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ONEONONE

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

Message from the Chair

Richard Klass

This issue of *One on One* will be distributed by the time of the NYSBA Annual Meeting in January 2015. I am looking forward to the Annual Meeting of the General Practice Section even more this year as I am its Chair. I take a certain sense of pride in viewing our Section's *One on One* journal on the table outside of our meeting room. I encourage all of you to promote our journal throughout the Sections and enlist writers who wish to be published to submit articles.

The hot-button topic for the legal profession in New York State is the mandatory reporting of pro bono hours and donations to legal service organizations. While this is certainly an important issue, it may be more critical for the legal community to be more concerned with the status of employment within the legal profession. In a recent article in *Business Week* entitled "Jobs Are Still Scarce for New Law School Grads," the news is in: job prospects for law school graduates are not improving much, and the overall employment rate has fallen for six straight years. I can report that many members of our Section are very concerned about the viability of the legal profession as a business model for lawyers to pay off their student loans, build a law practice and be successful. Indeed, most of our Section's membership is comprised of people who are solo and small firm practitioners who had to "roll up the sleeves" to build their practices.

In the spirit of boosting and supporting lawyers, the General Practice Section is taking steps to help our member attorneys develop business opportunities and enhance their practices, as well as polish their skills. We hope that you will help our Section to continue taking those steps into 2015 and beyond.

This year, NYSBA launched its Pathways to the Profession program. This program is designed to de-

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velop law school programming to encourage law students to join bar associations both during law school and after graduation. The General Practice Section has appointed Paul O'Neill, Jr. and John Owens, Jr. as Co-Chairs of the Planning Committee, who are working on events to be presented at local law schools to highlight bar activities and promote bar membership.

In September, our Section held its Fall event—A Weekend in Saratoga—where members gathered in Saratoga Springs. Event Chair Seth Rosner put together a fantastic program which included an informative CLE program presented by Pery Krinsky on social media ethics and much-needed R&R events (Saratoga Wine & Food Festival, Automobile Museum, Racing Museum). The overall camaraderie of the weekend was great!

Current General Practice Section Chair Richard A. Klass presents award to Immediate Past Chair Lew Tesser for his service to the membership of the New York State Bar Association at the Executive Committee Meeting held on July 17, 2014, at the City Bar.

In November, we held our Manhattan Meet-and-Greet and CLE Program at Abigael's Restaurant. Event Chair Meyer Silber introduced a fine speaker, Lisa Solomon, on the topic of writing legal briefs for judges in the 21st Century entitled "Pixel Persuasion." This Spring, Event Chairs Elisa Rosenthal and Emily Franchina (our Chair-Elect) are planning a weekend event on the North Fork of Long Island.

One of the major benefits of being a member of the General Practice Section is the use of its list serve. On a daily basis, attorneys from all over the State and beyond exchange ideas, forms, questions and answers, and goings-on. It has become over the years its own online community. In that spirit, changes will be coming to the online community. As many of you are already aware, the New York State Bar Association has rolled out Communities, the next generation of its communications platform. The General Practice Section will be joining Communities where members will interact with each other as they have always done on the list serve. For more information, you can go to www.nysba.org/HowDoI.

Picking up where our Immediate Past Chair Lew Tesser left off, the General Practice Section is once again funding the General Practice Pro Bono Fund with a $10,000 donation to a legal services organization. Last year, the Volunteer Legal Services Project of Monroe County was the recipient of our Pro Bono Fund grant.

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.

Rich Klass

From the Editors

Richard Klass

Mental health law: Marianne Simoni provides the practitioner with guidance on navigating the SCPA Article 17-A proceeding by presenting a Step by Step Primer. This type of proceeding involves guardianship for mentally retarded and developmentally disabled people. This article is a must-read for those attorneys who are looking to become familiar with helping and representing this segment of our population.

Book reviews: We are lucky to feature two reviews of books relating to the legal field. The first review is by a former associate dean of Brooklyn Law School and law professor, Carol Ziegler. Carol's review is of the book by Joel Cohen, entitled "Blindfolds Off." This book peers into the minds of judges to see what they are thinking about and considering when deciding cases before them. The second review is by James Riley of O'Connell & Riley. James' review is of the book entitled "Devil in the Grove: Thurgood Marshall, the Groveland Boys and the Dawn of a New America." This book details the extraordinary efforts of Thurgood Marshall and his legal team in their representation of four black men accused of raping a white woman in central Florida in 1949.

Martin Minkowitz

Enforcement of judgments: An informative article by Elisa Rosenthal, Co-chair of the General Practice Section's Second Department Chapter, discusses the current status of New York State law regarding the enforcement of judgments against bank accounts maintained by debtors outside the State. There is mention of the old English common law rule called the "separate entity" rule, which provides that each branch of a bank is considered separate from the other. It also mentions more up-to-date case law involving jurisdiction over foreign bank accounts based upon centralized banking systems.

Cy pres: The doctrine of *cy pres* has been invoked when courts wish to allocate moneys to a designated charity/beneficiary. The use of cy pres is analyzed as applied to grants of residual funds from class action settlements in an article by GP Section Past Chair, Martin Minkowitz, and Lesley Rosenthal and Michael A. Wiseman.

Co-Editors Richard Klass and Martin Minkowitz
Associate Editor Matthew Bobrow

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http://www.nysba.org/GP

A Weekend in Saratoga: The Fall General Practice Section Event

The General Practice Section held its Fall 2014 weekend program on September 5th and 6th in Saratoga Springs. Seth Rosner, Event Chair and Past Chair of the GP Section, planned an especially fun and diverse weekend program for all of the attendees. Seth was proud to showcase all that Saratoga Springs has to offer to visitors.

The weekend started off with a Friday evening membership cocktail reception and dinner at The Brook Tavern, a lovely restaurant located close by the famous Saratoga Race Course. During the dinner, Cristine Cioffi, President of the New York Bar Foundation, thanked the General Practice Section for its generous donation to the Pro Bono fund in 2014.

She described the beneficial legal services carried on by the Bar Foundation to help New York State residents and, especially, the Volunteer Legal Services Project of Monroe County, which received the $10,000 grant from our Section.

On Saturday morning, all attorney attendees were treated to an unbelievably informative and interesting continuing legal education program entitled "Social Media Ethics." The speaker was Pery Krinsky, a well-known ethics attorney. Through a fascinating audio-video presentation, Mr. Krinsky outlined the various pitfalls of attorneys and gave helpful advice to the wary practitioner.

Following the CLE program, all attendees had several options for the rest of the day. A large portion of the group went to the annual Saratoga Wine & Food Festival. Another group went to visit the National Museum of Racing and Hall of Fame, learning all about horse racing in America. Another great museum visited by members of the group was the Saratoga Automobile Museum, which had a special exhibit on the 50th anniversary of the Ford Mustang.

The GP Section Fall weekend was a great social and educational event in which attorneys from all around New York State got together. Looking forward to next Fall's weekend event already!

Enforcing Judgments Against Bank Accounts Held Outside the State

By Elisa S. Rosenthal

New York Civil Practice Law and Rules (CPLR) Article 52 dictates the procedures that a judgment creditor must follow to exercise its rights to enforce a judgment entered in New York.

When both the judgment debtor and its assets are located within New York State, the procedure is fairly straightforward. When the assets of the judgment debtor are located outside of New York State, however, the ability to levy upon the judgment debtor's assets can be tricky.

There are several factors that both Federal and State courts in New York have considered in determining whether or not assets held in another state can be used to satisfy a New York judgment, including: (a) the "separate entity" rule; (b) jurisdiction; and (c) the type of proceeding.

The '"Separate Entity" Rule

The "separate entity" rule, one which was adopted from the old English common law, provides that each branch of a bank is considered to be a separate entity. The mere fact that a bank may have a branch inside of New York is insufficient to render accounts outside of New York subject to attachment by a New York court. See *Motorola Credit Corp. v. Uzan*, 288 F. Supp. 2d 558 (S.D.N.Y. 2003).

In 2009, the "separate entity" rule was loosened by the Court of Appeals, due to the computerization of bank information and centralized systems, *Digitrex, Inc. v. Johnson*, 491 F. Supp. 66 (S.D.N.Y. 1980). Indeed, in *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533 (2009), the New York State Court of Appeals held that the Legislature intended CPLR Article 52 to have extraterritorial reach when it amended CPLR 5224 (Consol. 2011) to facilitate the disclosure of materials located outside of New York to judgment creditors seeking to collect a judgment.

Following *Koehler*, courts facing similar issues wondered whether the "separate entity" rule had been completely abrogated by *Koehler*. See, e.g., *Global Tech., Inc. v. Royal Bank of Can.*, 34 Misc. 3d 1209(A) (N.Y. Sup. Ct. 2012), *Parbulk II AS v. Heritage Mar., SA*, 35 Misc. 3d 235 (N.Y. Sup. Ct. 2011). Subsequent decisions, particularly in the First Department, however, have held that if the Court of Appeals had intended to eliminate the "separate entity" rule, it would have, and that "any future exception to the "separate entity" rule would require a pronouncement from the Court of Appeals or an act of the Legislature." *Ayyash v. Koleilat*, 38 Misc. 3d 916, 924 (N.Y. Sup. Ct. 2012), *citing Nat'l Union Fire Ins. Co. v. Advanced Empl. Concepts, Inc.*, 269 A.D.2d 101 (N.Y. App. Div. 1st Dep't 2000).

In fact, several trial courts since *Koehler* have instead held by the traditionally well-settled rule that "in order to reach a particular bank account the judgment creditor must serve the office of the bank where the account is maintained." See, e.g., *Global Tech., Inc. v. Royal Bank of Can.*, 34 Misc. 3d 1209(A) (N.Y. Sup. Ct. 2012), *Parbulk II AS v. Heritage Mar., SA*, 35 Misc. 3d 235 (N.Y. Sup. Ct. 2011). The Court of Appeals' deliberate sidestepping[1] the issue of the "separate entity rule" in *Koehler* may be the impetus for its most recent determination in *Motorola Credit v. Standard Chartered Bank*, decided on October 23, 2014.

In a divided opinion, the Court of Appeals, in *Motorola*, affirmed the long-standing common law tenet of the "separate entity" rule, holding that "limiting the reach of CPLR 5222 restraining notice in the foreign banking context, the separate entity rule promotes international comity and serves to avoid conflicts among competing legal systems." *Motorola Credit v. Standard Chartered Ban*k, No. 162, NYLJ 1202674400477 at *11 (Oct. 23, 2014).

Jurisdiction

The Court of Appeals in *Koehler* analyzed the issue of jurisdiction in connection with judgment enforcement proceedings. The Court explained that since a post-judgment enforcement action is against a person, and the purpose of the proceeding is to force the person to convert property he owns into money for payment to a creditor, New York has the authority to order the holder of a judgment debtor's asset to turn over property of the judgment debtor held outside the state if the Court has personal jurisdiction over a judgment debtor. *Koehler*, 12 N.Y.3d at 540, citing Siegel, N.Y. Prac. § 510, at 866 [4th ed].

In *Koehler*, the plaintiff sought to enforce a domesticated foreign judgment as against the defendant by issuing a restraining notice to the Bank of Bermuda, which it asserted held stock on behalf of the defendant.

The Court established personal jurisdiction over the defendant based upon defendant's willingness to subject itself to the Court's jurisdiction without objection. The Court then determined that, based upon its in personam jurisdiction over the defendant, it can extend its reach to assets of the defendant, even when those assets are held outside of New York State, either in another state or another country. *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533 (2009). In fact, the Court in *Koehler* went so far as to hold that the broad language of CPLR Article 52 extends to the turnover of out-of-state assets held by a garnishee. *Id.* at 541.

Utilizing a jurisdictional analysis to determine whether the out-of-state assets of a judgment creditor can be turned over, as in *Koehler*, has precedential support. In *U.S. v. First Nat'l City Bank*, the case involved notice and levy of a federal tax lien upon all of the assets of an Uruguayan corporation. *U.S. v. First Nat'l City Bank*, 379 U.S. 378 (1965). The United States sought to foreclose its tax lien upon all sums held for the corporation in the Montevideo branch office of the bank. *Id.* The bank had been served with an injunction preventing the bank from transferring any assets of the corporation during the pendency of the foreclosure, but the corporation had not been served. *Id.* The U.S. Supreme Court held the bank "has actual, practical control over its branches; it is organized under a federal statute, which authorizes it to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons as one entity, not branch by branch. *Id.* The branch bank's affairs are, therefore, as much within the reach of the in personam order entered by the District Court as are those of the home office…" *Id.*

Although the determinations in *Koehler* and *First Nat'l City Bank* appear to put to bed the issue of New York's jurisdiction over out-of-state bank branches, there remains an important factor to address before determining whether, in fact, a judgment should, or needs to, be domesticated in a foreign state or whether New York can assert its jurisdiction. The remaining issue is determining whether the proceeding is an attachment proceeding, an injunction proceeding or a turnover/garnishment proceeding.

Collection Proceedings

Under New York law, there are several different ways in which a debtor's assets can be reached: (a) attachment; (b) turnover proceeding; and (c) restraining notice/execution.

Attachment

An attachment proceeding is a pre-judgment remedy involving the seizure of the defendant/debtor's property so that they are no longer able to use the property in order to ensure satisfaction of a prospective judgment. Attachment proceedings in New York are governed by CPLR Article 62, and as stated in *Koehler*, enable a court to have jurisdiction over the property rather than the person. *Koehler*, 12 N.Y.3d at 539 ("It is a fundamental rule that in attachment proceedings, the res must be within the jurisdiction of the court issuing the process in order to confer the jurisdiction.").

In *Abuhamda*, moneys were transferred from a bank branch located in New York to a branch in Jordan. *Abuhamda v. Abuhamda*, 654 N.Y.S.2d 11 (N.Y. App. Div. 1st Dep't 1997). The court held that it had the authority to order a preliminary injunction to direct the bank to freeze the account in Jordan, based upon the Supreme Court's ruling in *First Nat'l City Bank. Id.* The fact that the bank did business in New York State subjected the bank to its jurisdiction. *Id.*

Turnover Proceeding

A turnover proceeding is a post-judgment special proceeding, under CPLR Article 52, in which the judgment creditor may obtain an order from the court forcing a third party garnishee in possession of property belonging to the judgment debtor to turn the property over to the judgment creditor. The analysis performed in *Koehler* resulted in a determination that "a New York court with personal jurisdiction over a defendant may order him to turn over out-of-state property regardless of whether the defendant is a judgment debtor or garnishee."

In *Gryphon*, the plaintiff, through a turnover proceeding, sought to have assets of the defendant turned over to the plaintiff to satisfy the judgment issued against the defendant based upon its non-payment of guaranteed notes. *Gryphon Dom. VI, LLC v. APP Int'l. Fin. Co.*, 41 A.D.3d 25 (N.Y. App. Div. 1st Dep't 2007). The court held that New York had jurisdiction over the defendant based upon the language of the notes and that on the basis of the court's jurisdiction over the defendant it could order the turnover of assets held outside of New York. *Id.*

Although the Court of Appeals in *Koehler* appeared to give broad discretion to a judgment creditor in terms of its ability to enforce its judgment, in 2013 the Court narrowed the holding in *Koehler* in the case of Commonwealth of Northern Mariana Islands. *Commonwealth of Northern Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013).

In *Commonwealth of Northern Mariana Islands*, the issue became one of not just possession and custody, but of control over the judgment debtor's assets. *Id.* The Court held that the bank's parent company in Toronto maintained possession and custody over the judgment debtor's assets, not the subsidiary, and the fact that the holder of the assets controls the subsidiary was not suf-

ficient to "compel another entity, which is not subject to this state's personal jurisdiction, to deliver assets held in a foreign jurisdiction." *Id.*

Restraining Notices/Execution

A restraining notice or execution does not necessarily require court assistance or intervention. Once the court has issued a judgment, the judgment creditor may pursue collection of that judgment pursuant to the rules laid out in CPLR Article 52, including issuance of an income execution, a restraining notice upon a bank, or an execution issued to the Sheriff to levy upon property owned by the judgment debtor.

In *Global Tech.*, a restraining notice relative to a judgment was served upon a defendant, Royal Bank of Canada, on its New York branch. The court in *Global Tech.* discussed that "a party that seeks a restraining notice need only engage an attorney, who is authorized to issue a restraining notice as an officer of the Court. The court has no involvement with the issue of whether service of the retraining notice upon the garnishee comports with due process until the garnishee challenges the restraining notice…when serving a restraining notice of assets held outside the state, the restraining notice must be served upon the individual bank branches holding the assets of the judgment debtor, rather than the home office or a branch within the State of New York." *Global Tech., Inc. v. Royal Bank of Can.*, 34 Misc. 3d 1209(A) (N.Y. Sup. Ct. 2012).

The holding in *Global Tech.* has support in *Koehler* as well. In the court's analysis of CPLR 5225(a)-(b) (Consol. 1964), the court took special note of the how the authority is invoked; in CPLR 5225(a) the judgment creditor must file a motion to order the judgment debtor to turn over property in his possession, while CPLR 5225(b) requires a special proceeding by the judgment debtor over a garnishee who is not a party to the main action. See *Koehler*, 12 N.Y.3d at 541.

In *Motorola*, the issue with Standard Chartered Bank began when Motorola served a restraining order on the New York branch of the defendant, a foreign bank from the United Kingdom. Motorola argued that based upon Koehler, the separate entity rule was no longer valid law. Standard Chartered Bank disagreed, asserting the separate entity rule is essential in the realm of international banking. The Court of Appeals determination affirmed Standard Chartered Bank's position that "abolition of the separate entity rule would result in serious consequences in the realm of international banking." *Motorola v. Standard Chartered Bank* at *13.

In determining whether enforcement of a judgment against a judgment debtor against assets held outside of New York, a determination of the type of enforcement action must first be ascertained. If the judgment creditor prefers collection by a restraining notice, the "separate entity" rule applies, and the judgment should then be domesticated in the foreign jurisdiction in order to assert jurisdiction over the assets. Should the judgment creditor instead prefer to enforce its judgment by a turnover proceeding, the court can assert its authority over assets held outside of the state so long as the court has exercised its jurisdiction over the holder of the assets.

Endnote

1. "Notably absent from our deicsion in Koehler was any discussion of the separate entity rule." *Motorola Credit v. Standard Chartered Bank,* No. 162, NYLJ 1202674400477 at *9 [Oct. 23, 2014].

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Your First SCPA Article 17-A Proceeding: A Step by Step Primer

By Marianne A. Simoni

Consider the following scenario: potential new clients contact you and advise that their developmentally disabled daughter is turning eighteen soon. The clients ask if you would represent them in petitioning for guardianship on her behalf. This article is intended to provide specific guidance in navigating the Surrogate's Court Procedure Act ("SCPA") Article 17-A[1] guardianship proceeding for those practitioners who are not familiar with the process of petitioning the appropriate Surrogate's Court for guardianship pursuant to SCPA Article 17-A.

To Whom Does SCPA Article 17-A apply?

The first edition of Article 17-A of the Surrogate's Court Procedure Act, titled "Guardians of Mentally Retarded and Developmentally Disabled Persons" became effective in 1969.[2] Usually, the SCPA Article 17-A proceeding is a less expensive alternative to a guardianship proceeding commenced under Mental Hygiene Law Article 81. SCPA Article 17-A provides a method for the filing of a petition for guardianship of an individual with mental retardation or who is developmentally disabled (hereinafter sometimes referred to as the "Respondent"). For purposes of SCPA Article17-A, developmental disability includes cerebral palsy, epilepsy, neurological impairment, autism, traumatic head injury, dyslexia, or any other condition that results in a similar impairment to the individual's general intellectual functioning or adaptive behavior as that found in a mentally retarded person.[3] Except for the traumatic head injuries, all of the foregoing categories of developmental disabilities must have originated before the age of twenty-two.[4]

Who Can Be the Petitioner?

The petition can be brought on by "a parent, any interested person eighteen years of age or older on behalf of the mentally retarded or developmentally disabled person including a corporation authorized to serve as guardian…or by the mentally retarded or developmentally disabled person when such person is eighteen years of age or older."[5]

What Is Included in the Petition?

Once you have met with your clients and confirmed that the individual for whom guardianship is sought falls within either the developmentally disabled or mentally retarded diagnosis, then you can begin to prepare the requisite documents that comprise the petition. The New York Courts website, located at www.courts.state.ny.us, provides all of the forms required for petitioning for guardianship under SCPA Article 17-A. Moreover, the website includes a checklist which guides the practitioner through the jurisdictional and substantive requirements of the application.

The main components of the petition for guardianship are:

1. The verified Petition for Appointment of Guardian of the Person, Property, Person and Property or Limited Guardian of the Property;
2. Combined Oath & Designation;
3. Affidavit of Proposed Guardian;
4. Affidavit (Certification) of Examining Physician or Licensed Psychologist and Affirmation (Certification) of Examining Physician;
5. Waiver(s) of Process, Renunciation(s) and Consent(s) to Appointment of Guardian;
6. Consent(s), Oath(s) and Designation(s);
7. Guardianship Citation;
8. Notice of Petition and Affidavit of Mailing of Notice of Petition;
9. Original, raised seal copies of birth certificates for Respondent, Respondent's spouse or any of Respondent's distributees who are under the age of 18;
10. Original, raised seal copy of death certificate for Respondent's parent(s), spouse or distributee if applicable;
11. Copy of any decree of divorce where Respondent was a party;
12. New York State Office of Children and Family Services ("OCFS") Request for Information Guardianship Form 3909; and
13. Filing fee (currently: $20.00, plus $6 per page for certifying the proposed Decree and $6 for each Certificate of Letters of Guardianship).

The petition for guardianship is filed in the county where the disabled individual is domiciled, "has sojourned therein immediately preceding the application," or if the disabled individual is a "non-domiciliary of the state but has property situate in that county."[6] Thus, even if a disabled child lives in a group home in another county, the courts have held that the county in which the

parents reside is the appropriate venue.[7] In determining the appropriate venue, the relevant inquiry is whether the "proposed ward ever had the capacity to express an intention to change her domicile."[8]

Medical Certifications

As a practical matter, when the attorney has the initial consultation with the clients, one of the first topics that should be discussed is the requirement that two medical certifications that detail the nature of the disability must be filed with the petition. During the first meeting, the clients should be provided with blank copies of these certification forms which are available from the New York Courts website. The clients should be advised that the medical certifications must be completed by "one licensed physician and one licensed psychologist, or by two licensed physicians at least one of whom is familiar with or has professional knowledge in the care and treatment of person with mental retardation or developmental disabilities."[9] Since it may take the clients some time to obtain the completed forms from these physicians, it is important that the practitioner give the clients these forms as early as possible.

The psychologist must be a licensed, certified psychologist with a doctorate in psychology. Thus, a medical certification completed by a school psychologist who has a master's certification and not a doctorate is generally not accepted by the court. The medical doctor can be the Respondent's treating physician or a neurologist. Some counties require that in order for the certifications to be accepted, both physicians must have examined the Respondent within one (1) year of the date of the report. The certifications themselves must have been signed within one year prior to the date of the petition. If the certifications are dated more than one year prior to the date of the petition, they may be rejected by the court as being stale. The certification forms must provide specific details as to the tests that were performed upon examination and the specifics of the diagnosis.

The standard for the Court's determination of whether or not a guardianship is warranted under SCPA Article 17-A, is whether the Respondent is "incapable to manage him or herself and/or his affairs by reason of mental retardation"[10] or has "an impaired ability to understand and appreciate the nature and consequences of decisions which result in such person being incapable of managing himself or herself and/or his or her affairs by reason of developmental disability."[11] In both instances, the condition must be "permanent in nature or likely to continue indefinitely."[12] The certifications must contain a determination by the physicians as to whether the Respondent has "the capacity to make health care decisions, as defined by subdivision three of section twenty-nine hundred eighty of the public health law, for himself or herself."[13]

The physicians must also provide a recommendation as to whether or not the Respondent is able to attend the hearing. Generally speaking, a Respondent's presence at the hearing will only be waived if either he is "medically incapable of being present to the extent that attendance is likely to result in physical harm"[14] to the Respondent, or "under such other circumstances which the court finds would not be in the interest of the mentally retarded or developmentally disabled person."[15] In determining whether the Respondent's presence at the hearing should be waived, some Surrogate's Courts will look at the IQ score contained in the psychologist's certification. If the score is below a certain value, the Respondent need not appear. The practitioner may wish to make inquiry with the guardianship clerk in his or her county to determine if that particular court follows this practice.

On both medical certifications, there are specific boxes for the physicians to check and ample space for detailed explanations that will assist them in providing their opinions on the foregoing issues. When completing the forms, the physicians must pay close attention to the information requested and provide as much detail in their responses as possible. If not, you are likely to have the forms returned to you by the guardianship clerk with the mandate that the forms be resubmitted with the missing information. This will cause unnecessary delay for you and your clients.

A practice tip is to direct the clients to have the psychologist complete his or her form first. The psychologist's form must include an IQ score, or if none could be obtained, the certification must provide the reason why the score is not provided (i.e., Respondent was non-compliant during testing, Respondent is non-verbal, etc.). The psychologist's signature at the end of the form must be notarized. Once the psychologist has completed his or her form, the clients should bring a copy of his report to the treating physician to assist the doctor in completing his or her form. It is helpful, but not mandatory, that both doctors concur in their diagnosis of either mental retardation or developmental disability. In some instances, an individual may accurately fall within both diagnoses, i.e., an individual with autism (developmentally disabled) who has an IQ that falls in the range of mental retardation.

The Verified Petition

The Verified Petition for guardianship must be completed in its entirety. The petition sets forth the names, addresses and telephone numbers of the petitioner(s) and Respondent, the Respondent's diagnosis, pertinent information relating to family members, whether Respondent resides in a group home or facility, the names of the Respondent's physicians, identification of personal property and designation of proposed Guardians and Standby Guardians. The questions contained in the form are fairly self-explanatory. A designation must be made as to whether the petitioner is seeking guardianship over the Respondent's person, property, or both. If

the Respondent owns real or personal property, the petitioners must provide details regarding the nature, location, amount and source of the property. The practitioner should be aware of the "other relief requested" portion of the "wherefore" clause. It is in this section that the request for end of life decision-making, pursuant to SCPA § 1750-b,[16] if applicable, should be made.

A sample response to include in the "wherefore" clause is: "Petitioners request that they be granted authority to make all necessary health care decisions for Respondent in accordance with SCPA § 1750-b, and such other and further relief as this Court deems just and proper."

Other Documents

In addition to the Verified Petition, the petitioners must complete and sign the Combined Oath and Designation and Affidavit of Proposed Guardian. Waivers of Process, Renunciation and Consent to Appointment of Guardian ("waivers and consents") must be completed by all individuals with equal standing to the petitioners. If parents of the Respondent are petitioning for guardianship, then the court generally does not require waivers and consents of siblings to be filed. If, however, one sibling is designated as a Standby Guardian and other siblings are not, then waivers and consents must be obtained for those siblings who are not so designated. Similarly, if one sibling is petitioning for guardianship of his brother, any remaining adult siblings who are not under a disability must submit waivers and consents. In the case of a contested guardianship where the non-petitioning siblings refuse to sign waivers and consents, such siblings must be served with the Citation either by personal service (if they reside within New York State) or by certified mail with return receipt (if they reside outside of New York State).

All Standby Guardians must complete a Consent, Oath and Designation which will be filed with the petition. The Consent, Oath and Designation must designate the clerk for service of process.

If either or both parents of the Respondent are deceased, a certified, raised seal copy of their death certificate must be filed with the petition. Additionally, a certified, raised seal copy of the Respondent's birth certificate must be filed with the petition. Most courts will return the birth certificate and death certificate to the petitioners as soon as the clerk scans same into the court's computer system. In the cover letter filing the petition, the practitioner should expressly request that the original birth certificate and death certificate be returned and include a self-addressed, postage prepaid envelope for the court's use.

Another form that must be submitted with the guardianship petition is the OCFS Request for Information Guardianship Form 3909. The Court is mandated to make an inquiry of the "New York Statewide Central Register of Child Abuse and Maltreatment as to whether the proposed guardian or any other individual eighteen years of age or over who resides in the home of the proposed guardian is the subject of an indicated child abuse or maltreatment report."[17] For each individual being cleared, a current address and any other addresses at which the individual(s) have resided for the last 28 years must be provided. A similar address history must also be provided for any individuals over the age of eighteen (18) years who reside with the petitioners. For each address listed, the petitioners must provide the month and year in which the individuals began living at and then moved from the address. Additionally, petitioners may be required to be fingerprinted prior to being appointed guardian. In some jurisdictions, parents are not required to be fingerprinted while in others they must comply with this requirement. Best practice is to check with the guardianship clerk of the Surrogate's Court having jurisdiction over the proceeding.

An original and copy for conforming of the SCPA Article 17-A Guardianship Citation must be included with the petition. The Citation should name the Respondent, the Administrator of the facility where Respondent resides (if applicable), Respondent's parents (if they are not the petitioners), adult siblings of the Respondent (if the Petitioner is other than a parent), adult children of the Respondent; and the Respondent's spouse (if applicable).[18] The date and time on the Citation may be left blank for the clerk to fill in. The relief that is set forth in the petition's "wherefore" clause must be reiterated in the section marked "state further relief requested."

Once the Citation is received from the Court with a date and time for the guardianship hearing, the Citation must be served in accordance with the Civil Practice Law and Rules. Some counties will allow one parent to personally serve the Respondent and the other parent (on behalf of the Respondent). The parent who served the Citation would then complete an affidavit of personal service regarding same.

Once the petition and related documents are filed, the Notice of Petition must be completed and mailed via certified mail, return receipt requested upon the following individuals or entities: any adult siblings of the Respondent (if petitioner is a parent), Mental Hygiene Legal Service, Director or Administrator of any state facility or group home where the Respondent resides, any adult children of the Respondent (if petitioner is a parent), any other person the Court deems proper and any person designated in writing by the Respondent.[19] It is noted that Mental Hygiene Legal Service may request a complete copy of the petition as well.

On the return date of the proceeding, petitioners, the Respondent (unless his appearance has been waived) and counsel should appear. Each Surrogate's Court has its own way of conducting the proceeding. In some jurisdictions, in an uncontested proceeding, the Surrogate

will guide the proceeding by placing into the record the verified petition and asking the petitioners if any facts contained in the petition have changed. The Surrogate may ask the Respondent if he or she agrees with the appointment of the proposed guardians. Additionally, the Surrogate may acknowledge on the record the submission of the medical certifications and make a finding on the record that the appointment of a guardian is justified. In other jurisdictions, the Surrogate may require the petitioning attorney to conduct a direct examination of the petitioners on the record. Again, the best practice is to make inquiry with the guardianship clerk as to the particular court's preferred method of proceeding.

If the Respondent resides in a facility, or if the petitioners are not the parents of the Respondent, then the Court may wish to hear testimony from an attorney representing the Mental Hygiene Legal Service as to the relief sought in the petition. Moreover, if the Respondent voices an objection to the proceeding, then Mental Hygiene Legal Service will conduct an independent investigation regarding the facts underlying the petition and provide the Court with its recommendation. In a contested proceeding, the Court will hear testimony from all interested parties, review all evidence submitted, and make a determination after a full hearing.

Once the hearing has been completed and the Court has approved the petition for guardianship, a Decree of Guardianship will issue. Some Surrogate's Courts require the petitioners to prepare and submit a proposed Decree. Other Courts will issue their own Decree. In addition to the Decree, the Court will issue Letters of Guardianship and a Certificate of Letters of Guardianship. It is important that your clients retain these documents in a place of safekeeping. Letters of Guardianship do not terminate at the age of majority or marriage of the Respondent and "shall continue during the life of such person, or until terminated by the Court."[20] The Certificate of Letters of Guardianship are valid until six months from the date noted on the Certificate. Similar to a driver's license, this Certificate can be renewed by tendering $6.00 per Certificate to the cashier of the Court and by verifying that the Guardians' addresses have not changed since the prior Certificates were issued. While the Certificate must be renewed, the Decree of guardianship is permanent and is not subject to renewal.

In conclusion, all of the required forms for petitioning for guardianship are available on the New York Courts website, and the guardianship clerk of the Surrogate's Court is an invaluable resource. In addition to all of the procedural considerations mentioned above, an attorney should be cognizant of the clients' family situation and the sensitive nature of the SCPA Article 17-A guardianship proceeding. Clearly, the statute was designed to protect individuals who are mentally retarded or who have a developmental disability. However, the proceeding may still have emotional components for the petitioning family as it may culminate in a public hearing in which it is judicially determined that their son or daughter may not be able to be independent in their life and may require assistance from others with regard to personal needs and/or property management decisions. Acknowledging these possible emotions will assist the attorney in effectively representing the family and making a process that can be daunting a little bit easier for the family to experience.

Endnotes

1. N.Y. Surr. Ct. Proc. Act Law § 1750-1756 (Consol. 2014) [hereinafter SCPA].
2. *Id.*
3. *Id.* § 1750-a(1).
4. *Id.* § 1750-a(1)(d).
5. *Id.* § 1751.
6. *Id.* § 1702; *id.* 1761.
7. In re Guardianship of Beasley, 232 A.D.2d 32 (N.Y. App. Div. 1st Dep't. 1996).
8. *Id.*
9. SCPA § 1750 (1) & 1750-a (1).
10. *Id.* § 1750(1).
11. *Id.* § 1750-a(1).
12. *Id.* § 1750(1) and 1750-a(1).
13. *Id.* § 1750(2); N.Y. Pub. Health Law § 2980(6) (defining "Health care decision" as "any decision to consent or refuse to consent to health care.").
14. SCPA § 1754(3).
15. *Id.*
16. Health Care Decisions Act for Persons with Mental Retardation was amended by 2002 N.Y. Laws 500, effective March 17, 2003. See SCPA § 1750-b.
17. SCPA § 1706(2); OCFS Form 3909, New York State, Office of Children and Family Services.
18. SCPA § 1753(1).
19. *Id.* § 1753(2).
20. *Id.* § 1759.

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Medicaid, Medicare and Increased Longevity

By Robert Abrams

We Americans think of ourselves as a nation that cares about our fellow human beings, especially our family members, other loved ones and our neighbors. We claim to be particularly concerned with our older relatives: our parents, grandparents, aunts, uncles and—as we all get older and live longer—ourselves and our children.

Our concern for older Americans was eloquently articulated almost fifty years ago when President Lyndon Baines Johnson announced the passage of Medicare and former President Harry S. Truman discussed the need for Medicaid:

President Lyndon Baines Johnson:

> No longer will older Americans be denied the healing miracle of modern medicine. No longer will illness crush and destroy the savings that they have so carefully put away over a lifetime so that they might enjoy dignity in their late years. No longer will young families see their own incomes, and their own hopes, eaten away simply because they are carrying out their deep moral obligations to their parents, and to their uncles, and their aunts. And no longer will this Nation refuse the hand of justice to those who have given a lifetime of service and wisdom and labor to the progress of this prosperous country.[1]

President Harry S. Truman:

> Millions of our citizens do not now have a full measure of opportunity to achieve and to enjoy good health. Millions do not now have protection or security against the economic effects of sickness. And the time has now arrived for action to help them attain that opportunity and to help them get that protection.[2]

There were approximately 18 million Americans over the age of 65 when President Johnson introduced Medicare;[3] today there are over 40 million Americans who are at least 65 years of age[4] and more than 100 million Americans who are 50 years of age and older.[5]

When President Harry S. Truman made the above remarks, he probably did not consider increased longevity and the number of older citizens who would require Medicaid protection, nor could he have foreseen the significant impact of the *Olmstead* decision[6] regarding the way in which we provide for the health care, shelter, and personal needs of the elderly and individuals with disabilities.

Moreover, life expectancy in 1965 was 67 years for men and 73 years for women, which meant that male Medicare beneficiaries would require approximately 2 years of coverage and female Medicare beneficiaries would require approximately 8 years of coverage.[7] Today, Americans who are 65 years of age or older can expect to live until age 85 and, accordingly, many may be entitled to approximately 20 years of Medicare benefits.[8]

Although a half century has passed since the initial passage and implementation of the Medicare and Medicaid programs, and notwithstanding our individual and collective love for the "elders" among us, we have done little to plan for the increased longevity of older Americans and the personal, familial, health care and financial challenges that accompany increased longevity. Our leaders in state and federal governments have failed to establish a sound and sustainable long-term care policy and such procrastination has and will continue to have disastrous individual and societal consequences.

Some, for example, argue that Medicaid, a program designed to provide health care coverage for individuals with minimal income and assets, has become, by default, our nation's *de facto* long-term care program. By circumstance or design, many older persons attempt to comply with Medicaid's stringent financial eligibility requirements[9] to ensure that they can access, and have Medicaid pay for, the costly medical and personal care they require (or may require in the future). With increased age often comes three or more chronic health care conditions,[10] reliance on five or more prescription medications,[11] multiple visits to the hospital emergency room,[12] hospital admissions due to acute health care episodes[13] and short or long-term placement in a rehabilitation facility or nursing home.[14]

Medicaid, a joint federal and state program, covers the above referenced services for eligible individuals. Unfortunately, due to the absence of a viable long-term care plan, Medicaid has been a particular drain on our nation's economy, and on state budgets in particular.

Moreover, due to a variety of reasons, including the absence of a national long-term care plan, informed Americans, whose income and assets may minimally and, in some cases, significantly exceed the Medicaid eligibility requirements, engage in "Medicaid planning" to accelerate their Medicaid eligibility.[15] Such planning is legal[16] and may involve the transfer of assets, creation of Medicaid-approved trusts, spousal refusals, the use of promissory notes and/or other sophisticated strategies.[17] Such planning options often require the assistance of a knowledgeable and experienced attorney and can be quite expensive. It is indeed ironic that potential Medicaid beneficiaries must spend thousands of dollars to qualify for a program designed for individuals with minimal financial resources and income.

Unlike Medicaid, almost all of America's seniors are eligible for Medicare. However, notwithstanding President Johnson's vision that Medicare would pay for home care and nursing home care, Medicare's administrators have spent the last five decades attempting to limit such coverage. In recognition of the lack of Medicare coverage for long-term care, several attempts have been made to pass laws that would expand Medicare coverage. Unfortunately, most such attempts have ultimately failed, including the Medicare Catastrophic Coverage Act in 1990.[18]

While legislative attempts have generally been unsuccessful, advocates have commenced and successfully litigated cases against the federal government to clarify the scope of Medicare services. As a result, over the past several years, there has been an increase in Medicare coverage for home care, nursing home and therapeutic services. Needless to say, however, further expansion and clarification is necessary.

Regardless of the original intent of the Medicare and Medicaid programs, it is clear that tens of millions of older Americans rely on one or both of these programs. Such reliance has resulted in significant public expenditures. The following statistics illustrate some of the costs associated with Medicare and Medicaid:

- The total health care-related costs for individuals who are 65 years of age or older is approximately One Trillion One Hundred Eighty-Six Billion Dollars ($1,186,000,000,000).[19] Medicare, which provides at least partial health care coverage for almost all American citizens who are 65 years of age or older, pays approximately 45% of these costs, a total of Five Hundred Twenty-Nine Billion Dollars ($529,000,000,000).[20]
- Medicare beneficiaries receive significant benefits but must make certain premiums, co-insurance and/or deductible payments. The average Medicare beneficiary contributes approximately $4,500 toward the cost of his or her Medicare coverage.[21]
- The greatest expenditure on health care costs is during the last six months of life when approximately $22,407 is spent per Medicare beneficiary.[22]
- The total current health care expenditures for individuals 85 years of age or older is One Hundred Ninety Billion Four Hundred Sixty-Five Million Dollars ($190,465,000,000).[23]
- Medicaid contributes approximately One Hundred Thirty-One Billion Dollars ($131,000,000,000) toward the health care costs incurred by Medicaid beneficiaries.[24]
- Approximately five million Americans have Alzheimer's type dementia.[25] According to a recent RAND corporation study, each case of dementia costs $41,000 to $56,000 a year and the total costs of dementia in 2010 were between $159 billion dollars and $215 billion. The Alzheimer's Association estimates that the total cost of dementia cases may exceed one trillion dollars by the year 2050.[26]
- Given that there are currently 5,700,000 Americans who are at least 85 years of age[27] and this demographic is expected to more than double over the next 20 years,[28] we can expect health care costs for this group to experience a corresponding increase.
- The Department of Health and Human Services predicts that America's total health care expenditures for individuals 65 years of age and older will increase by 33% in the next two decades.[29] In other words, the health care costs incurred by older Americans places a heavy burden on America's current and future fiscal stability.

Suffice it to say, that our federal and state governments, through both the Medicare and Medicaid programs, have and will continue to commit substantial money and resources to providing varying levels of health care and personal care to older Americans.

With at least hundreds of billions of dollars at stake, as well as the future of America, it's clearly time for our nation to evaluate if these funds would be better invested in a coordinated long-term care delivery system, rather than to rely principally on two fifty-year-old programs that were not designed to address the unprecedented and accelerated longevity of our older—but not necessarily old—citizens. Maybe it is

also time to revisit each citizen's responsibility to participate in long-term care planning, rather than face the responsibility of paying thousands of dollars toward Medicare premiums, co-payments and deductibles and other out-of-pocket expenses at a time when they may no longer be working and, therefore, have less income.

In closing, there is something bizarre, unsavory and inefficient about our current long-term care system; maybe we should celebrate the 50th anniversary of Medicare and Medicaid by creating an appropriate and efficient long-term care program.

Endnotes

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3. *Id.*
4. A Profile of Older Americans: 2012, Administration on Aging of the U.S. Department of Health and Human Services, at p. 2.
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6. *Olmstead v. L.C. ex re. Zimring*, 527 U.S. 581,604 (1999) (holding that the state could take into account available resources in determining whether patients, who qualified for community-based treatment, were entitled to immediate community placement). The *Olmstead* ruling stimulated federal guidelines for how states should comply with the Americans with Disabilities Act and spawned numerous lawsuits and complaints to the Department of Justice.
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10. Dual-Eligible Beneficiaries of Medicare and Medicaid: Characteristics, Health Care Spending, and Evolving Policies, Congressional Budget Office (June 2013).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Matter of Shah*, 257 A.D.2d 275, 282-83, 694 N.Y.S.2d 82 (2d Dep't 1999) ("The complexities of the Medicaid eligibility rules, not to mention the complexities of State and Federal law concerning gift and estate taxation which often come in to play as hapless middle class Americans seek to save themselves from financial ruin as the result of astronomical nursing home costs, should never be allowed to blind us to the essential proposition that a man or a woman should normally have the absolute right to do anything that he or she wants to do with his or her assets, a right which includes the right to give those assets away to someone else for any reason or for no reason.").
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17. *Matter of Shah*, 257 A.D.2d 275, 282-83, 694 N.Y.S.2d 82 (2d Dep't 1999).
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28. *Id.*
29. *Id.*

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The Use of *Cy Pres* Petitions to Obtain Grants of Residual Funds From Class Action Settlements

By Martin Minkowitz, Lesley Rosenthal and Michael A. Wiseman

Introduction

One of the mechanisms that the New York Bar Foundation and other charitable organizations have used to fund charitable activities is the petition of courts and counsel for *cy pres* awards for potential residual funds from class action settlements. This article describes the *cy pres* mechanisms generally and some of the successes the New York Bar Foundation has achieved.

A fertile source of funding for nonprofits exists where unclaimed, or "residual," funds are left over from class action settlements. The doctrine of *cy pres*, from the Norman French phrase *cy pres comme possible* ("as near as possible"), may be invoked when courts wish to allocate unclaimed funds that are left over from a settlement at the end date of the distribution process.[1] That date arrives when either all known plaintiffs have been made whole[2] or when distributions have ceased according to an end date specified by either the settlement[3] or the court ("claim deadline").[4] *Cy pres* may also factor in settlement agreements where parties seek to prophylactically plan for the disposition of unclaimed monies through what are known as "*cy pres*" distribution provisions.[5]

Class Action Settlements

Outside its application to charitable trusts, the *cy pres* doctrine is most frequently applied in the class action setting,[6] where cases involve named representatives acting on behalf of numerous absent class members.[7] Class action complaints may implicate putative classes of thousands or even millions of potential claimants who are subsumed under the class definition.[8] In this context, funds may go unclaimed because some class members remain unidentified and therefore unaware of pending settlements or because eligible class members who are otherwise entitled to funds fail to submit claims as required[9] or because the individual recovery amounts do not exceed procedural costs.[10] These residual funds are ripe sources of potential monies for nonprofits savvy enough to petition the court to invoke the *cy pres* doctrine. The court may approve such a distribution if the end destination befits the original interests and composition of the class.[11]

Eleemosynary Organizations

Charities and the foundations that support them may petition courts and counsel under the *cy pres* doctrine to receive distributions of residual funds.[12] Organizations that choose to do so must keep in mind the foundational basis for the doctrine that the residual funds must serve goals closely related to the underlying claims that presaged the settlement in question.[13]

Legal and Practical Considerations in Making Requests

Legal Considerations

In a class action settlement arising in federal court, the district court judge plays an active role as a steward of the class's interests and as a counterweight to the sometimes conflicting pecuniary interests of counsel.[14] Federal Rule of Civil Procedure 23(e)(1)(A) mandates the court to conduct a fairness hearing in order to protect the interests of the class.[15] The goal of the court is to determine whether the settlement is fair, reasonable and adequate by examining whether the interests of the class are better served by settlement than by further litigation.[16] In doing so, the court considers whether the claims process is likely to be fair and equitable in its operation.[17]

The court reviews the settlement as a whole, including *cy pres* provisions, and has within its equitable authority the ability to deny a *cy pres* assignment if it finds that the charity in question does not suit the goals of the underlying litigation; but the court may not rewrite the settlement agreement.[18] Alternatively, parties may provide in the settlement agreement that the court may, at its discretion, choose a charity to benefit from any residual funds; however, this can be disfavored.[19] If nothing is provided in the settlement, the court will face the whole cloth dilemma of how to dispense residual funds.

The district court has great discretion in deciding how to award these residual funds,[20] and, generally, the unclaimed funds may be distributed by the court in one of three ways: (1) reversion to the defendant; (2) disbursement to other class members who have filed claims; or (3) *cy pres* distributions.[21] Courts diverge in their treatment of the *cy pres* doctrine. Some judges

express skepticism,[22] preferring monies to be returned to the defendant,[23] but others hold that a *cy pres* distribution is an appropriate way "for a court to put any unclaimed settlement funds to their 'next best compensation use, e.g., for the aggregate, indirect, prospective benefit of the class.'"[24] Cognizance of these regional variations is an important aspect in developing a persuasive petition.

Cy pres distributions must be tied to the underlying litigation—"the nature of the plaintiffs' lawsuit, the objectives of the underlying statutes, and the interests of the silent class members, including their geographic diversity."[25] In seeking to apply this standard, the First Circuit, for example, has adopted the "reasonable approximation" test, based on the American Law Institute Principles of Aggregate Litigation enunciated in § 3.07(c): "[W]hen feasible, the recipients should be those 'whose interests reasonably approximate those being pursued by the class.'"[26] This recurrent test is perhaps the most important component of a successful petition for residual funds. Nonprofits and charities should be aware and considerate of this governing standard. For example, the court in *In re Lupron* cited numerous sister circuits that have applied the reasonable approximation test in rejecting *cy pres* awards to charitable organizations, and it stated that "[a]s these cases make clear, the mere fact that a recipient is a charitable or public interest organization does not itself justify its receipt of a cy pres award."[27] The primary focus of a petition for residual funds should be to explain to the court how the funds will be used and the nature of the organizations to whom they may be awarded, including specific charities, if known.

Cy pres awards must conform to the geographic nature of the underlying class and nature of the litigation. Courts have also considered the geographic makeup of the *cy pres* recipients and compared them to the geographic composition of the class. In *In re Airline Antitrust Ticket Commission*, the Eighth Circuit held that a *cy pres* distribution in a national class action suit against airlines to mostly local recipients was an abuse of the district court's discretion.[28] In the Tenth Circuit, the District Court of New Mexico stated that

> because many corporations, especially national corporations, are incorporated in Delaware or other eastern states, or large states, it may be that class litigation is concentrated in areas like the Southern District of New York [or] in certain Californian districts; thus, concentrated, urban areas may benefit more from class litigation than more rural, sparsely populated areas, like New Mexico, which have few particularly large corporations and few national class actions.[29]

A successful petition will convince the court that the *cy pres* recipient will provide indirect benefit to the class by being similar in nature or in geographic composition.

Practical Considerations

In order to bolster the credibility of the organization, re-granting entities, such as the New York Bar Foundation, may articulate to the court whether there are legal or administrative fees associated with the distribution of grant money. There are some techniques for a successful petition to be considered.

Although every litigation is affected by its own set of facts and circumstances, the following are strategic guidelines that petitioners for *cy pres* awards may wish to consider:

1. Identify the goals, strengths, and capabilities of your foundation, and the charities to which the foundation may be donating.
2. Identify cases that fit the paradigm (both old and new cases).
3. Research the particular circuit court, district court, and how the judges have ruled in previous cases involving the *cy pres* doctrine.
4. Articulate why the petitioner-foundation is particularly well-suited to identify suitable charities and to distribute funds.
5. Contact plaintiff's counsel and express desire to be involved with the possibility of helping to distribute residual funds.
6. Petition the court.

Include a detailed description of the proposed charities, their mission and use of the grant monies in relation to the underlying goals of the litigation. Alternatively, explain how the use of the grant monies will provide an indirect benefit to the class.

The New York Bar Foundation, for example, as a leading provider of *cy pres* assistance to courts and counsel, uses speeches, meetings and brochures to cultivate contacts in cases where *cy pres* monies might result. The New York Bar Foundation has a small administrative staff and a zealous board, who understand the legal system and unmet needs. This energy and knowledge is coupled with financial oversight of the board's finance and investment committees, making the Foundation a go-to organization for judges and class action counsel for *cy pres* awards.

The Foundation reports that *cy pres* matters have included:

- *White v. First American Registry*[30]: Federal District Judge Lewis A. Kaplan awarded $1.2 million *cy*

pres funds to the Foundation to re-grant to organizations addressing improper tenant screening practices. Board members with background in legal services and housing issues made site visits to the five grantees, interviewed program managers, and required true-ups of budgets against actual spending. Programs improved access to fair housing and helped families avoid homelessness.

- *Pinnacle*[31]: $2 million+ of settlement funds were ordered by the Honorable Colleen McMahon to be administered by the Foundation, to oversee promised improvements in housing conditions for low-income New Yorkers.
- *City of Detroit v. Grinnell*[32]: Chief Judge Preska, in Manhattan, entrusted The New York Bar Foundation to re-grant $850K to an entrepreneurship program for disabled veterans at Syracuse University and an antitrust technology policy center at University of Pennsylvania Law School. These funds, from a long-forgotten antitrust settlement, helped improve disabled veterans' prospects and business ethics nationwide. Board members with technology law knowledge made site visits and provided accountability over the three-year grant period.

Obtaining *cy pres* awards requires vigorous efforts to earn the trust of judges, uncover settlement funds that should be paid out to charities, locate suitable recipients, and provide accountability. These awards are increasing access to justice to our society as a whole, in this unique and high-impact way.

Endnotes

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9. Aggregate Litigation, § 3.07(b), *supra* note 6.
10. Kevin M. Forde, *What Can a Court Do With Leftover Class Action Funds? Almost Anything!*, 35 No. 3 Judges' J. 19 (1996).
11. *See* Aggregate Litigation, *supra* note 6, at § 3.07 cmt. b ("In such circumstances, there should be a presumed obligation to award any remaining funds to an entity that resembles, in either composition or purpose, the class members or their interests.").
12. *See* Rosenthal, *supra* note 1, at 116.
13. *See* Aggregate Litigation, *supra* note 6, at § 3.07(c) ("The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class."); *see also id.* at § 3.07 cmt. a (commenting that the doctrine arose from the trust context, where "if the testator's precise terms could not be carried out the court could modify the trust in a manner that would best carry out the testator's intent").
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15. *Id.* at 502; *see* Fed. R. Civ. P. 23(e)(1)(A).
16. Herr, *supra* note 14, at 503; *see* Fed. R. Civ. P. 23(e).
17. Herr, *supra* note 14, at 502.
18. *Id.* at 502 (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) ("The settlement must stand or fall in its entirety.")).
19. *See In re Lupron*, 677 F.3d at 24, 26 ("[W]e express our unease with federal judges being put in the role of distributing cy pres funds at their discretion.").
20. *In re Thornburg Mortg., Inc. Sec. Litig.*, 885 F. Supp. 2d 1097, 1108–09 (D.N.M. 2012).
21. *See* Herr, *supra* note 14, at 523.
22. *See Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 784 (7th Cir. 2004) (Posner, J.) (stating in dicta that where it is infeasible to distribute proceeds of a class action settlement and therefore the *cy pres* remedy is applied to "prevent the defendant from walking away from the litigation scot-free…[t]here is no indirect benefit to the class from the defendant's giving money to someone else. In such a case the 'cy pres' remedy…is purely punitive.").
23. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 482 (5th Cir. 2011) (Jones, J., concurring) (stating that the court must return residual funds to the defendant).
24. *Id.* at 474 (quoting *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007)).
25. *Nachshin v. AOL*, LLC, 663 F.3d 1034, 1036 (9th Cir. 2011).
26. *In re Lupron*, 677 F.3d at 33 (quoting Aggregate Litigation, *supra* note 6, at § 3.07(c)).
27. *Id.* at 34:

> *See, e.g.*, *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1040 (9th Cir. 2011) (rejecting, in a nationwide privacy class action, a *cy pres* distribution to local Los Angeles charities because it did not "account for the broad geographic distribution of the class," did not "have anything to do with the objectives of the underlying statutes," and would not clearly "benefit the plaintiff class"); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311–12 (9th Cir. 1990) (invalidating a *cy pres* distribution to the Inter-American Fund for "indirect distribution in Mexico," *id.* at 1304, in a class action brought by undocumented Mexican workers regarding violations of the Farm Labor Contrac-

tor Registration Act, because the distribution was "inadequate to serve the goals of the statute and protect the interests of the silent class members," *id.* at 1312); *Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 502 (7th Cir. 1989) (invalidating settlement agreement, in a national antitrust class action, that made a *cy pres* distribution to local law schools, and directing the district court to "consider to some degree a broader nationwide use of its *cy pres* discretion"); *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1253–54 (7th Cir. 1984) (invalidating, in a national antitrust class action, a *cy pres* distribution that would establish a private antitrust research foundation on the basis that "[t]here has already been voluminous research" on the subject).

28. 268 F.3d 619 (8th Cir. 2001) (explaining that a *cy pres* distribution should be closely related to the geographic origin of the underlying claim and distributed to those similarly situated to the class).
29. *In re Thornburg*, 885 F. Supp. 2d at 1109.
30. No. 04 Civ. 1611 (LAK), United States District Court, S.D. New York.
31. *Charrons, et al. v. Pinnacle Grp.*, No. 07 Civ. 6316 (CM), U.S. District Court, S.D. New York.
32. Nos. 68 Civ. 4026, 4028 and 4027 (LAP), U.S. District Court, S.D. New York.

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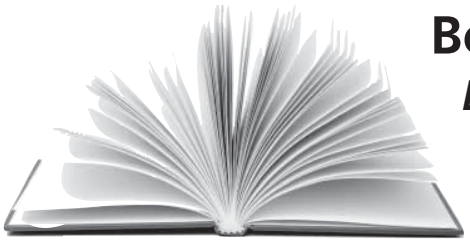

Book Reviews

Blindfolds Off

Reviewed by Carol L. Ziegler

Lawyers have a lot of strongly held opinions about how judges decide cases. Those opinions, however, are rarely matched in strength with insight. Joel Cohen's excellent new book, *Blindfolds Off*: *Judges on How They Decide*, makes a genuinely revealing contribution to righting that imbalance. The book is a lively, surprising and very readable look at what judges think they are doing when they decide cases.

Cohen takes as his lodestar, Justice Cardozo's observation in *The Nature of the Judicial Process,* that "The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by." This book is an attempt to determine the nature of the tides and currents that buffet contemporary federal judges: what is it in their conception of their role, their professional experience or their personal background that influences their decision-making.

As Judge Richard Posner notes in his Foreword to the book, there have been many previous efforts to unmask the real springs of decision hidden by the rhetoric of judicial decision-making and often outside the conscious awareness of the judge. The legal academy had its turn, chiefly in the eras of legal realism and critical legal studies. As these faded, the project moved on to the work of social or political scientists, economists and psychologists. Statistical analysis was employed to correlate the political slant of federal judicial decisions with the political party of the appointing president. Yet, despite these earnest efforts the veil—the blindfold—remained substantially intact.

It seems only fair, and long overdue, that having given these other disciplines their turn at bat, this book employs the trial lawyer's signature skill—the ability to ask good questions and to listen skillfully for the answers. Joel Cohen has deployed his considerable gifts as a cross-examiner to relentlessly, yet politely, probe what lies beneath a judge's decision to decide or manage a case this way or that, to employ particularly provocative language, to use or to decline to use a case to send a message or to set an agenda beyond the matter to be decided.

The book is based on Cohen's in-depth interviews of 13 federal judges who sat in significant and highly controversial cases. Their candor—and Cohen's—leads to results that may surprise the reader and, in some instances, appears to have surprised the judges themselves. The cases selected, a veritable Cook's Tour of important federal cases over the past several decades, range from Moussaoui (the so-called twentieth highjacker) terrorism case, to Bernie Madoff's sentencing, to the Deep Water Horizon Spill, same-sex marriage, the death penalty, Agent Orange, 9/11 tort claims, to "Intelligent Design" and more.

I challenge any lawyer to do better than Mr. Cohen at doggedly and sometimes forcefully guiding a judge down the path to introspection about the subtle—and not so subtle—influences on decision-making. Fortunately, we have Joel Cohen to do it for us.

Carol L. Ziegler is a former associate dean and professor at Brooklyn Law School and adjunct professor at Columbia Law School.

* * *

Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America

Reviewed by James K. Riley

This book is a Pulitzer Prize winning book on the Groveland case, which involved four black men accused of the rape of a white woman in central Florida in the early morning hours of July 16, 1949. The Groveland Boys case has not received the same degree of widespread and infamous attention as the somewhat similar Alabama *Scottsboro Boys*, but it certainly should have.

And, unfortunately as we all know, reports of allegedly excessive and inappropriate force, including compelled confessions and even loss of lives, directed at young men of color by police and civilians continue to occupy center stage in current news reports and public discourse—witness events involving the McCollum brothers in Lumberton, North Carolina (wrongful confessions resulted in two 30-year prison terms); the recent civil settlement of the civil cases involving the wrongful convictions of the Central Park 5; and issues raised concerning police detective work involving questionable convictions in both Brooklyn and the Bronx.

Each of these cases, and so many more recent events, such as the deaths of black men in Ferguson, Missouri and Staten Island, New York, carry one or more aspects or components of the Groveland case.

On that premise, the extraordinary efforts of Thurgood Marshall and his legal team in the face of virtually insurmountable challenges in the Groveland matter deserve the full and rich attention, which Gilbert King has now dedicated to that matter. Groveland had simply not previously received the analysis it merited until publication of this excellent study by Gilbert King. Some of the delay in bringing Groveland before the public is due to the fact that the FBI files concerning the independent investigations of the Groveland matter were not released to the public for 60 years—in 2009. Mr. King has made fine work as a result of his marshaling of both those files and all other available evidence concerning this terribly unjust and sadly disappointing saga in the history of the American criminal justice system.

Groveland is located about 60 miles north of Orlando in Lake County, Florida. It was, and in many parts remains, rural and agricultural—primarily citrus groves on small farms. Today, a close reading of the map of the State of Florida may show some western portions of the well known retirement community, the Villages, actually extends into Lake County, in all likelihood close in proximity to where some of the incidents in the Groveland case occurred—with emphasis on the word "allegedly" as to the "rape" but not as to its aftermath.

There are two primary force multipliers described in the "Devil In the Grove." First, the "good guy," Thurgood Marshall, who in this case raised the quality of lawyering on behalf of civil rights, including related criminal defense, from a craft to a fine art form. Second, the "bad guy," Lake County Sheriff Willis McCall who carried his racism on his wrist as some form of selective, skin color based misanthropic dogma to be disseminated universally in his bailiwick and, not to give anything in the book away, by extension to be implemented by use of his fists and his sidearm.

In short, this book is a non-fiction study of four lynchings, by legal process or available self-help alternative measures, carried out by the officers of the law. In this case, Willis McCall and his deputies (perhaps better described as McCall's horrific minions) had not just a little help from the local, deeply entrenched Ku Klux Klan. Mind one, this is non-fiction and excellent non-fiction at that. This book, which covers a complex and convoluted tale, and unlike the remarkable *To Kill a Mockingbird*, which has so many parallels, is all-true.

Thurgood Marshall was aligned against those forces with his weapons, or tools, his legal skills, both established and developing remarkably, as an attorney. One of those skills which he mastered both in Lake County and elsewhere in the South was the importance of preserving the record (in the face of a hostile judge and court) and the strategy of the obviously anticipated appeal, often all the way up to the U.S. Supreme Court. This is admittedly essential in all cases but especially when one is appearing and trying the case before a hostile local judge. E.g., in Groveland, Truman G. Futch, lined up an array of pieces wood to whittle while on his bench as he proceeded to hear the testimony and proceed to deny the objections of Marshall and his team on a consistent basis.

As Marshall said at the time, and throughout his career, "Lose your temper and lose your case." One assumes that those tempers were not to be lost "on the record," which would have to be the basis of an appeal. In any event Marshall never seriously believed that he could prevail at a trial before Judge Futch along with a jury composed of redneck Lake County farmers who believed that their primary function was the protection of southern white womanhood. Gilbert King emphasizes that the jury actually believed that if it did not bring back a conviction, "law enforcement would break down and [the] wives of jurymen would die at the hands of negro assassins."

And, speaking of assassins, there was the crucial lesson, essential, that Thurgood Marshall had to learn quickly and well in Lake County, Florida (and elsewhere): how to engage his courage in the shadow of great risk of personal harm, as in this case when working in an intolerant Florida. He literally had to learn how to manage how to not get himself or the members of his own legal team lynched. He was not necessarily able to do the same for either his clients or for some Florida supporters of the efforts of the N.A.A.C.P., its Legal Defense Fund, and the Groveland Boys.

The rape was allegedly accomplished by four black teenagers—including one military veteran—all under the age of 21. Remarkably, only three of the accused actually knew each other or had even met before the incident. The fourth was rounded up at the railroad station the morning of the occurrence on the assumption that he must have been trying to leave town to escape for no good reason.

In those days, prior to *Coker v. Georgia* in 1977, rape was a capital offense. The attack was said to occur after the victim, and her husband, had stopped on the side of the road because their car had broken down. The lives of the young black men who made the mistake of stopping to assist would never be the same. The couple claimed that the husband had been knocked out and the wife was sexually assaulted. The case never made a lot of sense. The medical forensics were inconclusive at best and more likely exculpatory but not allowed into evidence by Judge Futch. Further, the actions of the female victim were quite inconsistent with her claims that she was a victim of violent criminal conduct.

But all of those mitigating factors were not sufficient hurdles to prevent a successful southern rape prosecution when a white woman claimed rape by one or more black men. As the book emphasizes, the flower of southern white womanhood had to be protected at all costs.

On this basis, one must not count on Thurgood Marshall, or his very skilled legal team, winning at trial. Appeals in the end to the United States Supreme Court resulted in vacation of the death penalties and re-trial of the cases. Further, one must not count on anything turning out well for the defendants. In fact, Thurgood Marshall and his fellow attorneys and black journalists were fortunate that they managed to avoid their own lynching.

There are other characters of note; the foxy and irascible 72 year old Deputy State Attorney, Jesse Hunter, who himself was a force to be reckoned as a one man prosecution team complete with a straw hat and the red suspenders of a southern cracker. As but one example of his capabilities as to legal strategy, upon anticipating appeals on issues of composition of the petit or trial jury in the case, he placed a black truck driver on the grand jury. No person of color, however, would serve on the petit or trial jury because that would result in the unacceptable situation, in violation of the community mores of Groveland and Lake County and the south in general, whereby a black individual would be judging the credibility of a white woman. A local journalist, Mabel Norris Reeves, who is not without complexity, also occupies a significant role in arousing the discontent of the community concerning the accusations. There are others, in fact many others, worthy of description and Groveland does just that. It should be noted that some people grow for the better as human beings, others don't change, or grow for the worse, in this important saga.

There is so much more in this book; the development of the nascent and financially struggling N.A.A.C.P. and its Legal Defense Fund on both a statewide and national basis; bombings of civil rights activists; blatant "thuggery" by the Ku Klux Klan with the blessing of local and state government and police officials; and a multiplicity of incidents of man's inhumanity to man. Injured, lynched or bombed persons of color could not even be transported to the hospital in an ambulance used by whites. Instead, they would have to wait interminably for the black ambulance which would take them to the hospital for blacks. This incredible history should not be ignored or forgotten by attorneys.

In the end, this is essential—a must-read for all attorneys but not an easy one. In an interview in the *New York Times Book Review*, retired Supreme Court Justice John Paul Stevens, discussing various books which he had recently read, said, "Devil in the Grove, will make one cry—multiple times." I have to agree, but all attorneys should read this essential work. Many, if not all, if they do, will also cry. But as they do, they will also learn astounding amounts about the law, the practice of law, trial and appellate strategies, injustice and justice—lessons which we learn were so important in the mid-20th century and unfortunately are equally important today.

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New York State Bar Association Committee on Professional Ethics Ethics Opinions 985-1000

Ethics Opinion 985 (10/8/13)

Topic: Former law clerk appearing before judge who employed clerk

Digest: A lawyer is permitted to appear, and assist others who appear, before a judge by whom the lawyer was employed, on matters unless the lawyer had substantial personal participation in the matter.

Rules: 1.12(b)(2)

Facts

1. The inquiring lawyer has served as a law clerk of a judge in the past. Now the lawyer has opportunities to advise and provide legal analysis to clients or other lawyers in matters before the judge for whom the lawyer had worked. None of the opportunities relate to any matters before the judge while the lawyer worked for the judge.

Question

2. May a lawyer who formerly served as a legal clerk, appear, or assist those who appear, before the judge who had employed the lawyer?

3. If prohibited from appearing before the judge for whom the lawyer worked, may the lawyer appear before judges of the same court for whom the lawyer did not work?

Opinion

4. The only Rule of the New York Rules of Professional Conduct that addresses this matter is Rule 1.12. It states in relevant part, "...unless all parties to the proceeding give informed consent, confirmed in writing, a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a law clerk to a judge..." Rule 1.12(b)(2).

5. In order to trigger the requirement for informed consent, the matter must be one in which the law clerk had substantial personal involvement. Thus absent written informed consent from the parties, confirmed in writing, a former law clerk is prohibited by this Rule from appearing before the judge in such a matter.[1,2]

6. In the present inquiry, the lawyer asks only whether it is permissible to appear or advise others who will appear before the judge for whom the lawyer worked in new matters, that is, those matters which had not been before the judge while the lawyer was employed by the judge.

7. The application of these principles is illustrated in the Second Department's decision, *In re Coleman*, 69 AD3d 846 (2010). There the court held that a lawyer who had served as supervising attorney in the law department supporting the Surrogate's Court was not disqualified from appearing in that court on matters which had been handled by the lawyer's former law department. The court held that the record did not support a finding that the former government attorney was "personally involved to an important, material degree, in the investigati[on] or deliberative processes regarding the transactions or facts in question" (*In re Coleman*, at 849).

8. Given that the former law clerk is not prohibited by Rule 1.12 from appearing before the judge who employed the lawyer, the lawyer is permitted to appear before other judges of the same court as the judge for whom the lawyer worked.

Conclusion

9. A lawyer is permitted to appear, and assist others who appear, before a judge by whom the lawyer was employed, on matters unless the lawyer had substantial personal participation in the matter.

Endnotes

1. Whether the Judge has any obligations, or is required to consent to the former law clerk's appearance before the Judge, is a question under the Code of Judicial Conduct; this Committee expresses no opinion about the application or interpretation of the Code of Judicial Conduct.

2. What constitutes "substantial and personal involvement" has been discussed by this Committee in several opinions. For example, Opinion 748 (2001) sets forth factors which might require disqualification of a government prosecutor from representing a criminal defendant who was investigated and prosecuted while the lawyer was employed in the prosecutor's office. That Opinion states, "DR 9-101(B) (the predecessor to Rule 1.12 (b)) made clear that disqualification must be based on the lawyer's personal participation to a significant extent." The factors to be considered in analyzing whether the involvement of a lawyer was personal and substantial include serving more than a supervisory role, having responsibility for more than mere ministerial aspects of a matter, assisting in the research and writing of decisions on the merits and interaction with parties by which the clerk might have had access to confidential information.

(25-13)

Ethics Opinion 986 (10/25/13)

Topic: Whether it is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

Digest: It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

Rules 1.7, 1.14

Question

1. May a lawyer who represents a mentally incapacitated adult in a Medicaid benefits proceeding also represent that person's sister in seeking to petition for a guardianship for him where the sister, against the client's wishes, has refused to remove her brother from a hospital and will not permit him to return to her home?

Background

2. A Legal Services lawyer was retained to represent a severely incapacitated man to appeal the denial of certain Medicaid services. He has been diagnosed with schizophrenia and mental retardation. A recent evaluation concluded that he is "unable to function autonomously, and he cannot make financial or health decisions on his own. He is significantly mentally retarded." The client is not able to make decisions during the representation and "does not understand what is involved in appealing the denial of Medicaid Services." The client was assisted by his sister in applying for Legal Aid Services.

3. The sister has cared for and lived with the client until recently, when the client accidentally set fire to the sister's home. The sister brought him to a hospital where he remains. The hospital wants to discharge the client and his expressed desire is to return to the sister's home. The sister is unwilling to accept the client back to her home.

4. The attorney states that there is no practical method of protecting the client's interests other than to have a guardian appointed. There is no other family. Social services agencies have extremely limited resources. The sister is willing to serve as the guardian, but the client is so incapacitated that he is not capable of consenting or objecting to the appointment of his sister as guardian.

5. The attorney asks whether he is permitted to represent the sister in a petition for guardianship over her brother.

Opinion

6. The lawyer asks whether concurrent representation of client A with significant diminished capacity and another client (B) who seeks to become the guardian for client A is permissible when the stated wishes of client A are directly contrary to the position of Client B as the prospective guardian. To what extent is the lawyer bound by the arguably unreasonable and ill-considered stated desire of the incapacitated client in assessing whether such a conflict exists? What action is permissible by the lawyer?

7. Concurrent conflicts of interest are governed by Rule 1.7 of the Rules of Professional Conduct which prohibits a lawyer from representing clients with "differing interests." This includes "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest. Rule 1.0(f); See also Rule 1.7 Cmts. [1],[2],[8]. The lawyer is expected to be loyal, protect client confidences and provide independent judgment.

8. In the representation of Client A in the Medicaid appeal, the lawyer learned of the client's stated desire to return to his sister's home. Living arrangements are a fundamental interest of the client as contemplated by Rule 1.7. Unquestionably, if Client A did not have significant diminished capacity, the lawyer could not undertake to represent his sister in any proceeding where Client A's stated desires would be undermined, and in this case directly contrary to the client's wishes, by the lawyer's representation of another client.[1]

9. Thus, the question is whether the client's significantly diminished capacity alters the judgment as to whether the lawyer would be representing "differing interests" if he undertook representation of the sister in the guardianship proceeding. As explained below, it does not.

10. Rule 1.14 seeks to provide guidance to a lawyer in such circumstances. It acknowledges the difficulty of providing diligent and competent representation to clients who have diminished capacity precisely because the client is often incapable of understanding and making decisions about the matter. In such circumstances, even though the representation may be premised upon the goal of maximizing a client's autonomy and dignity, the lawyer may believe that advocating

the client's stated position to be directly contrary to what the lawyer reasonably believes is the only viable choice for the client with significant diminished capacity. May the lawyer maintain a position contrary to the client's stated wishes when that client has significant diminished capacity?

11. Rule 1.14 suggests a course of action for the attorney in such circumstances.[2] First, a lawyer must "as far as reasonably possible" maintain a normal lawyer-client relationship. The fact that a client suffers from mental illness or retardation does not diminish the lawyer's responsibility to treat the client attentively and with respect. Rule 1.14, Cmt. [2].

12. Second, Rule 1.14 permits a lawyer to take protective action when the lawyer reasonably believes that the client is at risk of physical, financial, or other harm unless such action is taken. Before considering what measures to undertake, lawyers must carefully evaluate each situation based on all of the facts and circumstances. "Any condition that renders a client incapable of communicating or making a considered judgment on the client's own behalf casts additional responsibilities on the lawyer." Roy D. Simon, Simon's Rules of Professional Conduct Annotated, 662 (2013). One of those responsibilities is to acknowledge that even clients with diminished capacity may have the ability to make decisions or reach conclusions about matters affecting their own well-being.

13. Any protective action taken by the lawyer should be limited to what is essential to carry out the representation. Thus, the lawyer may consult with family members, friends, other individuals, agencies or programs that have the ability to take action to protect the client. The Rule does not specify all of the potential protective actions that may be undertaken, but it makes clear that seeking the appointment of a guardian is the last resort, when no other protective action will protect the client's interests.

14. This opinion presumes that, before considering guardianship, the attorney has considered and exhausted other options. First, the lawyer has attempted to maintain a normal client-lawyer relationship as best as possible under the circumstances. A primary aspect of that relationship is to maintain communications with the client. The attorney has determined that the client's stated desire is to return to his sister's home. Even if the attorney reasonably believes this to be unwise, unreasonable, or otherwise ill advised, the client still deserves attention and respect.

15. Second, before deciding whether to take protective action with respect to the client, the lawyer has a reasoned basis, beyond what he believes to be the client's ill considered judgments, to conclude that the client cannot act in his own best interests and that protective action is necessary. The lawyer unsuccessfully attempted to communicate with the client, obtained information and assistance from the client's sister, and sought a medical evaluation.

16. It is not clear whether there are other individuals, community resources or social services agencies that may be of assistance to the client. Nor is it clear whether other options have been explored prior to seeking the appointment of a guardian. This includes an assessment as to whether or not referral to support groups or social services could provide protection to the client.

17. These alternatives should be exhausted prior to seeking the appointment of a guardian. The situation is particularly fraught for clients with limited financial means and social support networks. There are few social services available to assist such clients, thereby leaving the attorney in circumstances with few options to carry out representation as contemplated by Rule 1.14. Therefore, these circumstances require a lawyer to exercise careful judgment to adopt a course of action that best protects the client's interests.

18. The lawyer must recognize that seeking a guardianship is an extreme measure as it "deprives the person of so much and control over his or life." *In the Matter of the Guardianship of Dameris L.*, 38 Misc 3d 570 (Sur. Ct. NY Cty 2012) citing Rose Mary Bailly, Practice Commentaries, McKinney's Con Law of NY, Book 34A, Mental Hygiene Law § 81.01 at 79 (2006). It has been suggested that the lawyer should seek a guardian only if "serious harm is imminent, intervention is necessary, no other ameliorative development is foreseeable, and nonlawyers would be justified in seeking guardianship." Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 3 Utah L. Rev. 515, 566. (1997); see 62 Fordham L. Rev. 1073 (1993-1994)

19. Article 81 of the Mental Hygiene Law allows for the judicial appointment of a legal guardian for one's personal needs, property management or both, when a person is incompetent to conduct his or her own affairs. N.Y. Mental Hygiene Law § 81.02(a); §§ 81.06 et seq. The statute expects that the system is tailored to meet the individual's specific needs by taking into account the incapacitated person's wishes, and preferences. N.Y. State 746 (2001).

20. Assuming that the attorney has undertaken this thorough evaluation of the circumstances, and now reasonably believes that guardianship is the only alternative, that lawyer may seek out others to petition for the guardianship.

21. The guardianship process is initiated by a petition. The lawyer may seek out any available individual, social service agency or private organization to petition for guardianship. Article 81 specifies seven categories of persons who may file such a petition. § 81.06.

22. The court then is required to appoint a court evaluator who will recommend whether the alleged incapacitated person (AIP) requires counsel. The court evaluator will also make recommendations as to who should serve as guardian and make appropriate living arrangements. Any conflicts between the sister and AIP will be addressed by the court evaluator. *See e.g.*, MHL 81.09(c)(5)(xv). It is not apparent whether court evaluators are appointed in all matters as required by statute.

23. The court then considers all of the evidence and determines, by clear and convincing evidence, whether the person is likely to suffer harm because he or she is unable to provide for his or her personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of this inability. § 81.02 (b).

24. The guardian is to engage in the "least restrictive form of intervention, consistent with the concept that the needs of persons with incapacities are as diverse and complex as they are unique to the individual." NY Mental Hgy Law § 81.01.

25. The attorney may suggest that the sister seek a petition for guardianship and may make suggestions as to individuals or agencies to assist her in completing the petition, but the lawyer may not represent her in petitioning for the guardianship. Her interests are contrary to that of the client. She has clearly stated, contrary to the client's desires, that she will not permit him to return to her home. Thus, the attorney would be in conflict with his client if he represents the sister and assists her in filing a petition seeking an objective contrary to the client's stated desire.

26. The lawyer's position in protecting the client's interests is complicated by perceived difficulties for lay persons in completing the petition for guardianship and the lack of social service and other resources to assist the family of incapacitated people. The sister may desire to file a petition for guardianship but may be ill-equipped to do so and there may be no assistance available to her. Consequently, it may be that the attorney is the only person who can reasonably seek the appointment of a guardian. In general, a lawyer should only act as petitioner in seeking the appointment of a guardian if there is no one else who reasonably can do so. Simon, Rules of Prof Conduct Annot. at 663, N.Y. State 746 (2001).

27. In general, the interests of the petitioner in a guardianship proceeding are in conflict with that of the client, notably where there will be a contested hearing and the petitioner will serve as a witness. However, where the client does not oppose the guardianship or is incapacitated and cannot express an opinion as to the guardianship, Rule 1.14 implicitly acknowledges that the lawyer may file the petition to seek a guardianship in circumstances where the guardianship will not be subject to a hearing and no one else is reasonably available to file the petition. We previously considered the issue of whether an attorney-in-fact could petition for guardianship for a client and concluded, under the then-existing Code of Professional Conduct, that it was permissible under circumstances such as those presented here where there is no other option and there will not be a contested hearing under Article 81. We considered whether the "dual role" of petitioner in a guardianship proceeding and as client representative was impermissible in these circumstances and concluded that, given other safeguards in the Article 81 proceedings, the dual role was not impermissible. N.Y. State 746 (2001). We affirm that opinion under the Rules of Professional Conduct.

28. Should the attorney file the petition for guardianship, and the court become aware that the sister may be the only person who can be appointed as the client's guardian, the lawyer should advise the court of the sister's position regarding the client's living arrangements. The court can then consider whether, in light of the potential conflict between the client and his sister, she is the appropriate guardian.

29. Thus, using the same reasoning, Connecticut has determined that in these circumstances should the lawyer petition for the appointment of a guardian, the lawyer does not need to withdraw from representation on the underlying Medicaid matter. In circumstances involving clients with disabilities, this is not a preferred course of action. *See* Connecticut Inf. Opinion 97-19 (1997).

30. Assuming that a guardian is appointed, the lawyer should consult with the client and the guardian as to the position to be asserted in the Medicaid matter. The guardian is the representative of the client. The rationale for the appoint-

ment of a guardian is to have someone who can make decisions for the incompetent client. Thus, after the appointment of the guardian, the lawyer generally must take direction from that guardian.

31. Finally, Rule 1.14 is often frustrating because it does not provide solutions to all problems in dealing with clients with diminished capacity. It does, however, provide "an intelligible frame of reference for the lawyer and those who might later judge his conduct." Geoffrey C. Hazard Jr. and W. William Hodes, THE LAW OF LAWYERING, § 1.14:101, p.439. (1990). See Connecticut Inf. Opinion 97-19.

Conclusion

32. It is a conflict of interest for a lawyer who represents a mentally incapacitated client in a Medicaid benefits proceeding to also represent the client's sister in seeking to petition for a guardianship for the client where the incapacitated client's stated wishes as to living arrangements are contrary to the sister's position.

Endnotes

1. In some circumstances, the concurrent conflict may be waived, but not in this case. Even if the lawyer reasonably believed that he could provide competent and diligent representation to both Clients A and B, Client A is not capable of providing informed consent to such a waiver. Rule 1.7 (b).
2. Rule 1.14 provides that:
   (a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a conventional relationship with the client.
   (b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
   (c) Information related to representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

9-13

* * *

Ethics Opinion 987 (10/25/13)

Topic: Insurance company review of staff counsel's files.

Digest: Absent informed consent from the insured (staff counsel's client), staff counsel may not permit review of the confidential information in the client's file by non-attorney employees of the insurance company which employs the staff counsel.

Rules: 1.0(h); 1.6(a); 1.8(f)

Facts

1. An insurance company that employs staff counsel to represent the company's insureds conducts peer reviews of the staff counsels' files to both evaluate the attorneys' handling of files and to develop best practices to be followed by staff counsel attorneys of the insurance company. The panel conducting these reviews has until now been comprised solely of staff attorneys of the insurance company but the insurance company now proposes adding non-attorney members of the insurance company's claims department to the panel.

Question

2. Is it permissible to allow non-attorney members of the reviewing panel access to the insured's confidential information contained in the staff counsels' files?

Opinion

3. Rule 1.6(a) provides that a lawyer "shall not knowingly reveal confidential information…or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
   (1) the client gives informed consent…;
   (2) the 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; or
   (3) the disclosure is permitted by paragraph (b) [none of the provisions of which paragraph (b) are applicable to the facts of this opinion]."
4. Confidential Information is defined in Rule 1.6(a) as "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."
5. Rule 1.0(h) defines "law firm" to include "the legal department of a corporation or other organization." The office of staff counsel there-

fore constitutes a law firm but the non-attorney members of the insurance company's claims department are not members or employees of the "law firm" of staff counsel and are not subject to supervision and control by the staff counsel. Therefore, the attorney does not have the ability or authority to exercise reasonable care in their supervision to prevent their disclosure or use of confidential information in accordance with Rule 1.6(c).

6. Accordingly, any confidential information in the staff counsel's file cannot, without the client's informed consent, be revealed to the non-attorney members of the review panel. Informed consent is defined in Rule 1.4(j) as, "denot[ing] the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Unless such consent is contained in the language of the applicable insurance policy, it is incumbent upon the staff counsel to obtain the client's informed consent to the disclosure of the information to the non-attorney members of the reviewing panel. Absent such consent, the confidential information must be redacted from the file before the file may be reviewed by the non-attorney members of the reviewing panel. See N.Y. State 716 (1999) (counsel assigned by insurance company to represent the insured cannot provide bills, which are deemed to contain confidential information, to independent auditors retained by the insurance company, without the insured's informed consent) and N.Y. State 721 (1999) (defense counsel may follow direction of insurance carrier to utilize a specified legal research service subject to certain conditions, but may not in doing so reveal client confidential information without the informed consent of the client).

7. Because the fees of the staff counsel are paid by the insurance company, the provisions of Rule 1.8(f) are also applicable. These provisions require that if the fees are to be paid by someone other than the client, the client must give informed consent (this is usually in the language of the policy), there be no interference with the lawyer's independent professional judgment or with the client-lawyer relationship and the client's confidential information is protected as required by Rule 1.6.

Conclusion

8. Absent informed consent from the insured (staff counsels' client), staff counsel may not permit review of the confidential information in the client's file by non-attorney employees of the insurance company which employs the staff counsel.

19-13

* * *

Ethics Opinion 988 (10/25/13)

Topic: Lawyer Advertising; Solicitation

Digest: A lawyer may forward a cover letter describing his practice accompanied by a third party brochure containing helpful information of general applicability and the lawyer's contact information to nonlawyer professionals, such as accountants and bankers, in the hope that these professionals will consider referring their clients to the lawyer if a need arises.

Rules: Rules 7.1, 7.2, 7.3, 7.4, 7.5

Facts

1. The inquirers are practicing attorneys licensed in New York State who wish to market their services by sending brochures to local accountants and bankers with a cover letter stating that their practice includes estate planning, trusts and estates, and elder law. The brochures, which are purchased from a national publisher, are entitled "2013 Federal Tax Pocket Guide," and "2013 Personal Planning Guide," and include, among other things, various tax rate tables, estate tax planning techniques and tax laws. The brochures will have the inquirers' firm information printed on the cover.

2. The inquirers are not seeking to solicit the accountants and bankers to become clients. Rather, they hope that as these accountants and bankers meet with their own clients, they may recommend the inquirers if such clients are in need of legal services. The inquirers candidly admit that they are "[e]ssentially…hoping to gain these accountants and bankers as referral sources." In addition, the cover letter to the bankers will advise them to call the inquirers if they have general questions on which they can provide assistance, but they do not plan to charge the bankers for that assistance.

Question

3. May a lawyer forward a cover letter describing his practice accompanied by a third-party brochure containing helpful information of general

applicability and the lawyer's contact information to nonlawyer professionals, in the hope that these nonlawyers will recommend the lawyer's services if the nonlawyer determines that a particular client is in need of the lawyer's services?

Opinion

4. Rule 1.0(a) of the New York Rules of Professional Conduct ("Rules") provides that an "advertisement" includes "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 cover letters the inquirers plan to send to various accountants and bankers are advertisements governed by various rules, including Rule 7.1 ("Advertising"), Rule 7.4 ("Identification of Practice and Specialty"), and Rule 7.5 ("Professional Notices, Letterheads, and Signs"). See N.Y. State 848 (2010) (concluding that law firm's contemplated educational newsletter was an attorney advertisement within the meaning of Rule 1.0(a) after considering three factors: "(i) the intent of the communication, (ii) the content of the communication and (iii) the targeted audience of the communication").

5. If the above rules are satisfied, the lawyers are permitted to mail cover letters describing their practice with third party brochures to nonlawyer professionals in the hope that these professionals will consider referring their clients to the lawyers if a need arises. Since a lawyer can ethically enter into a nonexclusive reciprocal referral agreement, a lawyer's mere forwarding of cover letters and brochures to nonlawyer professionals with whom the lawyer does not intend to enter into a reciprocal referral arrangement, in the hope that it may one day lead to a new client is, by analogy, also permitted by the Rules.[1]

6. Rule 7.3, entitled "Solicitation and Recommendation of Professional Employment," defines a "solicitation" as 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). Rule 7.3(a) prohibits a lawyer from engaging in solicitation by in-person contact unless the recipient of the solicitation is a close friend, relative, former client or existing client. Rule 7.3(a) (1). Since the inquirers cannot personally solicit the prospective clients they are seeking, as they had no prior relationship with them, they may not do so through the acts of a third party, such as an accountant or banker. Rule 8.4(a) ("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."); see N.Y. State 887 (2011) (law firm could not authorize nonlawyer marketer to meet with or call prospective clients who are acquaintances of the marketer in order to promote the firm's services, because doing so would violate Rule 7.3(a)(1) unless the prospects were close friends, clients or former clients of the law firm); N.Y. State 885 (2011) ("Non-attorneys are not subject to the New York Rules of Professional Conduct, but a lawyer cannot circumvent either the solicitation or the advertising rules through the indirect use of the non-lawyer's communications.").

7. Thus, the inquirers could not expressly request that the accountants or bankers hand out the inquirers' brochures to their clients and ask their clients to contact the inquirers. However, there is no ethical prohibition for the accountant or banker to refer the client to the lawyer or hand the lawyer's brochure to the client when they perceive that their client needs legal advice, or in response to the client's request for a legal advice. See Rule 7.3, Cmt. [2] ("a communication made in response to an inquiry initiated by a potential client" does not constitute a solicitation).

8. However, Rule 7.2(a) prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client. To the extent the inquirers are offering to answer questions from bankers free of charge in exchange for the banker recommending the inquirers' services, such conduct violates Rule 7.2(a)'s prohibition. See N.Y. State 942 (2012) (Rule's prohibition is violated if the inquiring lawyer would be giving something of value to nonlawyer firm in exchange for client referrals, such as a reduced fee); N.Y. State 741 (2001) (attorney, who was required to pay substantial dues to organization in exchange for membership that entitled the attorney to referrals from the organization's members, and was required to make referrals to those members, would be transferring something "of value" in order to obtain referrals in violation of current Rule 7.2(a)).

9. Finally, Judiciary Law section 479 provides, in pertinent part, that it is unlawful to solicit legal business, or to solicit a retainer authorizing an attorney to perform or render legal services, on behalf of an attorney. Whether the inquirers' proposed conduct is in violation of this statute is a question of law beyond the jurisdiction of

this Committee. See N.Y. State 942; N.Y. State 927 (2012).

Conclusion

10. A lawyer may forward a cover letter describing his practice with a brochure to nonlawyer professionals, such as accountants and bankers, in the hopes that these professionals will consider referring their clients to the lawyer if a need arises.

Endnote

1. In N.Y. State 765 (2003), we noted that under former DR 1-107 and DR 2-103(B), a lawyer "may enter into a non-exclusive reciprocal referral agreement or understanding with a securities broker or insurance agent." In N.Y. State 870 (2011), we opined that the reasoning of N.Y. State 765 applied under current Rules 5.7 and 5.8 and that a lawyer could enter into a nonexclusive reciprocal referral arrangement with a debt reduction company.

7-13

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Ethics Opinion 989 (10/25/13)

Topic: Conflicting interests; former client

Digest: A law school legal clinic which previously represented a not-for-profit organization may thereafter represent an organization with similar objectives in applying to the Internal Revenue Service for not-for-profit status, since the matters for the proposed and former clients are not substantially related within the meaning of the Rules, the new representation would not involve use of confidential information of the former client, and the relevant interests of the clients are not materially adverse.

Rules: 1.6(a), 1.9

Facts

1. A law school legal clinic (the "Clinic") previously represented a not-for-profit organization (the "Former Client"). As a result of a dispute within the organization, a group of dissident organization members has formed a new organization (the "Proposed Client") that would perform the same kinds of functions as the Former Client, and has asked the Clinic to represent it in applying for tax-exempt status under Section 501(c)(3) of the Internal Revenue Code (the "New Representation").

Question

2. May the Clinic undertake the New Representation, or would such representation constitute a conflict of interest?

Opinion

3. Under the Rules of Professional Conduct (the "Rules"), a lawyer has ethical responsibilities to former clients as well as to current ones: "After termination of a client lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with these Rules." Rule 1.9, Cmt. [1].

4. In particular, Rule 1.9 (Duties to Former Clients) provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
>
> ….
>
> (c) A lawyer who has formerly represented a client in a matter … shall not thereafter:
>
> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
>
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

5. The term "substantially related" is explained in Comment 3 to Rule 1.9:

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise 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.

6. If the Clinic were to undertake an extensive or continuing relationship with the Proposed Client, that representation could include matters

substantially related to the representation of the Former Client in which the two clients' interests were materially adverse. In that case, Rule 1.9(a) would preclude representation of the Proposed Client unless the Former Client gave informed consent, confirmed in writing.

7. For two reasons, however, we believe that the limited New Representation proposed in the inquiry would be unlikely to give rise to such a conflict.

8. First, on the facts presented, the New Representation does not seem "substantially related" to the representation of the Former Client within the meaning of Rule 1.9. The filing of an application for tax exemption would generally not implicate confidential information of the Former Client.[1] The information needed for such an application is, rather, information about the Proposed Client and its conformity with legal requirements for tax-exempt status.

9. Second, the facts presented do not suggest that the Proposed Client's interests in the IRS application would be materially adverse to the interests of the Former Client. While the Former Client may be concerned with competition from a new organization with similar goals, this kind of general enterprise competition is not enough to create a conflict of interest. Cf. Rule 1.7, Cmt. [6] ("simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients"). Just as representation of competing business enterprises is not automatically representation of "differing interests" under Rule 1.7(a), we believe that competition between not-for-profit organizations would not ordinarily make establishment of the newer organization materially adverse to the interests of the existing one under Rule 1.9(a).

Conclusion

10. Under Rule 1.9, the Clinic's representation of the Proposed Client would not be in a matter substantially related to its representation of the Former Client; it would not involve use of the Former Client's confidential information; and the relevant interests of the Former Client and Proposed Client are not materially adverse. The Clinic may thus undertake the New Representation, representing the Proposed Client in applying for not-for-profit status, without obtaining the Former Client's consent.

Endnote

1. *See* Rule 1.6(a) ("'Confidential information' does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."); Rule 1.6, Cmt. [4A] ("The accumulation of legal knowledge or legal research that a lawyer acquires through practice ordinarily is not client information protected by this Rule. However, in some circumstances, including where the client and the lawyer have so agreed, a client may have a proprietary interest in a particular product of the lawyer's research."); Rule 1.9, Cmt. [3] ("In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation. On the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.").

38-13

* * *

Ethics Opinion 990 (11/12/13)

Topic: Representation of Conflicting Interests.

Digest: A lawyer who regularly represents both Client A and Client B may represent Client B in negotiating a loan agreement in which Client B would lend money to Client A in accordance with Rule 1.7. Whether the lawyer may properly request the clients to waive conflicts that might arise in the future if Client A defaults on the loan and Client B wishes the lawyer to sue Client A on its behalf, is subject to the conditions set forth in Rule 1.7(b) and on the sophistication and experience of the clients. If the consent complies with Rule 1.7(b) and both clients consented to such adverse representation, the lawyer would not have to withdraw from representing Client A in unrelated matters. If Client B is willing to make the loan to Client A only if the lawyer uses knowledge from the representation of Client A to help Client B determine the nature and value of Client A's collateral for the loan, the lawyer may disclose such information only if Client A gives informed consent to the disclosure. The lawyer may accept stock in Client B as all or part of the fee in the lending matter as long as the lawyer determines that the fee is not excessive for the work performed by the lawyer, the terms of the transaction are fair and reasonable to Client B, Client B is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable chance to do so, and Client B signs a writing that describes the transaction and the lawyer's role in the deal, including whether the lawyer is acting for the client in the acquisition of the

stock. It is unlikely that acceptance of stock in Client B would require the lawyer to withdraw from representing Client A in matters unrelated to the loan.

Rules: 1.0(f), 1.0(j), 1.5(a), 1.6, 1.6(b), 1.7, 1.7(b), 1.8(a), 1.8(b), 1.8(c)

Facts

1. A lawyer represents a sophisticated business client who is an individual. The existing representations are both transactional and litigation, and the lawyer represents both the client individually and entities wholly owned by the client. (The client individually and the client's wholly owned entities are hereafter called Client A.) Client A wishes to borrow money, and the lawyer has one or more other clients (hereinafter Client B) who may be willing to extend the loans.

Question

2. A. If Client B determines to lend money to Client A, may the lawyer represent Client B in the transaction and continue to represent Client A in other matters?

   B. May the lawyer ask Client A to sign a waiver of future conflicts, so that if the loan transaction results in litigation between Client B and Client A, the lawyer may represent Client B?

   C. If so, would the lawyer be required to withdraw from unrelated representation of Client A?

   D. If Client B is only willing to make the loan to Client A in reliance upon the lawyer's personal familiarity with the nature and value of the underlying collateral, may the lawyer participate in the transaction and disclose such information?

   E. If so, may the Lawyer receive, as all or part of the lawyer's fee, an equity interest in Client B?

   F. Does such an ownership interest in the lender affect the lawyer's ability to continue to represent Client A in unrelated matters?

Opinion

Representation of Differing Interests

3. The first question involves whether the Lawyer, who regularly represents both Client A and Client B, may represent Client B in negotiating a loan agreement in which Client B would lend money to Client A. We assume Client A would be represented by separate counsel. Rule 1.7 of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from representing a client if a reasonable lawyer would conclude that the representation will involve the lawyer in representing differing interests, unless the clients give informed consent, where consent is permitted by Rule 1.7(b). The term "differing interests" is defined in Rule 1.0(f) and including "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse, or other interest."

4. In order to be "differing," the interests need not arise in the same matter, and they need not arise in litigation. For example, Comment [7] to Rule 1.7 provides:

> "Differing interests can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client."

   In this case, representing Client B in lending money to Client A clearly would involve the lawyer in representing differing interests, since the interests of Client A and Client B in the negotiation of the loan agreement would be adverse. What is in the best interests of the lender is not necessarily in the best interests of the borrower. See Rule 1.7, Cmt [6] (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"); N.Y. State 952 (2012) ("The lawyer who represents a residential buyer and lender is representing differing interests if only because the buyer is executing a note and a mortgage in favor of the bank.")

5. Rule 1.7(b) provides that, notwithstanding the existence of a concurrent conflict of interest, the lawyer may represent Client B in lending money to Client A if:

> "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same

litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing."

6. Whether the lawyer reasonably believes the lawyer can provide competent and diligent representation to each affected client is a factual determination that we cannot make. But in the facts presented here, we see nothing that would prevent the lawyer from reasonably reaching that conclusion. Similarly, the representation is not prohibited by any law. *Cf.*, Rule 1.7, Cmt. [16] (non-consentable conflicts). Moreover, the inquirer has presented no facts that would provide grounds for believing, at this stage of the relationship between Clients A and B, that the lending relationship will result in litigation or another proceeding before a tribunal. Consequently, if the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to both Clients A and B, the lawyer may ask for consent to the conflict.

7. In N.Y. State 952 (2012) we found yet another possible conflict of interest. Because the lawyer regularly represented the lender and might well be eager to maintain that relationship and income stream, we found that the lawyer would have a personal business interest in advancing the lender's cause, which would create a significant risk that the lawyer's professional judgment on behalf of the borrower would be adversely affected by the personal business interest. *See* N.Y. State 867 at n. 2 (2011). Rule 1.7(a)(2) provides that a lawyer may not represent a client if a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the client will be adversely affected by the lawyer's own financial, business, property or the personal interest, except as provided in paragraph 1.7(b) (quoted above). The lawyer must therefore decide whether a reasonable lawyer would conclude that such a personal conflict of interest exists, and, if so, whether the requirements for requesting client consent are met. If so, the lawyer may request such consent, after disclosing the nature of the relationship with Client A.

Future Conflict Waivers

8. The second question assumes that the clients will grant a waiver for the lawyer to represent Client B in negotiating the loan agreement and asks if the conflict waiver may also include a consent to represent Client B against Client A if the loan agreement should result in litigation.

9. As noted above, Rule 1.7(b) allows a lawyer to represent a client despite the existence of differing interests, as long as, among other things, the lawyer reasonably believes he or she will be able to provide competent and diligent representation to each affected client and each affected client gives informed consent, confirmed in writing. Whether each affected client can give informed consent to a future conflict depends on the extent to which the lawyer is able to explain adequately the material risks of the proposed course of conduct and reasonably available alternatives, and on the sophistication of the client. *See* Rule 1.0(j) (definition of informed consent) and Rule 1.7, Cmt [22].

10. Rule 1.7, Comment 22 states:

> "The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent 'informed' and the waiver effective…. The lawyer should also disclose the measures that will be taken to protect the client should a conflict arise, including procedures such as screening that would be put in place."

Since Client A would be asked to consent to his lawyer's (or law firm's) suing him, it would be particularly important to make clear whether the lawyer who regularly represents Client A would be actively involved in any potential litigation.

11. Comment 22 warns that the effectiveness of advance conflict waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation and disclosures of the types of future represents that might arise, the greater the likelihood that the client will have the understanding necessary to make the consent "informed." See also Comment [22A], which discusses how to determine whether an advance waiver remains valid after the passage of time, when the circumstances may have greatly changed from those anticipated in the waiver. Whether Client A understands the material risks that the waiver entails depends on the sophistication of Client A. See, e.g., Rule 1.7, Cmt [22]:

> "[I]f the client is an experienced user of the legal services involved and is reasonably informed regarding

the risk that a conflict may arise, an advance waiver is more likely to be effective, particularly if, for example, the client is independently represented or advised by in-house or other counsel in giving consent."

See generally Simon's New York Rules of Professional Conduct Annotated (2012 ed), Annotations of Rule 1.7(b)(3) (hereinafter, *Simon*) ("The depth and content of the disclosure will depend largely on the sophistication of the client").

12. In the fact situation posited here, the requested conflict waiver would not be open-ended. The circumstances anticipated—that the lawyer would represent Client B in suing Client A for a default under the loan agreement (and in executing on the collateral for the loan)—is quite specific. Compare N.Y. City 2006-1 (authorizing a law firm to request that the client waive future conflicts of interest, and discussing requests for open-ended waivers, where the lawyer may not be able to give appropriate disclosure of the implications, advantages and risks involved, so that the client can make an informed decision whether to consent). The inquirer characterizes Client A as a sophisticated business client who is an individual. It is not clear whether Client A will be independently advised in connection with the waiver. Such independent advice would clearly make any waiver less subject to challenge.

The Downsides of Requesting Current and Future Waivers

13. The conflict of interest rules are derived from the lawyer's traditional duty of loyalty to the client. See, e.g., Preamble, par. 2 ("The touchstone of the client-lawyer relationship is the lawyer's obligation…to act with loyalty during the period of the representation"); Rule 1.7, Cmt. [1] ("Loyalty and independent judgment are essential aspects of a lawyer's relationship with a client.") The lawyer who requests a conflict waiver from a client must consider the possibility that a client such as Client A may give consent to a conflict today but consider it to be the height of disloyalty tomorrow (or in several months) when the lawyer represents Client B in bringing suit against Client A. Such a client may challenge whether the conflict waiver was made with sufficient disclosure, and may seek fee forfeiture or professional discipline, or sue the lawyer for malpractice or breach of fiduciary duty. *See generally Simon, supra*.

14. As Comment 21 to Rule 1.7 points out, the client (in this case, Client A) can also revoke a valid consent at any time, at least with respect to continued representation of Client A. Whether such revocation would also prevent the lawyer from representing Client B depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of Client B, and whether material detriment to Client B would result. See N.Y. State 902 (whether the lawyer may continue to represent the non-revoking client depends upon the circumstances, unless an advance agreement specifies what happens upon revocation of consent.)

Suing a Current Client

15. The third question asks whether the lawyer may represent Client B in legal action against Client A if the lawyer still represents Client A. Rule 1.7(b)(3), in describing non-consentable conflicts, includes cases where the representation involves "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." However, in this case, the lawyer would not represent Clients A and B in the same litigation or other proceeding. Client A, we assume, would be represented by another law firm. Thus the conflict would not be non-consentable. The question would be the same as that discussed above with respect to Rule 1.7(b)(1)—whether the lawyer believes he or she can adequately represent Client B, explains the situation to both clients and obtains the informed consent of both. *See generally, Simon*, Annotations of Rule 1.7(b)(3). In addition, the lawyer would have to determine that the lawyer's independent professional judgment on behalf of Client A in the unrelated matters would not be affected.

Use of Client Confidential Information

16. The fourth question posits that Client B might only be willing to make the loan to Client A in reliance upon the lawyer's personal familiarity with the nature and value of Client A's collateral for the loan.

17. Rule 1.6(a) prohibits a lawyer from knowingly revealing confidential information of a client, or using such information to the disadvantage of the client or for the advantage of the lawyer or a third person, unless the client gives informed consent (as defined in Rule 1.0(j)) or the disclosure is permitted by Rule 1.6(b) (which is not applicable to this situation). Confidential information is defined in Rule 1.6 to include information gained during or relating to the representation of a client that the client has requested to be kept confidential or the disclosure of which is likely to be embarrassing or detrimental to the client.

18. We believe that information gained by the lawyer during the representation of Client A about the value of the potential collateral for the loan by Client B constitutes confidential information within the meaning of Rule 1.6. Consequently, the Lawyer could not use the information for the benefit of Client B without the informed consent of Client A. In accordance with Rule 1.0(j), this would involve the lawyer explaining to Client A the material risks of the authorizing the lawyer to disclose information about the collateral to Client B, as well as the reasonably available alternatives, and obtaining the agreement of Client A. Although use of the information might be detrimental to the client (if the lawyer possesses information indicating that the value of the collateral is less than it otherwise appears), we believe that a sophisticated client might well consent to the disclosure, and see no reason why the conflict is inherently non-consentable.

19. The inquirer will want to clearly spell out to both Client A and Client B the extent to which confidential information of Client A will be shared, and the extent to which the lawyer has continuing obligations to inform Client B of changes in the value of the collateral. *See Spector v. Mermelstein*, 361 F. Supp. 30 (S.D.N.Y. 1972), *aff'd in part and remanded,* 485 F.2d 474 (2d Cir. 1973) (defendant attorney breached his fiduciary duties to plaintiff client by failing to inform client fully of facts known to attorney which raised serious questions regarding the advisability of client's loaning money to a corporation which owned a Nevada gambling casino). *Cf.,* Rule 2.3 (When the lawyer knows or should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent).

Ownership Interest in a Client/Lender

20. The fifth question assumes that Client B might wish to compensate the lawyer by giving the lawyer an interest in the legal entity that makes the loan and asks whether such an ownership interest would affect the ability of the lawyer to represent Client B in the loan transaction or to represent Client A in other matters. It is not clear whether the entity that makes the loan is a public or private company, whether its shares have a recognized value, and whether the value of its shares will depend principally on the success of the loan to Client A.

21. There are three questions implicit in this question. First, could the lawyer personally make the loan to the client (i.e. is the ownership interest in the lender allowing the lawyer to do something that would otherwise not be permitted by the Rules)? *See* Rule 8.4 (A lawyer shall not violate the Rules of Professional Conduct through the acts of another). Second, would the ownership interest in the lending entity pass muster under the rule governing the reasonableness of legal fees and the rule governing business transactions with clients? Third, would the ownership interest affect the lawyer's judgment on behalf of either client?

22. We have held that there is no express prohibition against a lawyer lending a client funds in connection with a non-litigated matter, although a loan transaction between a lawyer and client is a business transaction that involves potential conflicts of interest. *See* N.Y. State 600 (1989). *Cf.,* Rule 1.8(e) (While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client except as set forth in the rule). Consequently, the lawyer should ensure that the client understands the potential conflict and the fact that, at some point in the future, the lawyer may need to withdraw from representing the client. We warned that, despite the fact that the lawyer-lender is extending a benefit to the client, the lawyer should exercise caution when considering personal involvement in client affairs.

23. The rules of business transactions with clients are currently found in Rule 1.8(a), which provides that a lawyer may not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise independent professional judgment for the protection of the client, unless:

> "(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."

24. In N.Y. State 913 (2012), the Committee discussed the ethical issues that arise when a lawyer is paid with client stock. As we explained there, the starting point for determining whether a lawyer's compensation for legal services is appropriate is that, under Rule 1.5(a), the lawyer may not accept a fee the amount of which would leave a reasonable lawyer "with a definite and firm conviction that the fee is excessive." Rule 1.5(a) sets out the factors that should be used to determine excessiveness. However, we also concluded that Rule 1.8(a) (business transactions with a client) applies to negotiation of a fee in which a lawyer is to receive an equity interest in a client company, despite the clause in Rule 1.8(a) that makes the rule applicable only if the client expects the lawyer to exercise professional judgment on behalf of the client in the business transaction. In N.Y. State 913, we found that the common situation in which the lawyer will receive stock as a legal fee involves a "nascent venture" lacking a public market and offering consideration of indeterminate value and liquidity in lieu of cash, although our conclusion was not limited to this situation.

25. Accordingly, the lawyer may accept stock in Client B's corporation as long as the lawyer determines that the fee is not excessive for the work performed by the lawyer, the terms of the transaction are fair and reasonable to Client B, Client B is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable chance to do so, and Client B signs a writing that describes the transaction and the lawyer's role in the deal, including whether the lawyer is acting for the client in the acquisition of the stock.

26. Finally, the lawyer must determine whether acceptance of stock in payment of all or part of the legal fee would negatively affect his judgment on behalf of either client—Client A if the amount of the fee from Client B would encourage the lawyer to violate the confidences of Client A, and Client B if the fact that the lawyer has an ownership interest in the lender causes him or her to elevate his or her own economic interests over those of Client B.

If Lawyer Accepts Ownership Interest in Lender Corporation, May Lawyer Continue to Represent the Borrower in Matters Unrelated to the Loan?

27. As noted above, Rule 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that either (a) the representation will involve the lawyer in representing differing interests, or (b) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests. Mere ownership of stock in the lending corporation would not involve the lawyer in representing differing interests. Whether ownership of such stock would involve a significant risk that the lawyer's professional judgment on behalf of a Client A will be adversely affected depends on the value of the stock. The lawyer should also consider whether the relationship with Client B and the importance of lawyer's continuing representation of Client B would affect the lawyer's professional judgment on behalf of Client A.

Conclusion

A. A lawyer who regularly represents both Client A and Client B may represent Client B in negotiating a loan agreement in which Client B would lend money to Client A, if:

   (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

   (2) the representation is not prohibited by law;

   (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

   (4) each affected client gives informed consent, confirmed in writing."

B. Whether the lawyer may properly request Client A to waive conflicts that might arise in the future if Client A defaults on the loan and Client B wishes the lawyer to sue Client A on its behalf, is subject to the conditions set forth in Rule 1.7(b) and on the sophistication of the clients and their experience with legal representation.

C. If the consent complied with Rule 1.7(b) and both clients consented to such adverse representation, the lawyer would not have to withdraw from representing Client A in unrelated matters.

D. If Client B is willing to make the loan to Client A only if the lawyer uses knowledge from the representation of Client A to help Client B determine the nature and value of Client A's collateral for the loan, the lawyer may disclose such information only if Client A gives informed consent to the disclosure.

E. The lawyer may accept stock in Client B as all or part of the fee in the lending matter as long as the lawyer determines that the fee is not excessive for the work performed by the lawyer, the

terms of the transaction are fair and reasonable to Client B, Client B is advised in writing of the desirability of seeking the advice of independent legal counsel and is given a reasonable chance to do so, and Client B signs a writing that describes the transaction and the lawyer's role in the deal, including whether the lawyer is acting for the client in the acquisition of the stock.

F. It is unlikely that acceptance of stock in Client B would require the lawyer to withdraw from representing Client A in matters unrelated to the loan.

17-13

* * *

Ethics Opinion 991 (11/12/13)

Topic: Lawyer's disclosure of confidential information for personal advantage

Digest: A lawyer who handles foreclosure matters in mediation and at trial desires to provide leads on desirable properties to friends in the real estate business. The lawyer must not reveal confidential information to the disadvantage of a client or to the advantage of the lawyer or a third party unless the client gives informed consent. If a reasonable lawyer would perceive a significant risk that the lawyer's own financial, business, or other personal interests will adversely affect the lawyer's professional judgment on the client's behalf, then the lawyer may not continue the representation unless the conflict is consentable and the client gives informed consent, confirmed in writing. In any event, the lawyer may not use litigation tactics that have no substantial purpose other than delay.

Rules: 1.6(a); 1.7(a) & (b); 1.8(b); 1.9(c); 3.1(a) & (b); 3.2

Facts

1. An associate (the "Associate") works at a law firm that represents various lenders (collectively "Lender") in foreclosure actions. The Associate's duties include such tasks as drafting motions for default judgment, reviewing applications from borrowers seeking loan modifications, and appearing at mediation conferences.
2. Some of the Associate's college friends want to form a real estate LLC (the "LLC"). The LLC would evaluate properties that are in the foreclosure process or that have already been foreclosed, and would purchase those that the LLC considers to be sound investments as rental properties. The purchases would be made either (a) in short sales (if the LLC buys a property after the summons and complaint but *before or during* the foreclosure proceedings) or (b) at foreclosure auctions (if the LLC buys a property *after* the foreclosure proceedings end).
3. The Associate's college friends have asked him to join their real estate LLC. If he agrees, they anticipate that he would use information acquired during his law practice to provide leads on properties facing foreclosure that may be sound investments as rental properties. (The Associate does not say that he would represent the LLC or perform any legal services for it, so we assume he will not.)
4. However, the Associate is concerned that his role at mediation conferences may conflict with his role in the LLC. A conflict could arise because it might be to the LLC's advantage (and therefore to his personal advantage) either to speed up or to slow down or delay foreclosure proceedings, which might be contrary to the Lender's interest in a particular foreclosure case. In particular, the LLC might sometimes prefer to buy a property at a short sale, before the foreclosure proceedings begin or while they are pending, but might at other times prefer to buy a property at auction, after the foreclosure proceedings conclude. The Lender, however, might desire the opposite of what the LLC wants.
5. The Associate is in a position to speed up or slow down foreclosure proceedings regarding a given property because of his role in mediation conferences. In New York State, all foreclosure proceedings are effectively stayed, practically if not formally, while an action is in the mediation part. While an action is in the mediation part, Lenders must participate in good faith in one or more conferences to determine whether a borrower meets eligibility guidelines for a loan modification. If a borrower *does* meet the guidelines, then the pending or threatened foreclosure action will be settled via loan modification. If a borrower *does not* meet the guidelines (or if a borrower does not properly fill out and diligently update an application for a loan modification), then the action is released from the mediation part and the action can move forward toward foreclosure.
6. When the Associate attends a mediation conference on behalf of a Lender, his job (as he describes it) is either (a) to facilitate the loan modi-

fication process or (b) to argue that the borrower is ineligible for loan modification and that the action should be released from the mediation part so it can move toward foreclosure. The Associate independently decides which of these alternative courses to follow based on the totality of the facts and circumstances at the time of the conference.

7. If the Associate successfully facilitates the loan modification process and the case settles via loan modification, then neither a short sale nor a foreclosure auction will occur, and the LLC will have no opportunity to buy the property. But if the Associate stalls the mediation process, then the LLC may have an opportunity to buy the property at a short sale before a foreclosure auction occurs. Conversely, if the Associate persuades the mediator to release the matter from the mediation part and allow the case to continue toward foreclosure, the LLC may eventually have an opportunity to buy the property at a foreclosure auction.

Questions

8. May a lawyer who currently represents a lender in foreclosure proceedings join a real estate LLC and provide leads to the LLC regarding properties in foreclosure that the lawyer believes will be sound investments as rental properties? If not, may the lawyer do so if he waits until he leaves his current firm and joins a different firm in a different practice area?

Opinion

9. The inquiry raises three sets of issues: (i) confidentiality issues, (ii) conflict of interest issues, and (iii) issues regarding diligence and frivolous or dilatory litigation techniques. We will address these three sets of issues one at a time.

A. Confidentiality Issues: Rules 1.6(a), 1.8(b), and Rule 1.9(c).

10. The first set of issues concerns confidentiality. May the Associate disclose leads to the LLC based on information he acquires while representing Lenders in foreclosure proceedings? This question implicates Rules 1.6(a) and 1.8(b) while he is working at his current firm, and implicates Rule 1.9(c) if he waits until after he has moved to a different firm.

Rule 1.6(a) prohibits disclosure absent the client's informed consent

11. Rule 1.6(a), which is the most fundamental confidentiality rule, provides as follows (with emphasis added):

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the ***disadvantage of a client*** or for the ***advantage of the lawyer or a third person***, unless:
>
> (1) ***the client gives informed consent***, as defined in Rule 1.0(j);
>
> (2) the 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; or
>
> (3) the disclosure is permitted by paragraph (b).
>
> "Confidential information" consists of 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. ***"Confidential information" does not ordinarily*** include (i) a lawyer's legal knowledge or legal research or (ii) ***information that is generally known in the local community*** or in the trade, field or profession to which the information relates. [Emphasis added.]

12. The threshold question is whether information identifying properties that may be sound investments constitutes "confidential information" within the meaning of Rule 1.6(a). If so, then the Associate is prohibited from using the information to his own advantage, or for the advantage of third parties (such as his college friends or the LLC), or to the disadvantage of his client (the Lender). Whether information is confidential depends on multiple criteria.

13. The first of these multiple criteria is whether the information has been "gained during or relating to the representation of the client …." (Emphasis added.) Here, information about whether properties would be sound investments is plainly "gained during" the representation of the Lender, and is information "relating to" the representation. Only one of these is necessary, see N.Y. State 866 (2011), but here we have both. Accordingly, we need to examine one by one the three categories of confidential information listed in Rule 1.6(a).

14. Regarding privilege, the identity of properties in foreclosure by itself is not "protected by the attorney-client privilege," but communications

from the Lender to the attorney about particular properties would be privileged. For example, if the Lender has told the Associate that a particular property is in excellent condition or has attracted interest from a renovator, that communication is privileged.

15. Regarding detriment to the client, if the Lender's interests differ in any material way from the LLC's interests, then revealing confidential information about desirable investment properties to the LLC is "likely to be detrimental" to the Lender. In the context of confidentiality, we understand the term "likely" in Rule 1.6(a) to indicate a "significant risk" that revealing or using the information will harm the client. (This understanding borrows a concept from Rule 1.7(a)(2), which is quoted later in this opinion.) In other words, we think the phrase "likely to be detrimental" falls somewhere in between "probable" (meaning "more likely than not") and "possible" (meaning that it can't be completely ruled out). If there is a significant risk that revealing or using the information will disadvantage the client, then it is "likely to be detrimental" within the meaning of Rule 1.6(a). And the more sensitive the information to be disclosed, the more significant the risk, because the detriment to the client will increase as the sensitivity of the information increases.

16. Regarding client expectations, if the Lender has requested that information about the properties in foreclosure be kept confidential, then the information is presumptively confidential even if it is not privileged and even if disclosing the information is not likely to be detrimental to the client. Moreover, if the Associate's law firm has assured the Lender that all such information will be kept confidential, then that is equivalent to the Lender's request that the information be kept confidential even if the Lender has not expressly made such a request.

17. The fact that foreclosure proceedings are a matter of public record does not make the information "generally known" (which would take it outside the purview of "confidential information"). Comment [4A] to Rule 1.6 says, in relevant part:

> Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. ***Information is not "generally known" simply because it is in the public domain or available in a public file.*** [Emphasis added.]

18. The emphasized sentence in the quoted language is significant because in 2011 it replaced the following two sentences that were originally in Comment [4A]:

> Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process.

19. These two original sentences were criticized as inaccurate, and the New York State Bar Association therefore removed them from Comment [4A] in 2011 and substituted the single sentence in today's Comment [4A] (emphasized above). This legislative history strongly suggests that information in the public domain may be protected as confidential information even if the information is not "difficult or expensive to discover" and even if it could be obtained without "great effort" and without a Freedom of Information request or other formal process.

20. Here, we think the information in question cannot be "generally known." In our view, information is generally known only if it is known to a sizable percentage of people in "the local community or in the trade, field or profession to which the information relates." Given that hundreds or thousands of homes are in foreclosure in any locale at any given time, we do not believe that the identity of particular properties that would make sound investments is "generally known" within the meaning of Rule 1.6(a).

21. If information about particular properties—such as which ones are in good repair and which ones have new appliances—is "confidential information" within the meaning of Rule 1.6(a), then the Associate cannot use or reveal that information unless one of the exceptions in Rule 1.6(a) applies. The Associate may not have any such information—we understand that lenders do not always inspect properties in foreclosure, and may not share the foreclosure report with their lawyers—but if the Associate does have confidential information about particular properties, then Rule 1.6(a) prohibits him from using for his own benefit, or for the benefit of his friends in the LLC, or to the client's detriment, regardless of who benefits.

22. The first exception to Rule 1.6 is the client's "informed consent, as defined in Rule 1.0(j)," which is in the Terminology section. Rule 1.0(j) provides as follows:

> (j) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

23. We lack sufficient facts to spell out all of the disclosures the Associate would need to make to obtain the Lender's informed consent to revealing the identity of a promising investment property, but at a minimum it would need to include both (a) whether the Associate believes the particular property would be a sound investment for rental purposes and, if so, why; and (b) whether the Associate plans to speed up or slow down the mediation process. Armed with that information, the Lender should be able to decide whether it would also be interested in buying the property or working out a loan modification. If so, the Lender will presumably deny consent for the Associate to disclose the information to the LLC.

24. The second exception to the duty of confidentiality arises when the disclosure (a) is "impliedly authorized to advance the best interests of the client" and (b) is either (i) "reasonable under the circumstances" or (ii) "customary in the professional community." We do not perceive any circumstances in which disclosing a promising investment property to the LLC would advance the Lender's interests. If such circumstances exist, the better practice would be for the Associate to disclose the relevant facts to the client and obtain the client's informed consent. The "impliedly authorized" exception is intended mainly for situations in which time is of the essence and it is impractical for the lawyer to wait for the client's informed consent (such as during settlement negotiations or trial), or for situations in which revealing information about a client with diminished capacity is "necessary to take protective action to safeguard the client's interests." *See* Rule 1.6, Cmt. [5] (giving examples of circumstances in which disclosure of confidential information is impliedly authorized). Nothing suggests that those situations apply here.

25. The third exception to the duty of confidentiality arises when "the disclosure is permitted by paragraph (b)," meaning that the facts fall within one of the six specified exceptions in Rule 1.6(b) (*e.g.*, the need "to prevent reasonably certain death or substantial bodily harm" or "to prevent the client from committing a crime)." We need not elaborate on these exceptions because none apply here.

Rule 1.8(b) prohibits disclosure absent the client's informed consent

26. Rule 1.8(b) provides as follows:

> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

27. At first glance, Rule 1.8(b) appears to duplicate the prohibition in Rule 1.6(a) against using confidential information "to the disadvantage of a client." But Rule 1.8(b)—unlike Rule 1.6(a)—applies to *all* information "relating to representation of a client," whether or not the information is protected by the attorney-client privilege, whether or not disclosure would not be embarrassing or detrimental to the client, and whether or not the client has not requested that the information be held inviolate, and whether or not the information has become "generally known." Under Rule 1.8(b), a lawyer simply may not use information relating to the representation of a client unless either (i) "the client gives informed consent" (discussed above) or (ii) disclosure is "permitted or required by these Rules" (an exception that does not apply here).

28. Thus, whenever disclosing the identity of a promising investment property would be disadvantageous to the Lender, the Associate may not do it absent the client's informed consent pursuant to Rule 1.0(j). As Comment [5] to Rule 1.8 says:

> [5] A lawyer's use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as … a business associate of the lawyer, at the expense of a client. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the

client or to recommend that another client make such a purchase. …

Rule 1.9(c) prohibits disclosure absent the client's informed consent

29. The Associate also asks whether the answer will change if he waits until he has moved to a different firm working in a different practice area. It will not. Rule 1.8(b) does not apply to former clients, but Rule 1.6 does apply, via Rule 1.9(c), which provides as follows:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
>
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

30. In other words, the duty of confidentiality in Rule 1.6 toward current clients carries over with full force to former clients. To the extent that the Associate is barred from using or revealing confidential information of his current clients while working at his current firm, he will be equally barred from using or revealing the same information after he has moved to a different law firm. Whether his new firm practices in the same area of law or a different area of law will make no difference.

31. In sum, we conclude that Rules 1.6(a), Rule 1.8(b), and 1.9(c) all prohibit the Associate from making the disclosures he proposes to make here unless the Lender gives informed consent.

B. Conflict Issues: Rule 1.7

32. The second set of issues pertains to conflicts of interest between the Lender's interests and the lawyer's personal interests. Indeed, in his inquiry, the Associate expressly worries that his involvement in a business that buys properties upon which clients of his employer's law office are foreclosing "will create an ethical conflict subject to disciplinary action…."

33. The Associate's concern is well founded. The applicable provision of the New York Rules of Professional Conduct is Rule 1.7(a)(2), which provides as follows:

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

34. In the circumstances before us, a reasonable lawyer would conclude that there is a "significant risk" that the Associate's professional judgment on behalf of the Lender in foreclosure proceedings regarding each property will be adversely affected by (a) the Associate's own financial and business interests in the LLC, and by (b) the Associate's personal interests in maintaining good relationships with his friends who run the LLC. Thus, a concurrent conflict will arise with respect to each foreclosure proceeding in which the Associate represents the Lender.[1] In particular, the Lender has a legal duty to participate in the loan modification process in good faith, but the LLC is not involved in that process and has no good faith obligation. Some courts have sanctioned lenders for dragging out the loan modification process or for otherwise failing to negotiate a loan modification in good faith. *See, e.g., U.S. Bank v. Shinaba,* No. 381917/09 (Bronx Sup. Ct., July 31, 2013) (imposing sanctions on bank for "dilatory, and dishonest, conduct" that dragged out settlement conferences in a foreclosure action); *Citibank, N.A. v. Barclay,* No. 381649/09 (Bronx Sup. Ct., June 21, 2013) (same). These decisions underscore the conflict of interest that the Associate will face if the Lender desires to reach a loan modification agreement or otherwise move the foreclosure process along quickly, but the LLC wants to drag it out. (We address below the Associate's separate duty to avoid conduct whose purpose is to delay and prolong litigation.)

35. Because a concurrent conflict of interest exists, the Associate may not represent the Lender in any foreclosure proceeding unless he complies with Rule 1.7(b), which provides, in pertinent part, as follows:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to pro-

vide competent and diligent representation to each affected client; … and

(4) each affected client gives informed consent, confirmed in writing.

36. Under Rule 1.7(b), the Associate may not be involved in the LLC unless he "reasonably believes" that he can "provide competent and diligent representation" to the Lender, and the Lender "gives informed consent, confirmed in writing." This standard will be difficult to meet because the Lender has many interests that may diverge from the LLC's interests. For example, the Lender may desire to establish or maintain a reputation for cooperation with the courts, for fairness to borrowers, or for efficiency in resolving foreclosure proceedings. The Lender will also desire to minimize legal fees and minimize the costs of taxes, insurance, and maintenance on properties in foreclosure. And the Lender will want to avoid sanctions for dilatory or frivolous litigation conduct. The LLC does not share these interests—its only interest is in purchasing sound investments for the LLC. Accordingly, it is unlikely that the Associate can provide competent and diligent representation to the Lender if he is personally involved in the LLC or has agreed to provide "leads" to the LLC. Thus, the conflict may well be non-consentable (non-waivable).

37. Even if a conflict regarding a particular property is consentable—and it usually will not be—the Associate must not continue representing the Lender in the matter without the Lender's informed consent. The disclosures needed to obtain the Lender's informed consent to disclose confidential information to the LLC (see above) should normally suffice to obtain the Lender's informed consent for conflict purposes—but Rule 1.7(b)(4) also requires that the client's consent be "confirmed in writing"—see Rule 1.0(e) (defining "Confirmed in writing"). Moreover, the Associate will have to obtain a separate consent with respect to each property on which he represents the Lender, because each property presents a new and different conflict of interest.

C. Dilatory Tactics in Litigation: Rules 3.1 and 3.2

38. The Associate says in his inquiry that he may have an incentive to frustrate the mediation process by "causing delays in forwarding applications that I receive from borrowers to my client." Deliberately causing such delays would implicate Rule 3.1 ("Non–Meritorious Claims and Contentions"). Rule 3.1(a) provides that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.…" Rule 3.1(b)) provides that a lawyer's conduct is "frivolous" for purposes of Rule 3.1 if the conduct "has ***no reasonable purpose other than to delay or prolong the resolution of litigation***, in violation of Rule 3.2 …." [Emphasis added.]

39. Thus, the Associate may not advance frivolous claims or defenses, or engage in conduct whose main purpose is to "delay or prolong" the litigation.

40. Moreover, Rule 3.2 ("Delay of Litigation"), which is referred to in Rule 3.1(b)(2), provides that a lawyer representing a client "shall not use means that have no substantial purpose other than to ***delay or prolong*** the proceeding or to cause needless expense." (Emphasis added.) Comment [1] to Rule 3.2 explains the rule as follows (with emphasis added):

> [1] Dilatory practices bring the administration of justice into disrepute. Such tactics are prohibited if their only substantial purpose is to frustrate an opposing party's attempt to obtain rightful redress or repose.… The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay or needless expense. ***Seeking or realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.*** [Emphasis added.]

41. Seeking financial or other benefit for the lawyer's own client is not a legitimate reason for a lawyer to delay litigation, so seeking financial benefit for the lawyer (or a business in which the lawyer is involved) is a fortiori not a legitimate justification for using delaying tactics. Thus, even if the Associate obtains the client's consent to disclose confidential information to the LLC pursuant to Rule 1.6(a), and even if the Associate obtains the client's valid consent to the concurrent conflict pursuant to Rule 1.7(b), the Associate still must not use dilatory litigation tactics, such as seeking unwarranted continuances or demanding unnecessary loan documentation, that have "no substantial purpose other than to delay or prolong the proceeding."

Conclusion

42. A lawyer must not reveal confidential information to the disadvantage of the client or to the advantage of the lawyer or a third party (such

as a business in which the lawyer is involved) unless the client gives informed consent. If a reasonable lawyer would perceive a significant risk that the lawyer's financial, business, or other personal interests will adversely affect the lawyer's professional judgment on the client's behalf, then the lawyer may not continue the representation unless the conflict is consentable and the client gives informed consent, confirmed in writing. In any event, the lawyer may not use litigation tactics that have no substantial purpose other than delay.

Endnote

1. As mentioned earlier, nothing in his inquiry indicates that he will be representing the LLC. As long as the Associate does not perform any legal services for the LLC, the Associate's involvement in the LLC will not involve him in representing "differing interests" and thus will not create a concurrent conflict under Rule 1.7(a)(1).

(21-13)

* * *

Ethics Opinion 992 (11/13/13)

Topic: Permissible business structures and fee arrangements for a lawyer to work with a business person who seeks to establish a "Disability Office" to help persons with government benefit matters, most of which do not require representation by legal counsel.

Digest: A lawyer seeks to work with a nonlawyer who will establish a "Disability Office" in the local community to assist people with Social Security Supplemental Income, Social Security Disability Income, Medicaid Planning, and Guardianship matters. Some of these services may be performed by a nonlawyer pursuant to applicable regulations. The lawyer may not enter into a partnership or be employed by a nonlawyer to solicit third party clients, nor may the lawyer share legal fees with the business person. The lawyer may compensate the business person for marketing and may provide for other forms of compensation for the success of the firm. The lawyer may not enter into a business with a nonlawyer to handle matters where the lawyer is practicing law even if those services may be performed by a nonlawyer.

Rules: 5.4, 5.7, 5.8, 7.2 (a)

Question

1. The inquiring lawyer seeks to enter into an arrangement with a business person to provide legal services to assist clients in the community with government benefits programs (Social Security Supplemental Income, Social Security Disability, Medicaid Planning, Medicare and an occasional guardianship). He asks whether any of the following four proposals are consistent with the Rules of Professional Conduct:

    a. Businessman runs a "Disability Office" and employs attorneys. Attorney meets with clients and sets the fees. The fees are paid to the Office, and the percentage is then paid to the attorney.

    b. Businessman runs a "Disability Office" and enters into a legal services agreement with attorney's law firm, where attorney pays the Office certain percentage of the fees from each case.

    c. Attorney opens a separate law firm and employs the businessman as an Office and Marketing manager. Officer gets paid percentage of the overall business he brings in through his marketing efforts.

    d. Businessman employs attorney in nonlegal capacity to represent clients with the matters not requiring a legal license.

Background

2. The inquirer practices in the field of trusts and estates, guardianships and provides services to assist clients in Medicaid planning, Medicare, Social Security Supplemental Income (SSI), Social Security Disability Income (SSDI), and guardianships. He is of Russian descent, fluent in Russian, and provides these services to the Russian immigrant community. There are few lawyers of his background in his community performing these services, which are in high demand.

3. By statute, nonlawyers may represent clients in Social Security and Medicaid cases through the hearing process. 42 U.S.C. § 406 (a) (1); 20 C.F.R. §404.1705 (non-attorney representatives"), 18 N.Y.C.R.R. § 358-3.9 (non-attorney authorized representatives for Medicaid and other hearings). Only attorneys may represent a client in the appeal of such cases, in guardianship proceedings or in providing legal advice in Medicaid planning. In SSI and SSDI matters, fees are contingent of up to 25 percent of the overall award.

4. A businessman in the inquirer's community wants to establish a "Disability Office" to assist the community with its unmet needs to obtain Social Security Supplemental Income, Social Security Disability Income, Medicaid Planning, and Guardianships. This for-profit entity would mar-

ket its services to assist clients in the community with government benefit programs, fair hearings and guardianships. The businessman (owner) would have no client contact and would not interfere with the attorney-client relationship.

5. The attorney seeks to enter into a structural relationship and fee arrangement with the businessman that is consistent with the Rules of Professional Conduct. The attorney proposes four structures and inquires whether any of them are permissible.

Opinion

Structural Relationship

6. Rule 5.4 (d) provides that:

> A lawyer shall not practice with or in the form of an entity authorized to practice law for profit if:
>
> a nonlawyer owns any interest therein…
>
> (2) a nonlawyer is a member, corporate director or officer thereof or occupies a position of similar responsibility in any form of association other than a corporation

7. The rule seeks to protect the independent professional judgment of a lawyer and uncompromised loyalty to the client. Despite longstanding debate as to whether it should be revised to permit Alternative Law Practice Structures,[1] New York Rule 5.4(d)(2) endures and is intended to regulate nonlawyer ownership of entities in which a lawyer engages in the practice of law for profit. See Roy D. Simon, Simon's New York Rules of Professional Conduct Annotated, 1152-1157 (2013). So the proposal for the inquiring attorney working as an "employee" of the Disability Office is prohibited by Rule 5.4(d)(2).

8. Judiciary Law § 495 prohibits the practice of law by a corporation or voluntary association. Thus, the Disability Office may not engage in the practice of law. Moreover, Rule 5.4 (b) also prohibits a lawyer from forming a partnership with a non-lawyer if any of the activities of the partnership constitute the practice of law. Even if the business employed persons who are permitted by law to represent claimants in Social security and Medicaid hearings, it could not provide representation of clients in guardianships and Medicaid planning because legal advice on such matters constitutes the practice of law. In such circumstances, the lawyer may not form a partnership with a nonlawyer.

9. Rule 5.8 permits ongoing business relationships with a nonlawyer service provider, but only under limited circumstances that are not presented here. The first of these criteria is that the nonlawyer professional be one of those listed by the Appellate Division Rules §1205.3 (22 NYCRR §§1205.3) (limited to architects, certified public accountants, professional engineers, land surveyors, certified social workers). See N.Y. State 930 (2012); N.Y. State 885 (2011). Thus, neither Rule 5.4 (d) nor Rule 5.8 permits the first two business arrangements contemplated by the inquirer, wherein the attorney proposes to work directly for the business entity or have a legal services agreement with the business owner.

Fee Agreement

10. Even though the inquiring attorney may not enter into a business relationship as discussed above, the lawyer may enter into an agreement to compensate the business owner for marketing or other services. That agreement is subject to several rules.

11. First, it is long established that a lawyer may not share a legal fee with a nonlawyer. Rule 5.4 (a); N.Y. JUDICIARY LAW §491**.** Two of the proposed business structures are impermissible fee sharing agreements.

    These are:

> Businessman runs a "Disability Office" and employs attorneys. Attorney meets with clients and sets the fees. The fees are paid to the Office, and the percentage is then paid to the attorney.
>
> Businessman runs a "Disability Office" and enters into a legal services agreement with attorney's law firm, where attorney pays the Office certain percentage of the fees from each case

12. Second, a lawyer may not pay a fee to a person or organization for referring or recommending employment by specific clients. Rule 7.2 (a); N.Y. STATE 887 (2011); N.Y. STATE 917 (2012).

13. However, a lawyer may pay for marketing and advertising. Comment [1] to Rule 7.2 provides that:

> A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services such as publicists, public relations personnel, marketing personnel and web site designers.

See also N.Y. STATE 860 (2011) (firm can pay for marketing or client development services).

14. In N.Y. STATE 887 (2011) we opined that a firm could pay a bonus to the marketer employee based on overall profits of the firm or on a percentage of the employee's salary. The firm may pay a bonus to the marketer based upon the number of clients referred, but not based on the fees paid by those clients. N.Y. STATE 917 (2012).

15. The firm may also enter into a profit sharing arrangement as part of a retirement plan so long as that agreement is not tied to profit from a particular case or cases. Rule 5.4 (a)(3) provides that "a lawyer or law firm may compensate a nonlawyer employee or include a nonlawyer employee in a retirement plan based in whole or in part on a profit sharing arrangement." Comment 1[B] clarifies that "such sharing of profits with a nonlawyer employee must be based on the total profitability of the law firm or a department within a law firm and may not be based on the fee resulting from a single case."

16. Thus, the third proposed business arrangement is permissible only if the business person receives a bonus based upon firm profitability or a percentage of his salary. Payment of a percentage of firm profits for a specific matter is tantamount to fee sharing and is not permitted. The proposed arrangement is prohibited because it contemplates that the attorney will open a firm, employ the businessman as an Office and Marketing manager, and pay him a percentage of the overall business he brings in through his marketing efforts.

Nonlawyer Practice

17. The final proposed structure contemplates that the businessman will hire the lawyer in a nonlegal capacity to represent clients for the matters not requiring a legal license.

18. As indicated above, regulations authorize persons other than attorneys to represent claimants in Social Security hearings. The governing regulations set forth specific criteria that qualify non-attorneys as representatives of clients in these cases. C.F.R. § 404.1705 (b). The non-attorney is referred to as a "representative." N.Y. State 938 (2012). State regulations permit non–attorneys who are authorized by claimants to represent them in Medicaid hearings. These persons are referred to as "authorized representatives." Thus, the business may employ any such qualified person to represent claimants in such proceedings.

19. We have previously opined that SSDI services are "nonlegal services" defined in Rule 5.7 (c) as "those legal services that lawyers may lawfully provide and that are not prohibited as an unauthorized practice of law when provided by a nonlawyer." NY State 938 (2012). It is not the unauthorized practice of law for non lawyers to advise clients as to SSDI. The same is true for nonlawyer representatives in Medicaid hearings.

20. However, a lawyer who provides such SSDI or Medicaid services is, by definition, engaged in the practice of law and provides the client with legal services. (NY State 938 (fn.2) notes that a lawyer providing such services was a different matter).

21. The governing SSDI regulations distinguish between attorney and non-attorney representation. Attorneys may represent claimants so long as they are in good standing before a court. C.F.R. § 404.1705 (a). Where an attorney is engaged, the client has a reasonable expectation that the attorney has the skills and qualifications beyond that of a non attorney representative, is governed by professional conduct rules, and is subject to civil liability for the representation. Consequently, that lawyer may not circumvent the Rules of Professional Conduct and practice law by a designation that the attorney is employed in a "non-legal capacity" even if a non attorney may perform the same legal services. Cf., Rule 4.3.

Conclusion

22. The lawyer may not be employed by a nonlawyer to represent third party clients, nor may the lawyer share legal fees with the business person. The lawyer may compensate the business person for marketing and may provide for other forms of compensation for the success of the firm. Alternatively, the lawyer may hire a business person and compensate him through a bonus or profit-sharing as part of a retirement plan. The lawyer may not enter into a business with a nonlawyer to handle matters where the lawyer is practicing law even if those services may be performed by a nonlawyer.

Endnote

1. NYSBA Task Force on Nonlawyer Ownership,www.nysba.org; ABA Commission on Ethics 20/20 Discussion Paper on Alternative Law Practice Structures, http://222.americanbar.org/Ethics2020; see District of Columbia Rules of Professional Conduct, Rule 5.4 (permitting forms of Alternative Law Practice), http://www/org/for_lawyers/ethics/legal_ethics/rules_of_professional_condcut/amended_rules/rule_five/rule05_04.cfm.

11-13

* * *

Ethics Opinion 993 (11/13/13)

Topic: Misrepresentations as to purchase price in residential real estate contracts; disclosure of "gross-ups"

Digest: The requirement to disclose a "grossed up" real estate purchase price is triggered when the purchase price has in fact been grossed up in connection with a seller's concession.

Rule: 8.4(c)

Facts

1. A local bar association and a local association of realtors have jointly approved a new form to be used for residential real estate sales. This new "Contract of Sale for Residential Property" includes the following sentence: "The Purchase Price reflects an increase equal to the amount of the Seller's Concession."
2. This sentence (the "Disclosure Clause") was added to the form in an effort to comply with N.Y. State 882 (2011). That opinion followed the reasoning of N.Y. State 817 (2007). According to the inquiry, these two opinions require the Disclosure Clause to be included in all contracts that include a seller's concession.[1]
3. The inquirer reports that since adoption of the new form, attorneys and real estate personnel "have encountered continual problems with various lenders" such as "significant delays, requests for modifications of contracts, including strike out of the gross up text, and outright rejection of mortgage loan applications."
4. The inquiry says that these problems have arisen because, with the addition of the Disclosure Clause, mortgage lenders "consider the Seller's Concession to be an 'inducement to purchase.'" These mortgage lenders therefore "will only lend on the amount of the Purchase Price ***less*** the Seller's Concession, rather than based on the adjusted Purchase Price or the grossed up amount" (emphasis in inquiry).
5. The inquirer requests that the Committee reconsider N.Y. State 882 and modify it "by eliminating the requirement that all Seller's Concessions must be stated as an increase in the "Purchase Price." The inquiry, and a memorandum submitted with it, set forth arguments in support of that request.

Opinion

6. The inquiry is based on a misunderstanding of our prior opinions. Those opinions did not require that *all* transactions with a seller's concession be characterized as involving an increase or gross-up of the purchase price. N.Y. State 817 is clearly limited to situations in which there is, in fact, a gross-up of purchase price in connection with a seller's concession.[2] Our opinion in N.Y. State 882 is similarly limited, and its disclosure requirement does not apply to situations in which "the seller actually bears an economic cost equivalent to the concession."[3] In the most recent opinion in this line, we again adhered to the disclosure requirement in the context of a transaction in which "there has been a gross-up of the purchase price" in connection with a seller's concession. N.Y. State 892 ¶8 (2011).
7. Under our opinions, what the lawyer must disclose depends on the facts of the transaction. The relevant obligation is that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Rule 8.4(c). In some instances, as reflected in previous inquiries to this Committee, the parties may agree on a purchase price and thereafter agree to increase or gross up that price in connection with a seller's concession. The lawyer would be required to disclose such a gross-up. But when there has in fact been no gross-up, because the seller is actually bearing an economic cost reflected in the concession, the lawyer is under no obligation to assert that a gross-up has occurred. Indeed, it would be inappropriate for the lawyer to "disclose" something known to be inaccurate.
8. Thus, because the facts may vary from transaction to transaction, the lawyer's disclosure obligation may vary from transaction to transaction as well.[4] It appears that the Disclosure Clause quoted above is invariably included in the described Contract of Sale for Residential Property. That degree of uniformity is not required by the rules of legal ethics, nor is it appropriate if it results in misstatement of the facts in particular cases. The inquiry also mentions another form, adopted in one county, that takes a less uniform approach. In that county's alternate form, there is a checkbox next to the disclosure that "The Purchase Price has been increased by a sum equal to the Seller's Concession," and above that line is the instruction "Check if Applicable." We do not opine as to the best wording for forms, but we note that this alternate form allows a lawyer to make or not make the disclosure in question, depending on the known facts of the transaction.
9. The inquiry details problems that can result from use of the Disclosure Clause, including resistance by mortgage lenders. This is not the first time

the Committee has addressed such problems. A prior inquiry recounted how use of similar disclosure language led a lender to balk at a transaction, advising the seller's attorney: "Contract states price increased due to Seller concession; increase for this reason is not allowed." N.Y. State 892 ¶2 (2011). The Committee answered that a lawyer may not ethically participate in a residential real estate transaction in which a lender's objection precluded the required disclosure. *Id.* ¶8. The current inquiry tells us that the kind of problem addressed in N.Y. State 892 is not aberrational, but rather is faced with some frequency. That circumstance may make N.Y. State 892 and previous opinions more important in practice, but it does not refute their reasoning, which we believe continues to be sound.

10. The inquiry asserts that "the mortgage loan industry is fully familiar with and permits use of Seller's Concessions." As we have noted, however, the issue is not simply whether there is a seller's concession, but whether there is an associated gross-up of the purchase price. The reported industry reaction supports the significance of this distinction. The inquiry suggests that mortgage lenders do not consider sellers' concessions in general to be "inducements to purchase," but do consider them to be inducements to purchase when the purchase price is stated to be correspondingly grossed up. In effect, the very lenders that "permit" the use of sellers' concessions may not permit associated gross-ups, when explicitly recognized as such, to be included in the basis for the loan amount. This industry reaction does not undercut our prior conclusion that stating a grossed up purchase price without disclosing the gross-up is a misrepresentation. Indeed, the industry reaction demonstrates the materiality of that misrepresentation. The required disclosure of gross-ups may preclude uniformity of loan documents and may lead lenders to reject contracts in some cases, but an attorney's understandable desire to avoid such complications cannot justify misrepresentation.

Conclusion

11. We adhere to the conclusions in N.Y. State 882 and N.Y. State 817. The mere existence of a seller's concession does not require a statement that the purchase price has been increased. However, when the purchase price in a sale of residential real estate has in fact been grossed up in connection with a seller's concession, then a lawyer who participates in the transaction is required to ensure that the grossing up of the price is disclosed.

Endnotes

1. The inquiry states (incorrectly) that N.Y. State 882 and N.Y. State 817 "assume that all Seller's Concessions are phantom gross ups," and it urges that contracts should not need to "characterize every Seller's Concession as an increase or gross up of the Purchase Price as the Majority in Opinion 882 currently requires" (emphasis added).
2. That opinion dealt with this situation: "Following written agreement between buyer and seller of real estate as to terms," the buyer requested that the agreed sales price be increased by 3% to cover closing costs, and that the increase be set off by a seller's concession, allowing the buyer to obtain a larger mortgage loan. N.Y. State 817 ¶1. We concluded that when there is "a 'gross up' of the actual purchase price and concomitant seller's concession," then "the gross-up…must be disclosed," id. ¶14.
3. N.Y. State 882 distinguished the situation it considered—one in which there had been a "'gross-up' in the sales price to offset the seller's supposed concession"—from one in which

   > "the seller actually bears an economic cost equivalent to the concession.… This is a distinction with a difference.… The problem here is the matching 'gross-up' of the sales price, which effectively wipes out the seller's concession."
   >
   > Opinion 882 states that an ethical violation occurs "when a seller, buyer, lender, and their attorneys engage in the device of a seller's concession accompanied by a like increase in the purchase price that create a misrepresentation." The Committee concluded that "an attorney may ethically participate in a real estate transaction where the sales price is grossed-up by an amount equal to a corresponding seller's concession if the amount of the gross-up and the amount of the seller's concession are expressly and meaningfully disclosed."
4. We recognize that the lawyer may not always be aware of the history of negotiations. For example, we understand that it is not unusual for draft contracts already reflecting sellers' concessions to be submitted to lawyers, and we do not suggest that the mere statement of a seller's concession will suffice to put the lawyer on notice of a grossed up purchase price. A lawyer's good-faith omission to disclose unknown facts does not constitute "dishonesty, fraud, deceit or misrepresentation." On the other hand, we do not think that a lawyer may avoid the disclosure requirement by remaining willfully blind to the existence of a gross-up. Cf. Restatement (Third) of the Law Governing Lawyers §120, Reporter's Note to Comment c (2000) (citing court decisions that arguably articulate for certain disciplinary purposes "a version of the conscious-avoidance doctrine" applied in criminal law); Rule 1.0(k) ("A person's knowledge may be inferred from circumstances.").

(37-13)

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Ethics Opinion 994 (12/5/13)

Topic: Conflict of interest arising from lawyer's nonlegal employment by a law client.

Digest: A lawyer who coaches a sports team of a school district may also provide legal services to that school district unless there is a significant risk that the lawyer's professional judgment on behalf of the school district would be adversely affected by the lawyer's financial or other personal interest as a coach.

Rules: 1.7, 1.10

Facts

1. The inquirer is a lawyer who recently began working for a law firm that "represents and provides general counsel for school districts," including a school district that has previously employed and paid a stipend to the lawyer to coach one of the school sports teams. During part of the year, the school's team is run by the school district, and during another part, the team members participate in the sport under the auspices of a private club (the "Club"). The inquirer posits that to continue receiving stipends from the school district would create a conflict of interest given the inquirer's new position with the law firm, and asks whether it would be permissible to continue coaching if (a) the inquirer were to coach solely as an employee of the Club, or (b) the inquirer were to forgo the stipends and coach for the school district as a volunteer.

Question

2. May a lawyer whose firm represents a school district also work as a coach for one of the district's sports teams, and does the answer depend on whether the lawyer's coaching services are compensated by the school district, compensated by an affiliated private club, or not compensated at all?

Opinion

3. Seeking to avoid any possibility of conflict, the inquirer starts from the premise that a lawyer in a law firm may not be paid by a client of the firm to provide nonlegal services. But that premise goes beyond what is required by the rules of legal ethics. In a wide range of foreseeable circumstances, a law firm may ethically provide legal services to a school even though the school pays one of its lawyers to provide nonlegal services such as sports coaching. Indeed, the very lawyer employed as a coach could, in many circumstances, also provide legal services to the school.

4. The governing standard is found in Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules"). That Rule provides that in the absence of appropriate client consent, "a lawyer shall not represent a client if a reasonable lawyer would conclude that…there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests."

5. Before considering whether the firm as a whole could provide legal services to the school district, we first consider whether the inquiring lawyer could provide such services. The relevant analysis, made always from the viewpoint of a reasonable lawyer, is whether the inquirer's financial or other personal interest as a coach would create a significant risk of adversely affecting the inquirer's professional judgment. The inquirer's employment as a coach may incline the inquirer toward benefiting the school, but that interest generally would not interfere with exercising professional judgment that would also be for the benefit of the school. There may be little or no risk of adverse effect if, for example, the legal work on behalf of the school district were unrelated to the lawyer's work as coach. Whether payment of a stipend would create such a risk could depend on its size, but even if large enough to give the inquirer a significant financial interest in its continuation, there would be no conflict unless that interest were to create a significant risk of interfering with professional judgment on behalf of the client.

6. It is possible to imagine particular circumstances in which employment as a coach could create a conflict. For example, there might be a significant risk that the inquirer's professional judgment would be adversely affected by personal interests if the inquirer were retained to defend the school district in a wrongful termination action filed by another coach of the same team; to defend a Title IX lawsuit alleging insufficient support of girls' sports teams; or to advise the district whether to implement policies that would constrain the ability of certain students to participate on the team.

7. To assess the risk in such cases would require knowing the facts in some detail. If the facts in a particular legal matter give rise to a conflict under Rule 1.7(a) and the inquirer chooses to continue as a coach, then the inquirer could not represent the school district in that matter unless the school district could and did waive that conflict. Waiver would be available if the inquirer reasonably believed it possible to provide competent and diligent representation to the school district despite the conflict, and the school district gave

informed consent confirmed in writing. *See* Rule 1.7(b).

8. If a conflict would preclude the inquirer from handling a particular legal matter for the school, then that conflict would also be imputed to the other lawyers in the inquirer's firm. Absent appropriate waiver of the conflict, those other lawyers would be prohibited from representing the school in that matter. *See* Rule 1.10(a). The imputed conflict may, however, be waived by the school under appropriate circumstances. *See* Rule 1.10(d). Even if there were no reasonable prospect that the *inquirer* could adequately represent the school, rendering the inquirer's underlying conflict unwaivable under Rule 1.7(b)(1), the *imputed* conflict may still be waivable if other lawyers in the firm reasonably believe that they could provide competent and diligent representation to the school. *See* N.Y. State 968 ¶25 (2013).
9. We have addressed only those constraints arising from the rules of legal ethics. There may also be relevant legal rules in statutes or regulations relating to employees of the school district, or in internal policies of the school district or law firm. The inquirer would be well advised to consult any such rules, as they may limit outside employment or require its disclosure and approval.

Conclusion

10. Even though a lawyer works for a school district as a volunteer or paid sports coach, the lawyer or the lawyer's firm may provide legal services to the school district unless there appears to be a significant risk that the lawyer's professional judgment on behalf of the school district would be adversely affected by the lawyer's financial or other personal interest as a coach.

(36-13)

* * *

Ethics Opinion 995 (12/18/13)

Topic: Conflict of interest; lawyer and judge with employee in common

Digest: The fact that a lawyer's part-time secretary also works on personal matters of a City Court judge related to the lawyer does not preclude the lawyer's appearance before a different City Court judge, but the lawyer must take appropriate steps to protect confidential client information and may not suggest an ability to exercise improper influence.

Rules: 1.6(c); 8.4(e), 8.4(f)

Facts

1. Inquiring attorney's son (the "related judge") is a full-time City Court judge, and there is one other full-time judge (the "unrelated judge") in the same court. The related judge was inquiring attorney's law partner before becoming a judge. The inquiry states that the related judge is permitted to hire a part-time secretary "to handle his personal matters" and he would like to hire a secretary who would also work part time in the inquiring attorney's office. In working for the related judge, the secretary "will not be working on the [unrelated] judge's files."

Question

2. May the inquiring attorney appear in the City Court, before the unrelated judge only, if the inquiring attorney's part-time secretary also works for the related judge as part-time secretary for his private matters?

Opinion

3. The inquirer does not propose to appear before the related judge. *Cf.* N.Y. State 725 (1999) (opining that prosecutor may not appear before sibling Town Justice).
4. The inquirer does, however, propose to appear before the unrelated judge. We previously considered a situation in which a lawyer sought to appear before a judge although the lawyer's wife worked as the judge's confidential law assistant. N.Y. State 548 (1983). We found that the law assistant would be required to recuse herself from cases in which her husband appeared. We analyzed the underlying propriety of such appearances as an ethical issue for the judge rather than for the lawyer. Our conclusion was that the judge would not be automatically disqualified from hearing a case in which the lawyer appeared, as long as the law assistant were screened from contact with that case, but that disqualification "may nonetheless be required or appropriate on the facts of circumstances of a particular case." *Id*.
5. In the current inquiry, a lawyer proposing to appear before a judge has a close familial relationship not to one of the judge's employees, but rather to another judge of the same court. We find the considerations expressed in N.Y. State 548, though based on the Code of Judicial Conduct and the prior Code of Professional Responsibility, to be relevant to the current inquiry under the Rules of Professional Conduct (the "Rules"). A lawyer's familial relationship with one judge does not automatically preclude the lawyer's appearance before another judge in the same court. Additional factors in particular cases could

count against the propriety of such appearance, but the only additional factor mentioned in the inquiry, which we address below, is the employment of the same secretary by the lawyer and the related judge.

6. We rely on the inquiry's representation that the secretary will not work on any court cases assigned to the unrelated judge, and we take it that this would be true even if, for example, the unrelated judge were unavailable at a particular time and the related judge had occasion to handle one of the matters ordinarily assigned to the unrelated judge. Limiting our analysis to the ethical question posed, we do not consider other questions such as the legal propriety of the arrangements to compensate the secretary for handling the related judge's personal matters.

7. The contemplated kinds of employment relationships are not specifically addressed by any of the Rules. Nor would more general ethical provisions and the rules of judicial disqualification, such as discussed in N.Y. State 725 and N.Y. State 548, prohibit the proposed conduct. *See*, *e.g.*, Rule 8.4(f) (prohibiting lawyer's conduct in connection with a judge only when the lawyer knowingly assists the judge in conduct "that is a violation of applicable rules of judicial conduct or other law"). The inquiring lawyer is not automatically precluded from appearing before the unrelated judge on account of having an employee in common with a different judge, any more than appearing before the unrelated judge would be automatically precluded by the inquirer's familial relationship with that different judge.

8. The inquiring lawyer must, however, be mindful of the need to protect confidential client information and must fulfill the obligation under Rule 1.6(c) to "exercise reasonable care to prevent the lawyer's employees…from disclosing or using confidential information of a client." A secretary who will also be working part time in another law office should be given appropriate instructions about the importance of maintaining confidentiality while at that other office. Particular situations may call for renewed and more tailored warnings to the secretary. For example, if and when the secretary works on one of the lawyer's cases before the unrelated judge, or even a case in some other court involving parties or issues related to a case in the City Court, the duty of reasonable care may require the lawyer to highlight the need to maintain client confidentiality at the office of the related judge. *See also* Rule 5.3(a) (degree of lawyer's required supervision over nonlawyer depends on factors including likelihood that ethical problems might arise in course of working on the matter).

9. The inquirer must also be careful, as required by Rule 8.4(e)(1), not to state or imply an ability "to influence improperly or upon irrelevant grounds any tribunal, legislative body or public official." This proscription is equally applicable to the familial relationship and the shared employment relationship. For example, when negotiating a case pending in City Court, the lawyer should not gratuitously volunteer to other parties to the negotiation that the attorney's son is a judge in that court or that the lawyer's secretary also works for that judge.

Conclusion

10. A lawyer's appearance before the one of two City Court judges who is not related to the lawyer is not precluded by the circumstance that the lawyer's part-time secretary is also employed part time as secretary for personal matters by the judge related to the lawyer, but the lawyer must comply with Rules 1.6(c) and 8.4(e)(1).

(18-13)

* * *

Ethics Opinion 996 (1/3/14)

Topic: Escrowed client funds

Digest: Client funds in a lawyer's escrow account may not be shielded from lawyer's creditor by transferring them to an escrow account held by the lawyer's lawyer.

Rules: 1.15; 8.4

Facts

1. The inquiring lawyer ("L1") represents another lawyer ("L2") who owes money to a third party. As part of that representation, L1 is trying to negotiate an installment payment agreement with the third party, but has been unsuccessful. L1 is concerned that L2's creditor may seek to levy on L2's escrow account, which contains unearned advance payment retainers paid by L2's clients. So as to protect those funds, L2 would like to transfer the funds to L1, to be held in L1's escrow account. So long as the funds belong to L2's clients and L2 continues to represent those clients, L1 would maintain the funds in L1's escrow account; once L2 earns the funds, L1 would disburse them in whatever manner L2 directs.

Question

2. May L2 properly transfer the unearned advance payment retainers from L2's escrow account to L1's escrow account, and may L1 receive those funds, for the purpose of protecting the funds from levy by a third party?

Opinion

3. The inquiry is governed by Rule 1.15 of the New York Rules of Professional Conduct ("the Rules"). Rule 1.15(a) provides: "A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own." Rule 1.15(b)(1) provides in part that funds belonging to another person but in the lawyer's possession incident to the practice of law shall be maintained in a special account or accounts "in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed."

4. The funds at issue are advance payment retainers from L2's clients that have been paid to, but not yet earned by, L2. *See* N.Y. State 983 ¶5 & n.6 (2013) (distinguishing advance payment retainers from general retainers). L2 may agree with those clients to treat such funds as belonging to the clients until earned, or alternatively, to treat the funds as belonging to L2 subject to an obligation to return any ultimately unearned amounts to L2's clients. *See* N.Y. State 983 ¶4 (2013); N.Y. State 816 ¶¶ 4-7 (2007). The inquiry does not explicitly state whether L2's clients agreed with L2 on one of these options. However, it does state that the funds are being maintained in L2's escrow account. We assume that the funds are being held in that account properly, which is to say that the funds do not yet belong to L2, but rather are being treated as belonging to L2's clients until earned. See N.Y. State 983 ¶4; N.Y. State 816 ¶ 5. Because the funds currently belong to persons other than L2, but are in L2's possession incident to the practice of law, they constitute property subject to Rule 1.15.

5. Under Rule 1.15, L2 must continue to maintain these advance payment retainers belonging to L2's clients in L2's escrow account. That requirement is subject to client direction, in that L2 must comply with any given client's request for disbursement of that client's funds. *See* Rule 1.15(c)(4). But there is no suggestion in the current inquiry that any client has requested that L2 disburse escrow funds to L1, much less that all the clients have done so, as would be required for L2 to pursue the proposed course of action. Absent such direction from all affected clients and as long as the funds remain unearned, L2 may not transfer them to L1 or anyone else other than the clients to whom the money belongs.

6. We note some matters beyond the scope of our response. There are legal questions about whether the proposed transfer of the client's escrowed funds would tend to serve the purpose of avoiding levy by L2's creditor. These include the questions whether the funds in the L2's escrow account, which are unearned retainer fees not yet belonging to L2, would even be subject to levy under the circumstances, and whether the funds, if they could appropriately be transferred to the L1's escrow account, would be any better protected from the creditor. The Committee does not opine on questions of law as opposed to ethics, and in any event, the propriety of the proposed transfer does not turn on its efficacy.

7. Another kind of legal question is more relevant to ethical propriety. L1 does not ask about the lawfulness of the proposed transfer of the client's escrowed funds for the purpose of avoiding levy by the L2's creditor, but the propriety of the proposed conduct depends in part on whether such conduct is known by L1 or L2 to be in violation of law. Under the facts presented, L1 already is representing L2 in negotiating with the creditor, those negotiations have been unsuccessful, and L2 and L1 are contemplating the transfer from L2 to L1 for the specific purpose of protecting the L2's escrowed funds from being levied upon by the creditor. It is relevant to consider whether there would be anything fraudulent about the proposed transfer or whether, for example, L1 and L2 might reasonably believe that the purpose of transfer would be to protect from a wrongful rather than a legitimate attempt to levy. We note only that whether the proposed transfer would be fraudulent or otherwise unlawful, although a legal question, would implicate various rules of legal ethics. *See* Rule 1.2(d) (a lawyer shall not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client"); Rule 8.4(b) (a lawyer shall not "engage in illegal conduct that adversely reflects on the lawyer's honesty, trustworthiness or fitness as a lawyer"); Rule 8.4(c) (a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

8. If L1 and L2 were free under Rule 1.15 to engage in the proposed transfer of funds, then they would need to consider legal questions such as those mentioned above, and the ethical consequences of the answers to those questions.

However, because the proposed transfer would violate Rule 1.15, they need not reach such issues.

Conclusion

9. Funds held by a lawyer as advance payment retainers belonging to the attorney's clients and not yet earned by the lawyer must be held in the lawyer's escrow account and may not be transferred into the escrow account of another lawyer who represents the attorney holding the advance payments.

(34-13)

* * *

Ethics Opinion 997 (1/24/14)

Topic: Payment for evidence

Digest: A lawyer may in general pay for physical evidence in connection with contemplated or pending litigation, and such payment may be contingent on the outcome of the matter. There are limitations, however, such as when the transaction involves witness payments or the prospect of false evidence.

Rules: 1.1(c), 1.8(e), 3.4(b), 8.4(d)

Facts

1. A lawyer represents a plaintiff in a personal injury action arising out of an automobile accident.
2. A store surveillance camera recorded the events at issue, apparently showing that the defendant's actions caused the accident. The storeowner has contacted the lawyer and has offered to provide the surveillance tape for a payment.

Questions

3. May a lawyer purchase video surveillance evidence from a third party on behalf of a client?
4. If a lawyer purchases such evidence, may the amount of the payment be contingent upon the outcome of the matter?

Opinion

5. This inquiry raises a narrow question regarding the propriety, under the Rules of Professional Conduct (the "Rules"), of purchasing physical evidence for use in contemplated or pending litigation. We therefore do not address various related but different questions about the acquisition or use of physical evidence.[1]
6. Nothing in the Rules explicitly prohibits paying for evidence, nor do we perceive any implied prohibition. Such payment may, depending on the circumstances, be an appropriate means of advancing a client's interests. *See* Rule 1.1(c)(1) (lawyer shall not intentionally "fail to seek the objectives of the client through reasonably available means permitted by law and these Rules"); Rule 1.8(e), Cmts. [9B] & [10] (discussing rule that lawyer may not advance or guarantee financial assistance to client, subject to exceptions for court costs and litigation expenses, including "the costs of obtaining and presenting evidence").
7. However, while it is permissible in general for a lawyer to pay for evidence, particular circumstances may give rise to important limitations on that practice.
8. First is the prohibition of knowingly offering or using false evidence. *See* Rule 3.3(a)(3). A lawyer who knows that a surveillance videotape has been fraudulently altered may not offer or use that videotape. Nor may the lawyer evade that Rule by remaining willfully blind to the falsity of the videotape. *See* N.Y. State 993 ¶9 n.4 (2013) (addressing conscious-avoidance doctrine applied to ethics context).
9. Second, to offer the surveillance tape in evidence, the lawyer may need to offer foundation testimony by the person who has offered the tape for sale. When it is foreseeable that the lawyer will have occasion to call that person as a witness, either to authenticate the tape or for any other reason, then the lawyer will be subject to ethical limitations on witness payments:

> A lawyer shall not…pay, offer to pay or acquiesce in the payment of compensation to a witness contingent upon the content of the witness's testimony or the outcome of the matter. A lawyer may advance, guarantee or acquiesce in the payment of:
>
> reasonable compensation to a witness for the loss of time in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses…

Rule 3.4(b); see N.Y. State 962 (2013) (discussing "reasonable related expenses" permitted by Rule 3.4(b)(1)); N.Y. State 668 (1994) (discussing "reasonable compensation" as permitted by predecessor rule and also current Rule 3.4(b)(1)).

10. Of course a lawyer may not circumvent the restrictions of Rule 3.4(b) by disguising witness payments in whole or part as payments for physical evidence. On the other hand, the restric-

tions do not apply except to the extent that there is actual or proposed compensation to a witness. By the terms of the Rule, the limitations—including the prohibition of payment contingent on the matter's outcome—do not apply to purely physical as opposed to testimonial evidence.

11. Third, particular circumstances of payment for evidence could give rise to concerns about the reliability of that evidence. Such concerns may be heightened when, for example, the evidence in question is readily susceptible to alteration that is difficult to detect; when the payment for the evidence seems disproportionately large; and when a person involved in the transaction otherwise acts in ways raising suspicion about the integrity of the evidence. On sufficiently extreme facts, the purchase in such a case could amount to an ethical violation. *See* Rule 8.4(d) (lawyer shall not "engage in conduct that is prejudicial to the administration of justice"). While we cannot specify in the abstract all the circumstances that could rise to the level of a violation, a trial court would be positioned to assess the facts of a particular case and fashion appropriate remedies. *Cf. Caldwell v. Cablevision Systems Corp.*, 20 N.Y.3d 365 (2013) (citing Rule 3.4(b), noting concern about "what appears to be a substantial payment to a fact witness in exchange for minimal testimony" and "such a disproportionate fee for a short amount of time at trial," and concluding that trial court should have given a special jury instruction as to potential bias of the paid witness).

12. However, when these limitations are not triggered by particular circumstances, a lawyer may purchase surveillance video from a third party for use as evidence in contemplated or pending litigation. There is no requirement that the cost of purchasing evidence be charged to the client immediately, or in some cases, even ultimately. *See* Rule 1.8(e)(1)-(3) and Cmts. [9B] & [10] (providing that lawyer may "advance" expenses of litigation such as costs of obtaining evidence, "the repayment of which may be contingent on the outcome of the matter," and may "pay" such costs for indigent or pro bono clients and in contingent fee matters).

Conclusion

13. A lawyer may in general purchase video surveillance evidence on behalf of a client for use in connection with contemplated or pending litigation. There is no per se rule against such payments being contingent on case outcome. The lawyer's conduct may be subject to limitations, however, such as when the conduct also involves witness payments or the prospect of false evidence.

Endnote

1. For example, we do not address the admissibility of the purchased evidence. Nor do we address factors bearing on a lawyer's choice between seeking to obtain evidence by purchase or subpoena. *See* CPLR 3122(d) ("reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery"). Moreover, this opinion presumes that the evidence in question is acquired legally, and we do not address circumstances in which evidence is acquired in violation of another's rights, or acquired for purposes of alteration, suppression or other obstruction, which would require a separate analysis of the facts and circumstances under Rules 4.4 and 8.4, respectively.

(42-13)

* * *

Ethics Opinion 998 (2/5/14)

Topic: Confidential information; criminal conduct

Digest: Lawyers who become aware of fraudulent conduct by buyer and seller in a real estate transaction, including delivery of a fraudulent check in payment of the fee of buyer's lawyer, may not disclose attempted or completed fraud unless necessary to withdraw a representation by the lawyer still being relied upon; to the extent necessary to collect the fee; or where required by other law.

Rules: 1.6(b), 3.3

Facts

1. Buyer, seller and the mortgage-holding lender agreed to a short-sale residential real estate transaction. A short sale is a transaction in which the holder of a mortgage on the property consents to release its lien in a sale for less than the outstanding amount of its loan. Such a sale is often an alternative to initiating a foreclosure proceeding. In this case, buyer and seller secretly agreed prior to the closing (and without informing their lawyers) that the buyer would pay the seller an amount in addition to the amount being paid to the mortgage holder. At the closing, the buyer and seller signed affidavits swearing that there had been no side agreements and that no money would be exchanged outside of the approved arrangements. Buyer delivered checks to pay the broker's fee and to pay the buyer's own lawyer. Unbeknownst to counsel for either party, the buyer also delivered to the seller a check for the additional amount on which they had agreed.

2. The closing was completed, and a day or two later, the broker, seller and buyer's attorney all

discovered that the checks they had received were fraudulent. (The buyer otherwise had used non-fraudulent checks to consummate the closing.) The account on which the fraudulent checks were drawn did not exist. The seller asked the seller's attorney for advice regarding the fraudulent check the seller had received, resulting in that attorney also learning about the side agreement and ultimately about the other fraudulent checks. We are told, and it seems reasonable to conclude, that the side agreement was an attempt to defraud, if not an actual fraud upon, the mortgage holder.

Question

3. In a short-sale residential real estate transaction in which buyer and seller may have, without the knowledge of their lawyers, committed a fraud on the lender, and buyer has also issued fraudulent checks to buyer's attorney and others involved in the transaction, may or must the lawyers reveal the fraudulent conduct to the lender or law enforcement authorities?

Opinion

4. The critical facts here—that the buyer and seller had agreed on and attempted to consummate a side payment and swore affidavits to the contrary, and the buyer's issuance of fraudulent checks—are clearly "confidential information" within the meaning of Rule 1.6 of the Rules of Professional Conduct. Rule 1.6(a) defines "confidential information" as follows:

> "Confidential information" consists of 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.

The information here was gained during or relating to the representation of each lawyer's client. In N.Y. State 866 (2011), we opined that the term "during" in Rule 1.6 should not be read to be purely temporal, but rather "implies some connection between the lawyer's activities on behalf of the client and the lawyer's acquisition of the information—for example, if the lawyer learned the information because of the lawyer-client relationship." *Id.* ¶ 17 (footnote omitted). The seller's lawyer clearly learned the information during the course of his representation of the seller in this sense—indeed, the lawyer learned it in the course of a request for legal advice. The buyer's lawyer might have learned the information after the end of the representation, and thus not "during" the representation, but the information clearly "relat[ed] to" the representation.[1]

5. Moreover, the disclosure of that information by either lawyer is likely to be detrimental to that lawyer's client: the fact that the buyer and seller apparently defrauded the lender would be detrimental to each client if disclosed; the disclosure of the buyer's delivery of fraudulent checks would clearly be detrimental to the buyer; the disclosure of that fact likely would be detrimental to the seller as well, because it would likely lead to disclosure of the apparently illegal side agreement. Under Rule 1.6(a), each side's lawyer is therefore barred from revealing this information unless his or her client gives informed consent or the disclosure is permitted by Rule 1.6(b).

6. Rule 1.6(b) merely authorizes, but does not require, disclosure in the circumstances enumerated therein (and discussed below), and no other rule requires disclosure of confidential information in the present case. Another rule, Rule 3.3, does compel disclosure of confidential information, but it is inapplicable here. Rule 3.3 provides, among other things, that a lawyer who knows that a person has engaged in criminal or fraudulent conduct related to a proceeding before a tribunal must take remedial measures, including, if necessary, disclosure of confidential information. But Rule 3.3 only applies to lawyers who represent clients before a tribunal and only to criminal or fraudulent conduct related to a proceeding before the tribunal. Here, the lawyers do not represent clients before a tribunal and there is no applicable proceeding.

7. Turning to the permissive-disclosure provisions of the Rules, Rule 1.6(b) contains several exceptions to the obligation not to reveal confidential information. There are five exceptions that merit discussion here:

> A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:…
>
> (2) to prevent the client from committing a crime;
>
> (3) 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;….

(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or

(ii) to establish or collect a fee; or

(6) when permitted or required under these Rules or to comply with other law or court order.

8. Rule 1.6(b)(2) permits disclosure to prevent the client from committing a crime, but not to remedy a past crime.[2] Here, it appears that each of the potential crimes was complete before the lawyers learned of them. The Comments to this Rule recognize that some crimes are continuing crimes, and state that a lawyer "whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts…." Rule 1.6, Cmt. [6D]; *see also* N.Y. State 866 ¶ 26 (2011) (discussing disclosure of continuing crimes). While we do not opine on questions of law, as opposed to ethics, the frauds here do not appear to be continuing crimes, so Rule 1.6(b)(2) does not appear to be applicable.

9. Rule 1.6(b)(3) permits disclosure to the extent reasonably believed necessary to withdraw a written or oral opinion or representation that was based on materially inaccurate information and that the lawyer reasonably believes is still being relied upon by a third person. We do not know whether either lawyer might have given a representation upon which any third person—presumably, the lender—is still relying. If either lawyer gave a representation implying the absence of fraud in the transaction, it may be possible to conclude that the lender is continuing to rely on that representation in not pursuing remedies against the buyer and seller for their attempted fraud.

10. Rule 1.6(b)(5)(i) permits a lawyer to disclose confidential information to defend the lawyer against an accusation of wrongful conduct. On the facts known to us, there does not appear to have been any accusation of wrongful conduct leveled against either lawyer. Unless and until such an accusation is made, this exception to the bar on disclosure of confidential information is inapplicable.

11. Rule 1.6(b)(5)(ii) permits a lawyer to disclose confidential information to collect a fee. The buyer's lawyer thus would be entitled to disclose confidential information to the extent necessary to collect the fee that was purportedly paid with a fraudulent check. Any such disclosure would need to be limited, however. *See* Rule 1.6 Cmt. [14] ("a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose"); N.Y. State 980 ¶¶ 5-6 (2013) (discussing limitations on authorization to reveal information to collect fee). For example, the buyer's lawyer might reasonably conclude that the Rule does not authorize disclosure of the side agreement for the secret payment, but only the use of the fraudulent check to pay the lawyer's fee. The lawyer will also need to consider whether reporting the fraud to law enforcement authorities is reasonably necessary to collect the fee. Ordinarily, one need not report a crime in order to initiate a civil action to collect damages caused by the criminal conduct, but we do not exclude that in certain circumstances a lawyer could reasonably conclude that such reporting is necessary. *Cf.* N.Y. State 980 (2013) (addressing whether disclosure of fact that client had been "working off the books" was necessary to collect fee in bankruptcy proceeding); N.Y. State 684 (1996) (concluding that lawyer could not disclose to credit bureau client's failure to pay fee because disclosure was not necessary to collect fee).

12. Finally, Rule 1.6(b)(6) permits disclosure to the extent reasonably believed necessary "when permitted or required under these Rules or to comply with other law or court order." There are statutes that require reporting information about some crimes, or that at least prohibit concealment of such information, though the obligations they impose may be limited by judicial consideration of ethical principles.[3] As our jurisdiction is limited to questions of legal ethics under the Rules, we express no view as to whether other law may require disclosure here.

13. There is nothing anomalous about our conclusion that the lawyers may not be able to disclose the frauds to law enforcement authorities. There are various circumstances in which confidentiality obligations prevent a lawyer from exercising the full set of remedies for wrongful conduct available to others, even when the lawyer has suffered the consequences of the wrongful conduct. *See*, *e.g.*, *Simon's New York Rules of Professional Conduct Annotated* 215 (2013 ed.) (explaining rule that lawyer may reveal confidential information relating to future but not past crimes on ground that "preventing client crimes is more important than the duty of confidentiality, but solving crimes is not"); N.Y. City 1994-1 (citing cases for proposition that where an attorney "was pursuing a common law remedy, several courts have not permitted in-house attorneys to sue former employers for retaliatory termination, basing their conclusion on the confidential nature

of the attorney-client relationship and the ethical requirements relating to clients' confidences and secrets").

14. Finally, we note that even though the lawyers might be barred from disclosing the information at issue here voluntarily, that does not answer the question whether they might be compelled to disclose it. Some of the information may be protected from compulsory process by attorney-client privilege, such as any facts about the side agreement that were revealed by client to lawyer in confidence. But some of the information at issue here may be confidential for reasons other than the attorney-client privilege, and thus the lawyers may be compelled to disclose it. For example, the receipt of the fraudulent check might well not be privileged. *See In re Subpoena to Testify Before the Grand Jury*, 39 F.3d 973, 976 (9th Cir. 1994) (identity of client who paid lawyer with counterfeit bill was "entirely distinct from the matter in which the client sought the lawyer's services. It was therefore unprotected by the privilege.").

Conclusion

15. Neither the buyer's lawyer nor the seller's lawyer may disclose the apparent fraud on the lender or the delivery of fraudulent checks, except (i) to the extent reasonably believed necessary to withdraw any opinion or representation made by the lawyer asserting the absence of such conduct where the lender is reasonably believed still to be relying on such opinion or representation, (ii) where required by other law, or (iii) by the buyer's lawyer, to the extent reasonably believed necessary to collect the lawyer's fee.

Endnotes

1. *Cf. Levitt v. Brooks*, 669 F.3d 100, 104 (2d Cir. 2012) (disclosure of client's "vulgar remark" relating to fee dispute did not violate Rule 1.6 because "remark contained no material *information* beyond the use of profanity directed at counsel").
2. We note that New York has not adopted the ABA version of the exceptions, which include a provision that a lawyer may reveal confidential information to the extent the lawyer reasonably believes necessary "to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." ABA Model Rule of Prof. Conduct 1.6(b)(3). New York's rule thus provides a significantly narrower scope to reveal information about already completed crimes than the ABA model.
3. See, e.g., Wayne LaFave, Substantive Criminal Law § 13.6 & n.86 (2013) ("There is a misprision of felony statute in the United States Code, but it is not a true misprision statute in that it requires an act of concealment in addition to failure to disclose."); *People v. Belge*, 83 Misc. 2d 186, 372 N.Y.S.2d 798 (Co. Ct. Onondaga) (dismissing, on grounds of attorney-client privilege and in interests of justice, indictment of lawyer for failure to report, under Public Health Law §§ 4143 (requirement to report death occurring without medical attendance) and 4200 (duty of decent burial), where location of murder victim's body had been disclosed in attorney-client communication), *aff'd*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (4th Dep't 1975), *aff'd*, 41 N.Y.2d 60, 390 N.Y.S.2d 867 (1976); Stephen Gillers, *Guns, Fruits, Drugs, and Documents: A Criminal Defense Lawyer's Responsibility for Real Evidence*, 63 Stan. L. Rev. 813, 829-46 (2011) (discussing criminal statutes and court cases dealing with disclosure of evidence of a crime).

(44-13b)

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Ethics Opinion 999 (3/28/14)

Topic: Marital Mediation and referrals.

Digest: An attorney who works exclusively in the field of Marital Mediation, with a stated goal "to help couples resolve problems and stay together," may ethically refer such couples to the attorney's spouse, a psychiatrist, who has volunteered to provide two free couples-counseling sessions to such couples.

Rules: 1.7; 2.4(a); 2.4(b); and 8.4

Question

1. May an attorney who works exclusively in the field of marital mediation, with a stated goal: "to help couples resolve problems and stay together" ethically refer couples to the attorney's spouse, a psychiatrist who has volunteered to provide two free couples-counseling sessions to such couples?

Opinion

2. Rule 2.4(a) is entitled: "Lawyer Serving as Third Party Neutral" and provides that, "a lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them." Since the inquiring attorney is engaging in neutral mediation, that attorney is not representing clients.
3. The attorney serving as a third-party neutral must be mindful of the obligations imposed by Rule 2.4(b), which requires that, "a lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them." Additionally, should it become apparent that "a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client."
4. Because the lawyer is not engaging in the representation of a client or clients during the course of the mediation, the lawyer would not have a

personal interest conflict under Rule 1.7 (Rule 1.7 applies only to client representation).

5. With respect to the attorney/inquirer's spouse's offer to provide two free "couples-counseling" sessions to the mediating parties, the attorney/inquirer must also be mindful of Rule 8.4(c), which provides that an attorney must not engage in conduct involving dishonesty, fraud, deceit or misrepresentation." It may be that under the circumstances Rule 8.4(c) would require the attorney/inquirer to make clear disclosures that the psychiatrist is in fact the spouse of the attorney and also that the two free sessions might not be sufficient to resolve every issue between the parties and that therefore the attorney could conceivably derive an indirect benefit from fees charged to the parties by the attorney/inquirer's spouse for work beyond the two free sessions.
6. The attorney should be aware that even though a neutral mediator is not representing a client, the lawyer neutral may still be practicing law, and other Rules may apply. *See* N.Y. State 979 (2013); N.Y. State 678 (1996).

Conclusion

7. The attorney inquirer may make the referral to the attorney inquirer's psychiatrist spouse subject to the cautions identified above.

35-13

* * *

Ethics Opinion 1000 (3/28/14)

Topic: Payment of legal fees by a non-client whose interests could be adverse to the lawyer's client

Digest: It is permissible for a third-party to pay for a lawyer's representation of a client where the client's interests may be adverse to the interests of the third-party payer if: 1) the lawyer obtains the informed consent of the lawyer's client and 2) the lawyer exercises independent professional judgment on the client's behalf without interference from the potentially adverse third-party payer. That the lawyer may be owed additional fees from the client does not pose a conflict unless the outstanding debt interferes with the lawyer's ability to represent the client.

Rules: 1.0(e), 1.6, 1.7(a), 1.8(f); 1.16(b)(5), 4.3

Question

1. The inquiring lawyer asks whether the lawyer may accept payment of a retainer fee from the client's sibling to pursue an appeal on behalf of the client notwithstanding that the appeal could be adverse to the interests of the sibling and that the client remains in arrears on fees owed to the lawyer for work on proceedings giving rise to the appeal. We conclude that the lawyer may do so if the lawyer complies with Rule of Professional Conduct 1.8(f) concerning payments of fees by persons other than the client and if the third-party payer understands that the lawyer's obligations run solely to the client. That the client owes the lawyer additional fees from prior work is not an obstacle to this conclusion unless the debt gives rise to a conflict of interest with the client for which informed consent is not a remedy.

Background

2. The inquirer is a New York lawyer who represents one of two siblings in a dispute arising out of the incapacity of their now-deceased parent. Before the parent died, the client sued for removal of the non-client sibling as guardian of the parent. The court ruled in favor of the non-client sibling on the guardianship issue and awarded attorney's fees from the parent's assets. The parent thereafter died, but the appeal of the award of attorney's fees lives on.
3. The prevailing non-client sibling, apparently unhappy with the amount of the award of attorneys' fees, has paid the inquiring lawyer a retainer from the parent's estate to enable the lawyer's client to pursue an appeal of the attorney's fee award. One of the arguments the inquirer will make on the appeal is that the non-client sibling should be held personally liable for the attorney's fee.
4. The inquirer's client has not satisfied the terms of their fee arrangement for services rendered in connection with the trial-level disputes underlying the appeal. The inquirer is concerned that the inquirer's personal financial interest in being paid for the earlier services could give rise to a conflict between the lawyer and the lawyer's client.

Analysis

5. Rule of Professional Conduct 1.8(f) deals with third-party payment of attorneys' fees. That Rule states that a "lawyer shall not accept compensation for representing a client from one other than the client unless (1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship and (3) information relating to the representation of the client is protected as required by Rule 1.6," which requires a lawyer to maintain the confidential information of the client. Simply put, Rule 1.8(f) means that a lawyer owes a client the same du-

ties owed to a client without regard to the source of the fees the lawyer is paid, with the added proviso that a client must give "informed consent" to the arrangement.

6. Rule 1.0(e) defines "informed consent" as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." We have a number of opinions that apply these principles to various scenarios. *See, e.g.,* N.Y. State 901 (2011) and 867 (2011). Whether a lawyer conveys "adequate information" to constitute "informed consent" varies with the facts and circumstances in which the lawyer seeks consent and involves many factors including the proposed course of conduct, the sophistication of the client as a consumer of legal services, and risks attending the particular representation. Under these specific facts the inquiring lawyer cannot obtain informed consent without clarifying that the lawyer's duty runs solely to the client, that the non-client payer will not affect the lawyer's exercise of independent professional judgment on the client's behalf on the appeal, and, most important, that the non-client payer's interests may be adverse to the client's interests on the appeal, with particular emphasis on the fact that the non-client sibling may be found personally liable for the attorney's fees.

7. It is common for third parties to pay attorney's fees. Mortgagors commonly pay lenders' legal fees in real estate closings. In 2007, in N.Y. State 818, we acknowledged and approved the regular practice of issuers paying the legal fees of designated underwriters' counsel assuming compliance with DR 5-107(B), the predecessor of Rule 1.8(f), provided there was disclosure of conflicts accompanying the arrangement. We said the same in 1989, in N.Y. State 601, although there we disapproved the proposal because the fee arrangement provided a financial incentive for the lawyer to subordinate the interests of the lawyer's clients (tenants) if the lawyer achieved a settlement with the adverse third-party payer (the landlord).

8. Here, the non-client sibling is willing to finance the appeal without condition and knows that a result of the appeal could be that the non-client-sibling would have to pay the attorney's fee. The lawyer's full disclosure to the lawyer's client must necessarily entail disclosure of the lawyer's discussions with the non-client payer.[1]

9. Accordingly, the lawyer should leave no doubt in the third-party payer's mind concerning the potential consequences of the appeal for which the payment is being made. We do not mean thereby to suggest that a lawyer who receives payment from a third-party payer in compliance with Rule 1.8(f) must always undertake this responsibility. To the contrary, in most instances, we would expect that the third-party payer is fully mindful of the potential for adversity in the lawyer's representation of a client under some form of indemnity duty, whether contractual or otherwise.

10. Finally, that the inquirer's client is in arrears on fees for prior services is insufficient to suggest that the lawyer has a conflict in representing the client on the appeal. While under Rule 1.7 a lawyer may not represent a client when a lawyer's personal interests conflict with those of the client, it provides a lawyer may obtain a client's informed consent to proceed despite the conflict if the lawyer "reasonably believes that the lawyer will be able to provide competent and diligent representation" of the client. Sometimes, clients do not pay their lawyers, and this fact alone does not invariably negate a "reasonable belief" that a lawyer will be able to "provide competent and diligent" representation to the client. If the lawyer concludes that the lawyer is able to "provide competent and diligent representation" of the client on the appeal, *see* Rule 1.7(b), then the mere existence of the debt does not ethically disable the lawyer from obtaining informed consent from the client to proceed with the appeal.

Conclusion

11. A lawyer may accept a retainer from a third-party payer whose interests are potentially adverse to the lawyer's client's interests if the lawyer complies with Rule of Professional Conduct 1.8(f) concerning payments of fees by persons other than the client and if the third-party fee-payer understands that the lawyer's obligations run solely to the client. That the client owes the lawyer an additional fee from prior work is not an obstacle to this conclusion unless the debt gives rise to such adversity with the client that the lawyer's representation will be affected by the adversity or the lawyer may not obtain informed consent.

Endnote

1. If the estate is not represented by counsel the lawyer must abide by Rule 4.3. This Rule provides, in relevant part, that, if the lawyer knows or reasonably should know that a possibility of adversity exists, the lawyer must explain that the lawyer is not disinterested in the matter, and should not provide legal advice to the person in the circumstances other than the advice to obtain independent counsel.

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