "except as these Rules would permit or require with respect to a current client."[3]

23. Particular pieces of confidential information may lose their protected status as time goes by, such as when the information becomes generally known or when disclosure would no longer be embarrassing or detrimental to the client. But otherwise, a lawyer's duty to protect such information remains in force even after a current client becomes a former client. We lack sufficient facts to determine what information is protected by Rule 1.9(c), but we note that the duty of confidentiality under Rule 1.9(c) applies whether or not matters are substantially related under Rule 1.9(a).

Conclusion

24. Whether a law firm may represent new clients against an entity that the law firm has represented in the past depends on whether the entity is a current or former client, which is a mixed question of fact and law. A law firm may not oppose a current client in any matter, related or unrelated, absent the current client's informed consent, confirmed in writing. However, a law firm may oppose a former client in any matter that is not substantially related to the law firm's legal work for that former client. Even if the entity is no longer a client, a law firm has a continuing duty to protect confidential information of that entity.

Endnotes

1. The inquiry was submitted by a law firm rather than by an individual lawyer. For simplicity of expression, this opinion speaks in terms of duties of that firm rather than duties of its individual lawyers. At the expense of that simplicity, we could set forth our analysis in greater detail to account for the following. We rely on certain provisions of the Rules in which the direct imposition of duties is upon an individual lawyer rather than upon a law firm. *See* Rules 1.6(a), 1.7 and 1.9. It is through *other* provisions of the Rules that such duties are imposed derivatively (or related duties are imposed) on others in the lawyer's firm and on the firm as a whole. *See*, *e.g.*, Rule 1.6(c) (requiring lawyer to exercise reasonable care to prevent breaches of confidentiality by others), Rule 1.10 (a)-(c) (imputing specified conflicts to law firm and its associated

lawyers), Rule 1.10(e) (requiring law firm to maintain conflict-checking system), Rule 5.1 (requiring law firm and supervisory lawyers to make reasonable efforts to ensure that lawyers in the firm conform to the Rules), and Rule 8.4(a) (providing that a lawyer "or law firm" shall not "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another"). However, we do not think it necessary to set forth all our analysis at that greater level of detail.

2. "The duty to avoid the representation of differing interest prohibits, among other things, undertaking representation adverse to a current client without that client's informed consent. For example, absent consent, a lawyer may not advocate in one matter against another client that the lawyer represents in some other matter, even when the matters are wholly unrelated." Rule 1.7, Cmt. [6]. Conflicts arising under Rule 1.7 (and also those arising under Rule 1.9, which we discuss below) are among those imputed by Rule 1.10(a) to other lawyers associated in the same firm.

3. The term "confidential information" is broadly defined in Rule 1.6(a) to include (subject to certain exceptions not applicable here) "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."

(46-13)

* * *

Opinion 1009 (5/21/2014)

Topic: Advertising; solicitation; press releases and tweets regarding shareholder litigation

Digest: Press releases and tweets directed to potential clients in shareholder suits constitute advertising and solicitation. They are thus subject to retention requirements, and, if directed to New York recipients, are also subject to filing requirements. The tweets must be labeled "attorney advertising" but are not prohibited by the rule against interactive solicitation.

Rules: 1.0(a) & (c); 7.1(f) & (k); 7.3; 8.5(b)

Facts

1. Inquirer is a New York attorney who works for a firm based in a different state. The firm focuses its practice on shareholder litigation, and the companies and lawsuits in question are sited in various states.

2. The firm distributes press releases concerning new investigations or lawsuits, and potential clients sometimes contact the firm after seeing such releases. The inquiry states that the releases "are generally issued through an outlet such as Business Wire, PR Newswire or other electronic wire service." The firm also sends out "tweets" to alert recipients to the press releases.

3. According to the inquiry, the general purposes of the press releases are "to inform shareholders of the case or investigation" and to enable potential clients to contact the firm "for a potential attorney-client engagement." The inquiry attaches sample press releases, all of which are labeled "Attorney advertising," and some of which indicate that shareholders may contact the firm concerning their legal rights and remedies with respect to the specific cases described.

Questions

4. If a law firm issues press releases to inform potential clients of new investigations or actions, and sends "tweets" to alert recipients to the press releases, then are the press releases and tweets "advertisements" governed by Rule 7.1, and if so, (a) must copies be retained for one year or three years; and (b) must the tweets be labeled "attorney advertising"?

5. Are such press releases and tweets "solicitations" governed by Rule 7.3, and if so, (a) must copies be filed with the attorney disciplinary committee, and (b) are the tweets a permissible form of solicitation?

Opinion

A. Advertising Issues Under Rule 7.1

6. Lawyer conduct in using and disseminating advertisements is subject to Rule 7.1 of the New York Rules of Professional Conduct (the "Rules").[1] Under Rule 1.0(a), the term "advertisement" means (subject to exceptions not relevant here) "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm." The communication is to be assessed in light of the circumstances of its circulation, and if its primary purpose is to obtain clients, then it is an advertisement for purposes of the Rules. *See, e.g.*, N.Y. State 873 (2011).

7. It seems clear from the nature of the press releases and the tweets that their primary purpose is to secure clients. Such communications are therefore advertisements under the Rules. As such, they can serve potential clients by educating them as to their need for legal advice and helping them obtain an appropriate lawyer, and can serve lawyers by enabling them to attract clients. *See* Rule 7.1, Cmt. [3] (indicating "principal purposes" of advertising).

8. Because press releases and tweets constitute lawyer advertising, they are subject to pre-approval and retention requirements. Rule 7.1(k) provides that all advertisements "shall be pre-approved by the lawyer or law firm." It also provides that a

copy of an advertisement "shall be retained for a period of not less than three years following its initial dissemination," but specifies an alternate one-year retention period for advertisements contained in a "computer-accessed communication," and specifies another retention scheme for web sites. Rule 1.0(c) defines "computer-accessed communication" to mean

> any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.

9. The releases will be disseminated through wire services. We understand that such wire services typically distribute the releases to a wide variety of media, usually in full-text and without alteration. Even if the lawyers and wire services distribute the press releases by electronic means in the first instance, it does not follow that the alternative one-year retention period applies. Distribution by the wire services is merely the beginning of a pipeline of information that is intended to find its way into all kinds of mass media, including not only web sites and social networks but also newspapers, magazines and trade journals. Accordingly, the press releases at issue do not appear to constitute "computer-accessed communication[s]" subject to the alternative one-year retention period.

10. We reach a different conclusion as to the tweets. These are disseminated by computer and resemble the examples in Rule 1.0(c). It is conceivable that the tweets could ultimately be reproduced in a newspaper or some other non-electronic format, but that is not their intended route of distribution. The tweets are therefore computer-accessed communications, and their retention is required only for one year.

11. Rule 7.1(f) provides that advertisements must be labeled as "Attorney Advertising" unless they appear in certain specified media such as newspapers, radio, television, or billboards, or are "made in person pursuant to Rule 7.3(a)(1)." We next consider the applicability of Rule 7.1(f) to the tweets described in the inquiry.[2]

12. The tweets do not appear in any of the media that are explicitly exempted from the labeling requirement in Rule 7.1(f). They would be exempt only if they constituted advertisements "made in person pursuant to Rule 7.3(a)(1)." That provision generally prohibits certain forms of interactive solicitation—those made in person, by telephone, or by "real-time or interactive computer-accessed communication"—but allows those otherwise prohibited forms when "the recipient is a close friend, relative, former client or existing client." For present purposes, we need not determine the precise scope of this exemption from the labeling requirement.[3] Even if the exemption can apply to real-time or interactive computer-accessed communication, the tweets in question do not appear to come within that category. See *infra* ¶22. And even if they did, the exemption would still not apply. The inquirer has not suggested that access to the tweets would be limited to existing or former clients, or friends and relatives, nor does such a limitation seem plausible given the goal of directing potential new clients to the press releases. Because the tweets would not be in any of the categories exempted from Rule 7.1(f), they would need to include the "Attorney Advertising" label.

B. Solicitation Issues Under Rule 7.3

13. The threshold question is whether the press releases and tweets are "solicitations," a term defined in relevant part as

> any advertisement [1] initiated by or on behalf of a lawyer or law firm [2] that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, [3] the primary purpose of which is the retention of the lawyer or law firm, and [4] a significant motive for which is pecuniary gain.

Rule 7.3(b) (numbering added); *see* Rule 7.3, Cmt. [2] (elaborating on the four elements).

14. We have already noted (*supra* ¶7) that the press releases and tweets are advertisements, the primary purpose of which is to obtain retention of the lawyer or firm. It is also clear from the inquiry and the context that the press releases and tweets are initiated by or on behalf of the lawyer or law firm, and are motivated by desire for pecuniary gain. Whether they are solicitations thus depends on whether they are "directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives."

15. The Comments to Rule 7.3 point out a few ways in which communications can be directed to, or targeted at, specific recipients. First, they can be directed to specific recipients by their mode of transmission (such as through telephone calls,

mail, email, or in-person contact), which is not the case here. *See* Rule 7.3, Cmt. [3].

16. "Second, an advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers." Rule 7.3, Cmt. [3]. This is an exception to the general rule that "an advertisement in public media such as newspapers, television, billboards, web sites or the like is presumed not to be directed to or targeted at a specific recipient or recipients." Rule 7.3, Cmt. [4]. This exception is triggered by reference to people with legal needs arising from a "specific incident," which is "a particular identifiable event (or a sequence of related events occurring at approximately the same time and place) that causes harm to one or more people." Rule 7.3, Cmt. [5]. The harm caused by a "specific incident" to which a solicitation relates will often be physical but may also be economic.[4]

17. Third, an advertisement in a public medium that is aimed at a specific group of people, such as those injured by a defective medical device or medication, is a solicitation even if the potential claimants were injured "over a period of years." In such cases the claims arise "at disparate times and places" and do not relate to one specific incident so as to trigger the "blackout" provisions of Rule 7.3(e). Nonetheless, the advertisements are solicitations because they make reference to, and are "intended to be of interest only to," the potential claimants. Rule 7.3, Cmt. [6].

18. An advertisement in a public medium, seeking retention and pecuniary gain, *does not* become a solicitation "simply because it is intended to attract potential clients with needs in a specified area of law" such as shareholder litigation. *See* Rule 7.3, Cmt. [4]. But the advertisement *does* become a solicitation if it is directed to or targeted at the specific group of recipients who held shares in a particular company on particular dates. From the sample press releases submitted with the inquiry, it appears that at least some refer to a "specific incident" in the management of the companies in question, and to groups of shareholders whose legal needs, the advertisements suggest, arise out of that specific incident. But even if a shareholder suit alleges misconduct too extended in time and place as to constitute a single incident, it can nevertheless be described in a press release that makes reference to, and is "intended to be of interest only to," the potential claimants. Accordingly, the press releases and tweets at issue here are "solicitations" subject to the requirements of Rule 7.3.

19. A filing requirement applies to solicitations that are "directed to a recipient in this State." Rule 7.3(c); *see* Rule 7.3(c), Cmt. [8] ("Solicitations by a lawyer admitted in New York State directed to or targeted at a recipient or recipients outside of New York State are not subject to the filing and related requirements set out in Rule 7.3(c)."). If a press release or tweet is targeted at the shareholders of a particular company, the lawyer may or may not know those shareholders' identities and residences. A lawyer's solicitation is not "directed" to a New York recipient if the lawyer has no reason to be aware that New York residents are in fact among the target audience. But Rule 7.3(c) would apply if the lawyer knows that the intended audience includes any New York residents, or if the existence of such persons would be apparent from the size or nature of the company. *Cf.* Rule 1.0(k) ("A person's knowledge may be inferred from circumstances.").

20. The remaining issue is whether the tweets violate the rule that prohibits solicitation through certain interactive forms of contact. A lawyer may not engage in solicitation "by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client." Rule 7.3(a)(1). The policy is one of protecting potential clients:

> Paragraph (a) generally prohibits in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients. For example, in-person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner.

Rule 7.3, Cmt. [9].

21. As noted in ¶12 *supra*, it does not appear that the tweets would go only to close friends, relatives, former clients or existing clients. Accordingly, the tweets would be impermissible if they were to constitute "real-time or interactive computer-accessed communication." The tweets do constitute computer-accessed communications, see ¶10 *supra*, but that leaves open the question whether those communications are also "real-time or interactive." This concept is addressed in Comment [9] to Rule 7.3:

> Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a web site that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication.

22. Our understanding is that the broadly distributed tweets contemplated here, as currently used and in contrast to instant messaging or chat rooms, generally do not involve live responses. In that sense the tweets are more like ordinary email or web site postings. Because the tweets should not be considered real-time or interactive communication, Rule 7.3 does not prohibit them.

Conclusion

23. The subject press releases and tweets constitute "advertisements" and are thus subject to retention requirements. Copies of the press releases must be retained for three years. The tweets must be labeled "attorney advertising" and copies must be retained for one year. The press releases and tweets also are "solicitations" and are thus subject to filing requirements if directed to recipients in New York. The tweets are not prohibited by the rule against interactive solicitation.

Endnotes

1. The inquiry notes that the proposed conduct has connections to jurisdictions other than New York: the inquirer's firm is based in another state, and the companies involved in the derivative suits, and the lawsuits themselves, may be in any state. Although the inquirer is admitted to practice only in New York, in some circumstances ethics rules from other jurisdictions could apply. If the advertising and solicitations in question are "in connection with" a proceeding that has already been filed in court in a jurisdiction other than New York, and the inquirer has been admitted to practice before that court for purposes of that proceeding, then that jurisdiction's ethical rules would govern unless the rules of the court provide otherwise. *See* Rule 8.5(b)(1). But when there is not yet any particular forum for a lawsuit, the New York rules will generally apply to the inquirer's conduct (no matter where the firm is based), because the inquirer is licensed to practice only in New York. *See* Rule 8.5(b)(2)(i). And of course New York rules will also apply to the inquirer's conduct as to any lawsuit that has been filed in New York. In this opinion we limit our analysis to the latter two situations and apply the New York rules of ethics. We also note that beyond the general provisions of Rule 8.5, one of the Rules at issue here includes more specific provisions as to its own applicability. *See* Rule 7.3(c) (discussed *infra* ¶19) and Rule 7.3(i).
2. Whether *press releases* must be labeled as attorney advertising may depend on the circumstances. *See* Rule 7.1, Cmt. [5] (explaining that the label is not necessary for advertising in newspapers or on television or for "similar communications that are self-evidently advertisements," such as "press releases transmitted to news outlets" as to which there is no risk of confusion). The inquirer has already chosen to apply the label to the press releases in question, and has not asked us whether such labeling is required, so we do not opine on that issue.
3. Read literally, the exemption could apply only to those solicitations that are permissible under Rule 7.3(a)(1) even though they are made "in person." However, the exemption has also been read more broadly to apply to *all* solicitations permitted under Rule 7.3(a)(1), including those by real-time or interactive computer-accessed communication. *See Simon's New York Rules of Professional Conduct Annotated* 1377 (2013 ed.).
4. "Specific incidents *include* such events as traffic accidents, plane or train crashes, explosions, building collapses, and the like." Rule 7.3, Cmt. [5] (emphasis added). But as quoted above, this comment also includes more general language explaining that—for purposes of the definition of solicitation— a specific incident occurs when events closely connected in time and place cause "harm." Comment [5] also refers to "a specific incident involving potential claims for personal injury or wrongful death," but that reference is for the different purpose of describing the scope of the 30- and 15-day "blackout" provisions of Rule 7.3(e), which are explicitly limited to such claims.

(14-14)

* * *

Opinion 1010 (7/21/2014)

Topic: Advertising; second opinions

Digest: A firm may advertise that it provides second opinions to represented parties.

Rules: 4.2(a), 7.1, 7.3

Facts

1. The inquirer is a member of a law firm that advertises via public media including radio. The firm proposes to inform the public that it is available to provide second opinions on pending legal cases on which individuals are already represented. Specifically, the firm proposes to include in its advertisements language such as: "If you are unhappy with your current attorney, you can call [ABC Law Firm] to discuss your matter."

Question

2. May a law firm advertise its availability to provide second opinions as to pending legal cases on which individuals are already represented?

Opinion

3. We first consider the "no-contact rule" set forth in Rule 4.2(a) of the New York Rules of Professional Conduct (the "Rules"), which states:

> In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the mat-

ter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

4. This rule applies only to communications made by a lawyer in the course of "representing a client." It does not apply, therefore, to the communications proposed by the inquirer, by which the inquirer's firm would seek to obtain new clients in matters in which the firm is not already involved. *Cf.* Rule 4.2, Cmt. [4] (noting that the Rule does not preclude "communication with a represented party or person who is seeking advice from a lawyer who is not otherwise representing a client in the matter"). Accordingly, the proposed communications are not subject to Rule 4.2(a). *Accord* Florida Opinion 02-5 (2003) (citing opinions from several jurisdictions).

5. The proposed communications are, however, subject to restrictions on legal advertisements. *See* Rule 1.0(a) (defining "advertisement" generally to include "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm"). These restrictions include, among other things, prohibition of statements or claims that are false, deceptive or misleading, Rule 7.1(a)(1); limitations on paid endorsements and fictionalized portrayals, Rule 7.1(c); in some media, a requirement to label as attorney advertising, Rule 7.1(f); a requirement to include certain information identifying the advertiser, Rule 7.1(h); and pre-approval and retention requirements, Rule 7.1(k).

6. It does not appear from the face of the inquiry, or from the illustrative sentence quoted in paragraph 1 above, that the proposed advertisement would contain any false, deceptive or misleading statements or claims. A more definitive conclusion would require consideration of the entire actual advertisement in relation to terms of the representation available to the advertisement's recipients.[1] But if the advertisement as a whole and in context is not false, deceptive or misleading, and if it complies with the other requirements such as pre-approval and retention for required periods, then Rule 7.1 would not preclude its use.

7. Rule 7.3 contains further restrictions applying only to those advertisements that are also solicitations. The Rules define "solicitation" to include

> any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.

Rule 7.3(b) (but excluding writings delivered in response to a specific request); *see* N.Y. State 1009 ¶13 (2014) (discussing elements of this definition).

8. "[A]n advertisement in public media such as newspapers, television, billboards, web sites or the like is a solicitation if it makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers." Rule 7.3, Cmt. [3]. But an advertisement in public media that does not make such reference "is presumed not to be directed to or targeted at a specific recipient or recipients" even if "it is intended to attract potential clients with needs in a specified area of law." Rule 7.3, Cmt. [4].

9. Thus, if the proposed advertisements were to refer explicitly to a specific incident and to a specific group of people with legal needs arising out of that incident, then the advertisements would be subject to restrictions on solicitations that are set forth in Rule 7.3.[2] But it does not appear from the inquiry that the advertisements would include such references. In that case, they would not be solicitations and Rule 7.3 would not apply.

10. The inquiry seeks guidance only as to the propriety of the proposed advertisements. Accordingly, we do not address the application of ethical rules to what the lawyer may say in a meeting resulting from a prospective client's response to the advertisement.

Conclusion

11. A firm may advertise that it is available to provide second opinions on pending legal cases on which individuals are already represented.

Endnotes

1. For example, the advertisement may not mislead as to the costs of seeking a second opinion or the additional costs, if any, that may be incurred by changing attorneys. Considerations bearing on the possibility of such additional costs may include but are not limited to the import of contingent fee arrangements and work that may need to be reconsidered or redone if a new strategy is adopted. Moreover, if a represented person contacts the inquirer about taking over an existing representation, whether as a result of the advertisement or otherwise, then the inquirer may need to address such considerations. *See* Rule 1.5(b) (requiring lawyer to communicate "the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible").

2. *See*, *e.g.*, Rule 7.3(a)(2)(v) (prohibiting solicitation when lawyer intends but does not disclose that legal services will be performed primarily by a different and unaffiliated lawyer); Rule 7.3(c) (setting forth filing requirements); Rule 7.3(h) (requiring inclusion of certain information about the soliciting lawyer). Additional restrictions apply to solicitations relating to a specific incident

involving potential claims for personal injury or wrongful death. *See* Rule 7.3(e) & Cmt. [5].

(4-14)

* * *

Opinion 1011 (7/29/2014)

Topic: Duty to remedy fraudulent submissions to administrative agency

Digest: Duty under Rule 3.3 to remedy false statements made to a "tribunal" does not apply to applications for visas or work permits, though other rules may apply.

Rules: 1.2(d), 1.6, 3.3, 4.1, 8.5(b)

Facts

1. The inquirer is a New York attorney representing a corporate client (the "Employer," or the "Corporation") in matters related to immigration benefits. In the course of the representation, the inquirer filed several employment-based immigrant visa petitions with the Department of Labor, and related petitions with the Department of Homeland Security, in order to obtain the appropriate visas for foreign workers allowed to accept full-time employment in the United States when no U.S. worker is able to fill the position.

2. The application process required the Corporation to certify that it undertook sufficient efforts to locate a U.S. worker qualified for and willing to accept the position before offering the position to a foreign worker. As another required part of the visa petitions, an employee of the Corporation (the "Corporate Recruiter") signed and submitted attestations regarding the various methods of local recruiting the Corporation had supposedly undertaken. Relying on the Corporate Recruiter's assurances, the inquiring lawyer signed each application and submitted them to the Department of Labor. In each instance, the Department of Labor certified each application, at which time the lawyer prepared and filed related petitions with the Department of Homeland Security, which incorporated the applications certified by the DOL, to obtain permanent resident status for the foreign workers.

3. After the submission of these applications, and after some of the foreign workers acquired permanent resident status, the Corporation discovered that its employee, the Corporate Recruiter, had submitted knowingly false attestations.

4. Upon learning of this misconduct, the inquiring lawyer withdrew from representation of the Employer in connection with the applications that were filed but not resolved and in connection with similarly tainted documents that the lawyer had prepared but had not filed, and urged the Employer to disclose the conduct to the federal agencies. The Employer has refused to give the lawyer consent to disclose information regarding the fraudulent conduct to the federal agencies, claiming that the information is privileged and confidential.

Question

5. Where an attorney learns of misconduct by an employee of a client that resulted in both the client and the attorney making false representations to a government agency in an application for a foreign-workers' visa, does Rule 3.3(b) require the attorney to disclose the underlying misconduct to the federal agency that granted the visa if the client declines to do so?

Opinion

The New York Rules of Professional Conduct Apply

6. The inquiry concerns conduct before a federal agency with its own rules of professional conduct. *See* 8 C.F.R. § 1003.102. The choice-of-law provisions in Rule 8.5 of the New York Rules of Professional Conduct (the "Rules") distinguish between an attorney's "conduct in connection with a proceeding in a court," Rule 8.5(b)(1), and "any other conduct," Rule 8.5(b)(2). For conduct in connection with a proceeding in a court, "the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise." Rule 8.5(b)(1). For all other conduct, if "the lawyer is licensed to practice only in this state"—as is the case here—"the rules to be applied shall be the rules of this state." Rule 8.5(b)(2).

7. Rule 8.5(b)(1) is limited to a proceeding before "a court"; the New York Appellate Division declined to adopt a proposed version of the rule that would have extended it to govern conduct in connection with proceedings before any "tribunal." *See* N.Y. State 968 ¶6 (2013) ("we do not believe we are free to read 'court' in Rule 8.5(b)(1) to include administrative tribunals"). We discuss below whether consideration of a visa application is a proceeding before a "tribunal," but it is clearly not a proceeding before a "court." *See* N.Y. State 750 (2001) (conduct of attorney "who represents individuals in immigration matters" is conduct that "does not involve court proceedings"). Accordingly, Rule 8.5(b)(2) governs, and the conduct is subject to the New York Rules of Professional Conduct.

8. Attorney conduct rules of the federal agencies involved, such as those cited above, could also be relevant to the inquirer's obligations. For example, the rules of professional conduct for practitioners before the Executive Office for Immigration Review provide: "If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures." 8 C.F.R § 1003.102(c); *see* 8 C.F.R § 1001.1(i) (defining "practice" to include acts of any person appearing in a case through "the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board"). However, our jurisdiction is limited to interpreting the New York Rules. We thus analyze the inquirer's ethical obligations under those Rules, but we express no view as to whether those obligations are modified or supplemented by ethics rules of the agencies in question.

Rule 3.3 Does Not Apply to False Statements in an Administrative Immigration Proceeding

9. Rule 3.3, which is entitled "Conduct Before a Tribunal," addresses a lawyer's obligations upon learning that evidence provided to a "tribunal" was false. In relevant part, Rule 3.3 provides:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; …or
>
> (3) offer or use evidence that the lawyer knows to be false. If 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, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.…
>
> (b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

10. Of central importance here, Rule 3.3(c) requires that a lawyer take such remedial measures "even if compliance requires disclosure of information otherwise protected by Rule 1.6." That is, the duty to remedy false statements of fact or law made to a tribunal, or false "evidence" presented to the tribunal, can override the lawyer's duty of confidentiality to a client.

11. In contrast to Rule 8.5(b)(1), which is limited to proceedings before a "court," Rule 3.3 applies broadly to false statements made to any "tribunal." Rule 1.0(w) defines the term "tribunal" as follows:

> "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

12. We have previously offered the following general criteria to help guide analysis of whether a particular administrative proceeding is sufficiently adjudicative to qualify as a "tribunal":

> (a) Whether specific parties will be affected by the decision;
>
> (b) Whether the parties have the opportunity to present evidence and cross examine other providers [of] evidence; and
>
> (c) Whether the ultimate determination will be made by a person in a policy-making role or by an independent trier of fact, such as an administrative law judge.

N.Y. State 838 ¶12 (2010).

13. Based on the facts provided to us, we conclude that the immigration proceedings at issue here do not qualify as proceedings before a "tribunal." The ordinary meanings of the words "tribunal" and "adjudication" do not encompass an administrative procedure involving a unilateral application for a benefit. In ordinary parlance, the material presented with such an application, although attested to "under penalty of perjury," is not "evidence," and the answers to the questions in the required forms are not "legal argument," both terms used in the Rule's definition of "tribunal." There is also no adverse party, no oral proceeding and no cross-examination, which are hallmarks of many adjudicative proceedings. The consular officers and other government officials who consider these applications, while they presumably endeavor to administer the laws in an impartial and conscientious way, would not be called "triers of fact,"

another common feature of adjudicative proceedings to which we pointed in N.Y. State 838. We do not say that unilateral proceedings may never be adjudicative—the Rule expressly contemplates that an adjudication may result from a proceeding in which there is "presentation of evidence or legal argument by a [single] party." But the visa and work permit proceedings at issue here do not meet the test.

14. Two ABA ethics opinions have reached a similar conclusion with respect to administrative proceedings, although each involved proceedings that were more akin to investigations than those here. ABA 93-375 advised that a "routine bank examination" should not "be considered an 'adjudicative proceeding' so as to bring into play the lawyer's duty of candor under Rule 3.3(b)."[1] The opinion relied on a prior ABA opinion that had held, for purposes of predecessor rules, that the Internal Revenue Service was "neither a true tribunal, nor even a quasi-judicial institution," at least when settling tax cases. ABA 314 (1965) (withdrawn on other grounds by ABA 85-352). Professor Wolfram concludes that a patent application, which is in some respects similar to the visa applications at issue here, is "a substantially nonadjudicatory proceeding" for purposes of a predecessor to Rule 3.3 in which "tribunal" was similarly defined to mean "all courts and all other adjudicatory bodies." Wolfram, *Modern Legal Ethics* § 12.6.5, at 673-74 (1986). He notes that "many administrative agencies can be regarded as 'adjudicatory bodies' only if the concept of adjudication is taken very far from its judicial roots" and that the "adjudicatory model" involves "adversarial presentation of two points of view." *Id.*

15. We are aware of contrary authority. In particular, three courts have found applications for a visa or other government benefit to be proceedings before a "tribunal" for purposes of Rule 3.3, but none explained its analysis. In *In re Vohra*, 68 A.3d 766, 781-82 (D.C. 2013), the District of Columbia Court of Appeals affirmed a conclusion that the District of Columbia's version of Rule 3.3 applied to an attorney who forged his clients' signatures on a visa application, but the attorney did not dispute the finding that the Rule applied, and the violation of Rule 3.3 was one of approximately a dozen rules that the underlying disciplinary board had found to have been violated.[2] In *Matter of Bihlmeyer*, 515 N.W.2d 236 (S.D. 1994), the South Dakota Supreme Court found that statements made to the Industrial Commissioner of Iowa regarding the attorney's fee arrangement in an application for a lump-sum payment on a worker's compensation claim were also "before a tribunal" for purposes of Rule 3.3, but the attorney there also had admitted that the rule applied. In *In re Disciplinary Proceeding Against Conteh*, 284 P.3d 724 (Wash. 2012), the Washington Supreme Court found a lawyer's misrepresentation of his own employment history in his asylum application to be a violation of Rule 3.3, but the opinion does not discuss whether the application was made before a "tribunal." *See also* Hazard & Hodes, *The Law of Lawyering* § 29.3, at 29-7 (2007 Supp.) (stating, without citing authority, "Rule 3.3(d) applies to such matters as applications before the Patent Office and other *ex parte* presentations").

16. In addition, while not determinative of the ethics question, we note that Congress, in creating the Bureau of Citizenship and Immigration Services, referred to one of the functions being transferred from the Immigration and Naturalization Service as "[a]djudications of immigrant visa petitions." 6 U.S.C. § 271(b)(1). This is in line with the Administrative Procedure Act, which treats "licensing" as "adjudications." 5. U.S.C. § 551(6), (7).[3]

17. We are not persuaded by these authorities. We are concerned that interpreting the terms "tribunal" and "adjudicatory" to apply to unilateral applications for government benefits would lay a trap for the unwary, because such an application would, as Professor Wolfram notes, take the term "adjudicative" "very far from its judicial roots." Wolfram, *supra*, at 673-74. There may well be, as Professor Wolfram also notes, *id.*, policy reasons that duties of candor should apply with even more rigor in unilateral proceedings. But the drafters of the Rules were conscious of the very strong countervailing force of a lawyer's duty of confidentiality. The circumstances in which a lawyer is required to override that duty are thus very limited. Indeed, the New York Rules do not contain the one other rule in the ABA Model Rules in which the lawyer has an obligation to disclose false testimony, Rule 3.9. ABA Model Rule 3.9 states that a lawyer representing a client "before a legislative body or administrative agency in a nonadjudicative proceeding…shall conform to the provisions of Rules 3.3(a) through (c) …." New York's version of that Rule omits the duty to conform to Rule 3.3 and does not does not address the question of correcting false statements.

18. A Comment to the ABA version of Rule 3.9 also supports the conclusion that administrative proceedings such as those at issue here are not "adjudications" for purposes of ABA Model Rule 3.3 (which served as the model for New York's Rule 3.3). Comment [3] provides that Rule 3.9 applies only when the lawyer or the lawyer's client "is presenting evidence or argument. *It does not apply to representation of a client* in a negotiation or other bilateral transaction with a governmental agency

or *in connection with an application for a license or other privilege* or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns." ABA Model Rule 3.9 Comment [3] (emphasis added). The Comment thus appears to consider "applications for a license or other privilege" not to involve the presentation of "evidence or argument." As quoted above, the definition of "tribunal" indicates that the presentation of "evidence or legal argument" is one of the required elements of adjudication.

Other Rules or Law May Permit, or Even Require, Disclosure of the False Statements

19. The inquirer asks only about the obligation to correct false statements under Rule 3.3. We note, however, that even if, as we conclude above, Rule 3.3 does not apply to *require* disclosure of the false statements here, Rule 1.6(b)(3) *permits* a lawyer to reveal confidential obligation to the extent that the lawyer reasonably believes necessary

> to withdraw a written or oral opinion or representation previously given by 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 forms that we understand the inquirer submitted each require that the "preparer" of the form certify that the information contained in the forms is true to the best of the preparer's knowledge. If the inquirer reasonably believes that the relevant federal agencies are continuing to rely upon any certification that the inquirer may have made, or that such certification is being used to further a crime or fraud, then Rule 1.6 permits (but does not require) him to withdraw that certification.

20. In addition, Rule 1.6(b)(6) permits disclosure of confidential information to the extent a lawyer reasonably believes necessary "when permitted or required under these Rules or *to comply with other law* or court order." (Emphasis added.) Thus, for example, if the federal rule noted in paragraph 8 above (8 C.F.R § 1003.102(c)) requires that the inquirer take action to remedy the false statements here, and the inquirer reasonably concludes that disclosure of confidential information or withdrawal of his certification is necessary to comply with that obligation, then such disclosure or withdrawal would not violate Rule 1.6. However, any such "disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose." Rule 1.6, Cmt. [14].

21. Further, Rule 1.2(d) provides that a lawyer generally shall not assist a client "in conduct that the lawyer knows is illegal or fraudulent," and Rule 4.1 provides that a lawyer, in representing a client, "shall not knowingly make a false statement of fact or law to a third person." A comment notes that "[s]ometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like." Rule 4.1, Cmt. [3]. We do not express any view on whether silence in the present circumstances could be deemed to be a continuing affirmative statement of fact such as to *require* correction. *Cf.* D.C. Ethics Op. 336 (2006) (opining that when incapacitated person gave false name and social security number, and court-appointed guardian used that information to obtain benefits and learned later that the information was false, withholding those facts in periodic reports to the court "would likely constitute a 'circumstance[] where the failure to make a disclosure is the equivalent of an affirmative misrepresentation'" for purposes of Rules 3.3 and 8.4).

Conclusion

22. The lawyer's conduct is subject to the New York Rules of Professional Conduct. The immigration proceedings at issue here do not constitute adjudicative proceedings before a "tribunal" so as to trigger the lawyer's obligations under Rule 3.3. The lawyer should consider, however, whether obligations may by imposed by other ethics rules including rules of the federal agencies involved.

Endnotes

1. The ABA opinion predates the inclusion of the definition of "tribunal" in the ABA Model Rules, but the ABA committee viewed Rule 3.3 as applying to an "'adjudicative proceeding' before a 'tribunal,'" a view derived from the contrast to Rule 3.9, which applies to "nonadjudicative proceedings." The opinion thus predicted the definition of "tribunal" that was later adopted.
2. The D.C. definition of "tribunal" is different from New York's, although the gist of the test appears to be similar. In place of the term "adjudicative capacity," the D.C. rule defines "tribunal" to be "a court, regulatory agency, commission, and any other body or individual authorized by law to render decisions of a *judicial or quasi-judicial nature*, based on information presented before it, regardless of the degree of formality or informality of the proceedings." *See* Report and Recommendation of Hearing Comm. No. 1, *In the Matter of Robert N. Vohra*, Bar Dkt. 324-06, at 42 n.6 (Aug. 9, 2011) (emphasis added).
3. Issuance of a visa appears to be a form of "licensing," which is defined as, among other things, the grant of "an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." 5 U.S.C. § 551(8)-(9).

(23-14)

* * *

Opinion 1012 (7/30/2014)

Topic: Conflicts arising from limited-services pro bono representation

Digest: A lawyer who represents a client in a limited pro bono legal services program owes a continuing duty of confidentiality to that client, and is precluded from later representing a materially adverse client in the same or a substantially related matter if the lawyer has actual knowledge of the unwaived conflict, but conflicts arising from participation in such a program are not imputed to others in the lawyer's firm.

Rules: 1.6, 1.7, 1.9, 1.10, 5.1, 6.5

Facts

1. The inquirer is the managing attorney of a county bar association legal services project. The bar association sponsors a legal services corporation that runs a limited pro bono legal services program (the "Program"). A lawyer who volunteers in such a program (a "Participating Lawyer") renders advice to individual clients (the "Program Clients") in a clinic setting on subjects such as landlord/tenant, domestic violence, family court and pro se federal court matters. The services are completed in one evening and often involve referral to another agency to assist the Program Client. After that evening, the Participating Lawyer does not provide any additional services to, or have any continuing relationship with, the Program Client.

2. Participating Lawyers typically volunteer their services three to four times per year. The Program advises the Program Clients that the services are limited to addressing one problem and that the lawyer rendering the limited service will not provide any further services to the client. The rights and responsibilities of the Program and the Program Client, including the limited nature of the representation, are set forth in a written agreement signed by the Program and the Program Client, and the Program retains that written agreement.

Questions

3. If a lawyer has represented a client in a limited pro bono legal services program, may that same lawyer later represent another client with interests materially adverse to the Program Client in the same or a substantially related matter?

4. If a lawyer in a firm has represented a client in a limited pro bono legal services program, may another lawyer associated in the same firm represent a client with interests materially adverse to the Program Client in the same or a substantially related matter?

Opinion

5. The inquiry is governed by Rule 6.5 of the New York Rules of Professional Conduct (the "Rules"). That rule's precursor, ABA Model Rule 6.5, was adopted in 2002 based on a proposal by the ABA Ethics 2000 Commission. The ABA proposal addressed conflict-checking requirements in the context of providing short-term limited representation under the auspices of a volunteer legal services project operated by a local bar association. The concern underlying the ABA rule was that "strict application of the conflict-of-interest rules may be deterring lawyers from serving as volunteers in programs in which clients are provided short-term limited legal services." Report of the ABA Ethics 2000 Commission, quoted in *Simon's New York Rules of Professional Conduct Annotated* 1314 (2013 ed.). In New York, prior to the adoption of Rule 6.5 in 2007, Rule 1.10(e) required a lawyer advising a client in a limited-services program to do a firm-wide conflicts check even though such programs "are normally operated under circumstances in which it is not feasible for a lawyer to utilize the conflict-checking system required by Rule 1.10(e)" before providing the limited kinds of services that such programs provide. Rule 6.5, Cmt. [1].

6. New York adopted a version of Rule 6.5 in 2007, using language slightly different from the ABA Model Rule. The current New York Rule 6.5 applies to a lawyer who provides short-term limited legal services under the auspices of a program sponsored by a bar association or certain other kinds of entities.[1]

7. Rule 6.5 provides in part that such a lawyer is required to comply with certain conflicts rules—namely, Rules 1.7, 1.8 and 1.9—"only if the lawyer has *actual knowledge* at the time of commencement of representation that the representation of the client involves a conflict of interest." Rule 6.5(a)(1) (emphasis added). It also provides that the lawyer is required to comply with the imputation provisions in Rule 1.10 "only if the lawyer has *actual knowledge* at the time of commencement of representation that another lawyer associated with the lawyer in a law firm is affected by Rules 1.7, 1.8 and 1.9." Rule 6.5(a)(2) (emphasis added). However, Rule 6.5 ceases to apply "if during the course of the representation, the lawyer providing the services becomes aware of the existence of a conflict of interest precluding continued representation." Rule 6.5(e).

8. Rule 6.5 is written from the perspective of the individual Participating Lawyer and addresses what the lawyer must consider when undertaking a limited-services assignment. It makes the usual conflicts rules inapplicable unless the Participating

Lawyer has "actual knowledge" that the representation of the client involves a conflict of interest.[2] In the absence of such actual knowledge, the lawyer does not need to make any further conflicts inquiry and may provide the short-term services.

9. The reason for relaxing the conflicts rules in this context is that "a lawyer who is representing a client in the circumstances addressed by [Rule 6.5] ordinarily is not able to check systematically for conflicts of interest." Rule 6.5, Cmt. [3]; *see* Rule 6.5, Cmt. [1], quoted in paragraph 5 *supra*. Thus the clear implication of Rule 6.5 is that a Participating Lawyer may undertake a limited-services representation without first consulting the conflict-checking system required by Rule 1.10(e). Moreover, while Rule 6.5 does not explicitly address what is required by Rule 1.10(e), we think it is within the fair import of the approach taken in Rule 6.5 that a limited-services representation does not require the Participating Lawyer or that lawyer's firm to enter the limited-services relationship into the firm's conflict-checking system.

A. Do the Usual Conflict Rules Apply to a Participating Lawyer?

10. The first question is whether the relaxed conflicts rules that apply to the Participating Lawyer *during* the provision of the short-term limited legal services also apply if a conflict between a Program Client and another client or prospective client arises (or is discovered) *after* the short-term representation has ended. Suppose, for example, that after the Participating Lawyer has finished rendering services in a certain matter to a short-term Program Client, a prospective client seeks to retain the Participating Lawyer in the same or a substantially similar matter, and the prospective client's interests in the matter are materially adverse to those of the Program Client. Does Rule 6.5 continue to apply? If not, then the lawyer would be subject to the more exacting conflict provisions that ordinarily apply.[3]

11. We believe that Rule 6.5 continues to relax the conflict rules in this situation until there is actual knowledge of a conflict. Our conclusion is based on the Rule's broad language, its policy of facilitating participation in limited legal services programs, and the lack of any provision explicitly terminating its application at the conclusion of the short-term representation. *See* Rule 6.5(b) (providing that except when conflict is imputed based on actual knowledge, Rules 1.7 and 1.9 "are inapplicable to a representation governed by this Rule").

12. Thus, when a prospective client seeks to retain the Participating Lawyer, and unknown to the Participating Lawyer there is a potential conflict arising from the lawyer's participation in the Program, the Participating Lawyer remains subject only to the relaxed conflict provisions of Rule 6.5(a)-(b). In other words, if the Participating Lawyer does not have "actual knowledge" of a conflict with the Program Client, then the Participating Lawyer may undertake the new representation.[4]

13. However, if at any time the Participating Lawyer comes to have actual knowledge that the prospective client is seeking representation in a matter that is the same as or substantially related to a matter on which the Participating Lawyer represented a Program Client, and that the interests of the two are materially adverse, then the relaxed conflict provisions of Rule 6.5(a)-(b) cease to apply. *See* Rule 6.5(e). At that point, the regular conflicts rules apply as usual, and the Participating Lawyer may not represent the prospective client absent the former Program Client's informed consent confirmed in writing. *See* Rule 1.9(a).

B. Are the Participating Lawyer's Conflicts Imputed to the Firm?

14. In the second question, the inquirer asks whether Rule 1.10(a), which imputes a lawyer's conflicts under certain rules to others associated in the same firm, would prohibit another member of the Participating Lawyer's firm from representing a client who has interests materially adverse to the Program Client in the same or a substantially similar matter.

15. In analyzing this question, we are again guided by the Rule's broad language and its policy of facilitating participation in short-term legal services programs. For such programs, Rule 6.5 not only limits the application of underlying conflict provisions such as Rules 1.7 and 1.9, but also—at least as to a Participating Lawyer—limits the application of the imputation provisions of Rule 1.10. *See* Rule 6.5(a)(2). We believe that just as applying a rigid imputation rule to a Participating Lawyer could unduly burden a firm's participation in such programs, so could undue burdens result from applying a rigid imputation rule to other lawyers in the Participating Lawyer's firm. And the rules do not by their terms explicitly mandate such imputation to other lawyers in the firm.[5]

16. Thus, if a new client seeks to retain the Participating Lawyer's firm in a matter that is the same as or substantially related to a matter on which the Participating Lawyer represented a Program Client, and there is known material adversity between the interests of the two, then Rule 1.10(a) will not preclude other members of

the firm from representing the new client, even though Rule 1.9(a) will preclude the Participating Lawyer from doing so absent proper waiver.[6] The same reasoning applies if the firm discovers that it is *already* representing a client in a matter that is the same as or substantially related to a matter on which the Participating Lawyer represented a Program Client, and that there is material adversity between the interests of the two. In that case too, the Participating Lawyer's conflict would not be imputed to other members of the firm, and those other members could continue the representation.[7]

17. Nothing about the limited nature of the Program modifies the Participating Lawyer's duties of confidentiality to the Program Client.[8] Thus, even when the Participating Lawyer or another lawyer in the firm may and does represent another client with materially adverse interests in a substantially related matter, the Participating Lawyer may not reveal confidential information of the former Program Client, or use confidential information of the former Program Client to that former client's disadvantage, except as permitted by Rule 1.9(c).

18. The ethical obligations arising from participating in the Program extend beyond the Participating Lawyer. All lawyers with management responsibility in the firm, and the firm itself, are required to make reasonable efforts to ensure that the lawyers in the firm conform to ethical obligations. *See* Rule 5.1(a), (b). Here, those obligations include (i) the Participating Lawyer's duty of confidentiality to the Program Client and (ii) the Participating Lawyer's duty to refrain from representing a client materially adverse to the Program Client when the Participating Lawyer actually knows of a conflict prohibiting such representation.

Conclusion

19. A lawyer who has represented a client in a limited pro bono legal services program is prohibited from subsequently representing a materially adverse client in the same or a substantially related matter only if the lawyer has actual knowledge of the conflict. Even if the lawyer has actual knowledge of such a conflict, however, the conflict is not imputed to others in the lawyer's firm. Whether or not anyone in the firm represents a client adverse to the limited-services client, the lawyer who represented the limited-services client remains bound by confidentiality obligations to that client.

Endnotes

1. "Short-term limited legal services" is defined to mean "services providing legal advice or representation free of charge as part of a program described in [Rule 6.5(a)] with no expectation that the assistance will continue beyond what is necessary to complete an initial consultation, representation or court appearance." Rule 6.5(c).

2. For example, if, at the outset of the consultation, the lawyer actually knows that the short-term representation would conflict with a current client under Rule 1.7 or with a former client under Rule 1.9, then the lawyer generally may not provide the short-term limited legal services. Likewise, if the lawyer obtains such actual knowledge during the course of the consultation, then the lawyer may not continue to provide the services.

3. If Rule 6.5 did not apply, the lawyer would be subject to the provisions in Rule 1.9 that govern conflicts relating to former clients. *See* Rule 6.5, Cmt. [1] (noting that in advice-only clinics and pro se counseling programs, "a client-lawyer relationship is established"); Rule 6.5, Cmt. [2] (stating that except as provided in Rule 6.5, the limited representation is subject to all the Rules, and citing as an example Rule 1.9(c), which applies to former clients). *But see Simon's New York Rules of Professional Conduct Annotated* 1321 (2013 ed.) (arguing that limited-service clients should enjoy only the protections accorded prospective clients under Rule 1.18 rather than the broader protections accorded former clients under Rule 1.9).

4. Of course it would still be necessary to consult the firm conflict-checking system to check for possible conflicts with current firm clients, and with former clients other than Program Clients. Rule 6.5 relaxes the requirement of using a conflict-checking system only with respect to short-term clients under that Rule; with respect to other former clients and current ones, Rules 1.7, 1.9 and 1.10(e) apply as usual.

5. So long as a possible conflict remains governed by Rule 6.5—which means that the application of that Rule has not been negated by actual knowledge under Rule 6.5(a) and (e)— then the possible conflict is not governed by Rule 1.7 or 1.9, and the literal terms of Rule 1.10(a) therefore do not impute any conflict. Rule 6.5 ceases to apply when the Participating Lawyer comes to have actual knowledge of a conflict, but the Rules do not explicitly provide in that case that Rule 1.10 springs back to apply to other lawyers in the firm. *Cf.* Rule 6.5(a)(2) (providing that in case of actual knowledge *the Participating Lawyer* shall comply with Rule 1.10); Rule 6.5, Cmt. [5] (Rule 1.10 does "become applicable" if the Participating Lawyer later undertakes to represent the Program Client "on an ongoing basis," meaning beyond the confines of the short-term program).

6. We have addressed only the situation in which the conflict is known to the firm. It is also possible, especially since conflict-checking systems are not required to include short-term clients, see paragraph 9 *supra*, that the firm would not discover the conflict. But in that case there would be no argument for imputation. *See* Rule 1.10(a) (providing that lawyers shall not "knowingly" represent a client whom an associated lawyer could not represent due to certain kinds of conflicts).

7. Of course Rule 6.5 affects only those conflicts that could arise as a result of a lawyer's participation in a short-term limited legal services program. If other lawyers in the firm have any direct or imputed conflicts arising from any other source, then Rule 6.5 would not alter their obligation to follow the normal rules governing conflicts of interest.

8. Confidentiality duties are defined by Rule 1.6 during the short time of the representation in the Program, and thereafter are defined by Rule 1.9(c). *See* Rule 6.5(d) (short-term limited legal services representation "shall be subject to the provisions of Rule 1.6"); Rule 6.5, Cmt. [2] (except as provided in Rule 6.5, all rules of legal ethics, "including Rule[ ] 1.6 and Rule 1.9(c), are applicable to the limited representation"). We decline to follow the alternative suggestion, see note 3 *supra*, that confidentiality duties should be only those that apply to prospective clients under Rule 1.18.

(20-14)

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