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ONEONONE

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

Message from the Chair

If your actions inspire others to dream more, learn more, do more and become more, you are a leader.

- John Quincy Adams

Emily Franchina

When I describe my practice area to friends and colleagues, I highlight my advocacy for the elderly and disabled individuals I represent. I talk to them about my practice as a Trusts, Estates and Elder Law attorney. However, once I start to explain some of the planning techniques or the manner in which an elder law matter could arise, I realize that "general practice" aptly describes the varied scope of many situations. A case in point: I met with Bob today at an area nursing home. He and his partner have resided together for 20 years, but never married. The division of assets to secure Medicaid benefits required advance directives, e.g., Powers of Attorney and Health Care Proxies, as well as tax advice on transfers of assets, real estate knowledge to protect the home, and estate planning. Of course, discussion of matrimonial issues was also relevant.

If I required clarification or wanted to pose a question about any aspect of this case (or any other), I could connect with any of our almost two thousand members, by posting on our Listserv, now a private Community for our members. The Community allows members to interact, search directories and utilize mentoring tools. I find the repartee between members to be useful, informational and often amusing.

I recently reviewed our Section blog, which has a number of pertinent posts, including a request for our members to provide insight to Gerard Antetomaso and Jerry DeSalino regarding use of the statutory short form Power of Attorney in real estate transactions. The State Bar has formed a task force to study possible changes to the Power of Attorney statute. Please contact Jerry for more information (Jerry@ggalaw.com).

Inside

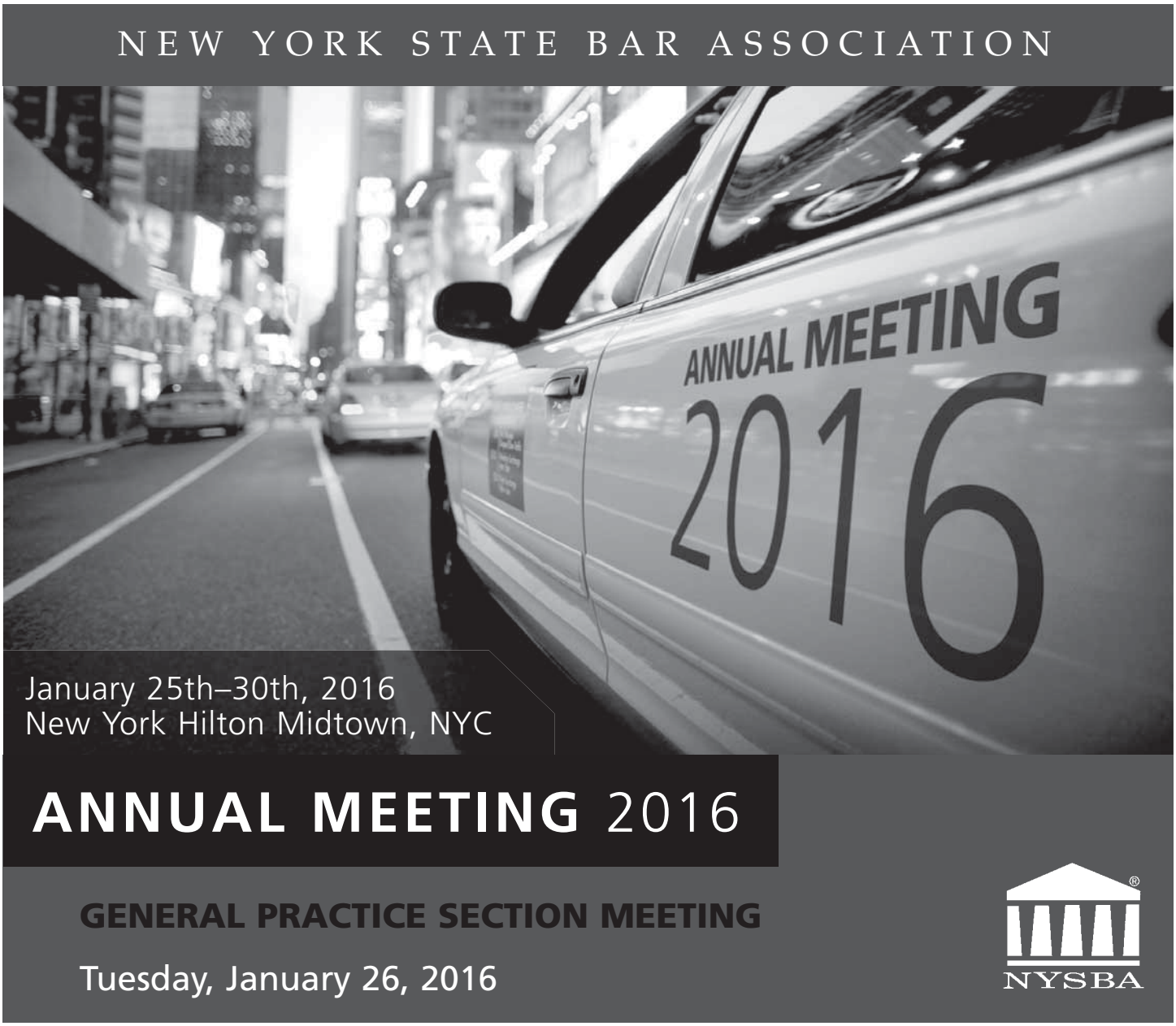
NYSBA

I hope to meet some of you at our upcoming fall and winter meetings. On Thursday, October 29th, we are partnering with Section member Jeff Fetter, FarmNet and Cornell University to present Farm and Family business successor planning services in Syracuse. Please see our website for registration opportunities and the details contained in this issue. The program is an all day eight CLE credit day, which should be a great educational and networking event. On Tuesday, January 26th, we shall have our Annual Meeting, which will incorporate an ethics presentation and Hot Tips on Hot Topics. Every year this presentation provides our members with a rapid-fire recitation of minefields, issues and positive innovations to keep in mind in our daily practice. Our Section continues to support the New York Bar Foundation by funding the General Practice Section Pro Bono Fund with a $10,000 donation to a legal services organization.

Much of the activity of our Section is due to the leadership of our immediate past Chair, Richard Klass. Rich is an innovative and energetic attorney who supported the efforts to develop programs to educate and inspire our membership. On behalf of the Section, I extend our heartfelt thanks to Rich for his past (and anticipated future!) services to our General Practice Section.

As Chair, I welcome the opportunity to interact with our Section members. Please contact me to join a committee, write an article for one or suggest a CLE topic of interest by reaching me at 516-877-7500 or eff@elderlawfg.com.

Emily Franchina



From the Co-Editors

Richard Klass

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

The Uses and Abuses of the Power of Attorney: Paul Shoemaker, an expert at handling cases in Surrogate Court, highlights Power of Attorney as a tool for estate planning services and advises attorneys to fully advise clients of the risks and benefits due to the nature of the agency relationship.

An Advisory Opportunity for the Legal Profession: Analyzing the growing field of Cybersecurity, Scott Corzine provides an article regarding the ways in which counsel can be useful for effective cyber response, crisis management preparedness, and reputation management.

Recent Employment Laws Impacting Private Employers in New York: Sharon Parella and Leah Ramos focus on a range of 2014 enactments by the New York State Legislature and the New York City Council, dealing with matters such as unpaid interns under anti-discrimination protections; mandatory provision of paid sick time; electronic cigarettes under anti-smoking prohibitions; and prohibition of discrimination based upon pregnancy or a person's status as being unemployed.

A "Duty to Mitigate"? Civil Claims Against Liquor Establishments for Sexual Assaults Under Existing Premises Liability Law: Nicholas B. Adell is a student at Loyola University Chicago School of Law with an undergraduate degree in History with Honors from Oberlin College and a General Course certificate in International History from the London School of Economics. His article provides an overview of premises liability for sexual assault, and advocates for imposing duties of care on liquor establishments.

Martin Minkowitz

Employment Investigations by Independent Investigators: Priorities, Privileges and Protocol: Alfred G. Feliu, past Chair of NYSBA's Labor and Employment Law Section, and Christopher A. D'Angelo give a complete guide as to how best utilize outside investigators.

Rights to Compensation During Imprisonment: *One on One*'s Co-Editor Martin Minkowitz, discusses the ramifications of incarceration for a crime committed by an injured worker who is claiming or receiving workers' compensation benefits.

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

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

Sincerely,

Martin Minkowitz
Richard Klass
Matthew Bobrow
Co-Editors

The Uses and Abuses of the Power of Attorney

By Paul T. Shoemaker

A power of attorney is a document by which a principal designates an agent to act on his or her behalf.[1] Powers of attorney can be used by individuals to appoint agents to execute legally binding documents for them when they cannot be present. For example, a person who is moving may designate an agent in the place he is leaving to stand ready to execute a deed in connection with the sale of the person's house in that place on his behalf after he has moved away.[2]

Over the years, the actions taken pursuant to powers of attorney have become much broader in scope, the legitimacy of durable powers of attorney—which continue to be valid and effective even after the principal has become incapacitated—has been recognized and the use of durable powers of attorney has become widespread.

As the powers became broader, and durable, concern developed that principals often were not fully aware of the scope of the authority they were granting to their agents under powers of attorney, and that unintended consequences and abuse were all too likely.

Accordingly, New York enacted a new statute governing powers of attorney effective September 1, 2009.[3] The new statute provides safeguards and precautions for powers of attorney that authorize actions with respect to financial and estate planning.

The safeguards and precautions include: (a) the granting of power to make gifts, (b) clarification of the duties of the agent, and (c) provision for appointment of a monitor to keep tabs on the actions of the agent.

This article will discuss the prerequisites to a valid power of attorney, the use of powers of attorney for estate planning purposes, and the potential for abuse that exists whenever a broad grant of authority is made in a power of attorney.

Historical Background

Today we refer to the person appointed to act on behalf of the principal as the "agent." In previous times, such person was referred to as an "attorney-in-fact." That, however, is not the term used in the new statute; the term "agent" now is preferred.[4]

Traditionally, each power of attorney spelled out with some particularity the power given to the agent and frequently the power was limited to a specific transaction or function.

However, New York adopted a statutory short form power of attorney in 1948, which provided for the grant of various powers to the agent and contemplated that numerous powers to be exercised in unspecified future situations would routinely be granted.[5] The new law further provided that the power of attorney would terminate upon revocation or when the principal died or became incapacitated.[6]

New York amended the power of attorney statute in 1975 to provide for a "durable" power of attorney.[7] Under a "durable" power of attorney, the power continues to be in effect even after the principal has become incapacitated.[8] This permits the power of attorney to be used for financial and estate planning purposes and it also can avoid the need to have a guardian of the person appointed for the principal because the agent can handle the principal's financial and other affairs.

New York's law governing powers of attorney was amended again in 1996 and broadened to enable a principal to empower his or her agent to make gifts of the principal's property.[9] This change in the powers that could be granted to the agent, as well as the provision for powers of attorney to be durable, greatly expanded the breadth and scope of the authority that could be and typically was granted under a power of attorney.

However, the statutory short form power of attorney did not signal to the principal that such great authority was being granted to the agent. Moreover, the only requirement for execution of the power of attorney was that the principal's signature had to be notarized, a very limited and often perfunctory formality.

New York's New Power of Attorney Law

In 2008, New York passed a new power of attorney law, effective September 1, 2009, in order to deal with the above concerns.[10] The New York State Law Revision Commission had conducted a study and concluded that there were problems that needed to be addressed.

As a result, the Legislature created a new §5-1514 of the General Obligations Law, which provides for what is known as a Gifts Rider. The Gifts Rider is required to be executed by the principal and signed by two witnesses. These execution requirements are intended to alert the principal to the significance of granting gift–giving authority to the agent.

The form of the Gifts Rider also facilitates careful decision–making concerning whether the agent will be allowed to make gifts of the principal's property to third parties and also whether the agent will be allowed to make gifts to himself or herself. This is achieved by requir-

ing the principal to check specific boxes if he wishes to authorize the agent to make gifts.

The Gifts Rider is a document separate and apart from the power of attorney itself. A Gifts Rider is required in order to authorize an agent to create, amend, revoke or terminate an *inter vivos* trust, to designate or change the beneficiaries of a retirement benefit or plan, to change the beneficiaries of any life insurance, to open, modify or terminate a bank account in trust form, and to take other actions which would transfer the property of the principal without consideration.

These powers are quite broad and enable the agent to undertake estate-planning activities on behalf of the principal. The point of the new law was not to narrow the powers of the agent but instead to spell them out in some detail so that the principal will not inadvertently grant such broad powers without giving prior thought and consideration to whether he or she wants to do so.

The Legislature further sought to deal with some of the concerns about powers of attorney by enacting §5-1505, which sets forth the fiduciary duties of the agent, reflecting the fact that the common law saw the agent as a fiduciary. As part of the effort to bolster and enforce the recognition of the duties of the agent, the statutory short form power of attorney as set forth in §5-1513 of the new law added a notice to the agent that explains the role of the agent, his fiduciary duties and the legal limitations on his authority.

In the same vein, the Legislature enacted §5-1509 authorizing the principal to appoint a monitor to oversee the actions of the agent on behalf of the principal. The monitor has the authority to request that the agent provide him with a copy of the power of attorney and copies of documents recording transactions the agent has carried out for the principal.[11]

The new law also provides for an expanded "Caution to the Principal" that is intended to provide the principal with a greater amount of information about the gravity of the document.[12]

The new law also addresses concerns about the acceptance of powers of attorney by third parties. At times, third parties (such as banks and securities brokers) have refused to allow actions to be taken pursuant to powers of attorney, to the consternation of persons attempting to take such actions.

The new law provides, in §5-1504, that a financial institution cannot require a power of attorney to be on the institution's own form and, as a general rule, must instead accept any validly executed power of attorney.

However, third parties do have the ability to refuse to accept powers of attorney if they have reasonable cause for doing so. For example, if the third party has actual knowledge that the principal is deceased or was incapacitated when he or she executed the document, the third party may refuse to accept the power of attorney.

The new law added a section (§5-1510) authorizing the agent to go into court to obtain an order compelling a third party to accept the power of attorney.

Finally, the new law seeks to deal with concerns about HIPAA privacy rules and limitations by providing specifically in §5-1502K that an agent can examine and deal with the principal's medical bills provided that the power of attorney includes a general power with respect to records, reports and statements.

Using a Power of Attorney as an Estate Planning Tool

The use of a power of attorney as an estate-planning tool is illustrated by the decision of the Appellate Division, Second Judicial Department, of the Supreme Court of the State of New York in *Perosi v. LiGreci*.[13]

In *Perosi*, the court held that an amendment to a trust was effective even though it had been executed by the grantor's attorney-in-fact and not by the grantor himself.

Shortly before his death, the grantor had executed a durable statutory short form power of attorney appointing his daughter, Linda Perosi, as his attorney-in-fact. She then executed the trust amendment and obtained the consent of the three beneficiaries. The amendment designated the grantor's grandson (Nicholas Perosi, the son of Linda Perosi) as the new trustee.

The grantor's brother—who had been designated as the trustee in the original trust instrument—challenged the authority of the attorney-in-fact to amend the trust on behalf of the grantor.

The Appellate Division rejected that argument, finding that the power of attorney granted the attorney-in-fact authority over "estate transactions" and "all other matters." The court held that the amendment of the trust instrument was not, by its nature or pursuant to public policy, an action that required personal performance by the grantor himself.

The Appellate Division listed examples of matters that do require personal performance such as the execution of a will, the execution of an affidavit upon personal knowledge, or getting married or divorced.

However, there is no statutory requirement that amendment of a trust be by personal performance and, since the trust instrument in this case did not prohibit the grantor from amending the trust by way of his attorney-in-fact, the court concluded that the amendment was valid.

The Appellate Division noted that there was no evidence that the grantor was incapacitated at the time of the amendment even though it was made shortly prior to his death, but then observed that the grantor's condition—as long as he remained alive—was not relevant in any event inasmuch as the power of attorney was durable

and would have remained in force during any period of incapacity.[14]

Interestingly, the trust in *Perosi* was created by an "Irrevocable Trust Agreement" that contained a proviso stating that it "shall be irrevocable and shall not be subject to any alteration or amendment."

Notwithstanding that language, the court held that Section 7-1.9 of the Estates, Powers and Trusts Law ("EPTL") allowed for the amendment of the trust with the written consent of all persons beneficially interested in the trust. The trust's beneficiaries were the three adult children of the grantor and all three consented to the amendment.

Accordingly, notwithstanding the language in the trust stating that it was irrevocable and not subject to alteration or amendment, the amendment was found to be valid and effective.[15]

As noted above, in *Perosi*, the amendment consisted of the removal of the trustee designated in the trust instrument (the brother of the grantor) and the replacement of that trustee with a new trustee—the grandson of the grantor. No change was made in the beneficiaries' shares. The trust corpus consisted of a $1,000,000 life insurance policy and the trust provided that, upon the death of the grantor, the proceeds of the policy would be divided among his three adult children.

The amendment affected only the identity of the trustee and changed that person from the grantor's brother to his grandson. The dispositive provision of the trust—calling for the proceeds of the life insurance policy to be divided among the three adult children—was not changed. Moreover, the role of trustee was not particularly lucrative.

There would of course be commissions payable, but they were not likely to exceed $10,000 based on the amount involved. Nevertheless, the brother resisted the proposed amendment and sought to remain in office as the trustee. His efforts were successful at the trial court level, but the Appellate Division rejected his arguments and found the amendment to be effective.

The *Perosi* ruling illustrates the broad reach of powers of attorney and how they can be used to alter an individual's estate plan. It also shows how a seemingly irrevocable and unalterable trust may in fact be subject to amendment if certain conditions are fulfilled.

Abuse of the Power of Attorney

Unfortunately, it is tempting and relatively easy for agents to abuse the power of attorney and take assets from the principal for themselves. In the case of *Matter of Boatwright*,[16] a daughter had wrongfully withheld from her mother's estate funds totaling more than $100,000. According to the court, the daughter had powers of attorney with respect to certain bank accounts in her mother's name and used those powers to withdraw money from the bank accounts and deposited that money into her own checking account.

Significantly, the court held that, where there is a confidential relationship, the burden shifts to the beneficiary of a transaction to prove by clear and convincing evidence that the transaction was fair, open, voluntary, and well understood, and therefore free from undue influence.

The court went on to state that the daughter had a fiduciary relationship with the decedent by virtue of the powers of attorney that she held with respect to the subject bank accounts.

The court accorded great weight to the Surrogate Court's credibility determination that the daughter's testimony explaining the transactions was "evasive, dissembling, and incredible."[17]

The Appellate Division in *Boatwright* cited its own ruling of 5 years earlier in *Matter of Audrey Carlson Revocable Trust*.[18]

Audrey Carlson Revocable Trust also involved transfers of funds pursuant to a power of attorney for the benefit of the agent. In *Carlson*, the court stated that "an attorney-in-fact will only be authorized to make gifts to himself or herself to the extent that such gifts are in the principal's best interest."[19]

In practice, this ordinarily means that the agent must show that the gift–making was known to and authorized by the principal. In the *Carlson* case, the Appellate Division stated that the evidence had not been sufficiently developed and the matter was remanded for a hearing to determine whether the agent could show that the transfers were indeed free from fraud, deception or undue influence.[20]

Conclusion

The power of attorney can be a useful tool for estate planning purposes. As seen above, however, it is subject to abuse and therefore should not be utilized lightly. Lawyers should carefully and fully advise their clients regarding the powers that can be granted and should make sure that the principal does indeed want to grant such powers after having been fully informed of the risks and benefits that are involved.

Endnotes

1. *See* Restatement (Third) of Agency §1.04 (7)-comment g (2006), "A power of attorney is an instrument that states an agent's authority… A power of attorney is a formal manifestation from principal to agent, as well as to third parties with whom the agent interacts, that evidences the agent's appointment and the nature or extent of the agent's authority."
2. *See* N.Y. Gen. Oblig. Law §5-1507(1)(a) (Consol. 2009). The law provides that an agent who is signing on behalf of a principal can sign the name of the principal followed by the words, "by [name of agent], as agent" or the agent can sign his or her name followed by the words, "as agent for [name of principal]." The agent is not

supposed to simply sign the principal's name without anything else or his or her own name without anything else. Instead, the signatures are required to be in the format just described.

3. Laws of 2008, c. 644, as codified at N.Y. Gen Oblig. Law §§5-1501—5-1514 (Consol. 2009).
4. N.Y. Gen Oblig. Law §5-1501(1) (Consol. 2009).
5. 1948 N.Y. Laws, c. 442, as codified at N.Y. Gen. Bus. Law §422, as repealed by 1963 N.Y. Laws 4 c. 576 and recodified at N.Y. Gen. Oblig. Law §5-1501 (Consol. 2009).
6. *Id.*
7. Laws of 1975, c. 195, as codified at N.Y. Gen. Oblig. Law §5-1601, as amended and renumbered 5 by 1994 Laws of New York, c. 694, as codified at N.Y. Gen. Oblig. Law §5-1501 (Consol. 2009).
8. *See* N.Y. Gen. Oblig. Law §5-1501A(2) (Consol. 2009).
9. Laws of 1996, c. 499.
10. Laws of 2008, c. 644, as codified at N.Y. Gen Oblig. Law §§5-1501—5-1514 (Consol. 2009).
11. An agent appointed pursuant to a power of attorney has an obligation to account for his or her actions as agent. The requirement to account is fundamental to all fiduciary relationships, not merely the agent—principal relationship involved with respect to a power of attorney. *See*, *e.g.*, *Matter of Francis*, 19 Misc. 3d 536, 853 N.Y.S.2d 245 (Surr. Ct., Westchester Cnty. 2008).
12. N.Y.Gen. Oblig. Law §5-1513 (Consol. 2009).
13. 98 A.D.3d 230, 948 N.Y.S.2d 629 (2d Dep't 2012).
14. Note that, if the amendment had been made after the grantor had died, it would have been invalid because the power of attorney would have terminated when the grantor died. The law provides that a power of attorney is terminated when, among other things, the principal dies, or the principal revokes the power of attorney, or (if there is no successor, agent or co-agent) the principal revokes the agent's authority or the agent dies or becomes incapacitated or resigns, or, if the power of attorney is not durable, the principal becomes incapacitated, or if the power of attorney was for a limited purpose and the purpose has been accomplished. N.Y. Gen. Oblig. Law §5-1511(1) (Consol. 2009).
15. If the beneficiaries had not all been adults, it might not have been possible to amend the trust. The courts have held that a trust beneficiary who is a minor cannot, without leave of court, consent to an amendment of a trust, and the courts have approved trust amendments where there are minor beneficiaries only where the amendments are of obvious benefit to the minors. *See, e.g., Rosner v. Caplow*, 90 A.D.2d 44, 456 N.Y.S.2d 50 (1st Dep't. 1982), *aff'd*, 60 N.Y.2d 880, 470 N.Y.S.2d 367 (1983) (minor cannot consent to trust amendments); *Matter of Cord*, 58 N.Y.2d 539, 462 N.Y.S.2d 622 (1983) (consent not required where amendment could only add to the benefits available to the beneficiaries).
16. 114 A.D. 3d 856, 980 N.Y.S.2d 554 (2d Dep't 2014).
17. 114 A.D.3d at 859, 980 N.Y.S.2d at 558.
18. 59 A.D.3d 538, 873 N.Y.S. 2d 669 (2d Dep't 2009).
19. 59 A.D.3d at 540, 873 N.Y.S.2d at 671.
20. *See also Matter of Putnam*, 68 A.D.3d 1614, 891 N.Y.S.2d 701 (3d Dep't 2009) (agent had burden of establishing that decedent had authorized her actions; Surrogate's Court rejected the agent's testimony and concluded that the agent had misused the power of attorney).

Paul T. Shoemaker is a partner at Greenfield Stein & Senior, LLP in New York City. Mr. Shoemaker focuses on handling contested Surrogate's Court proceedings.

Cybersecurity: An Advisory Opportunity for the Legal Profession

By Scott Corzine

Summary

As operational risk advisors, we caution our clients to plan, fund, and prepare for information security incidents as if they were inevitable. We recommend that clients develop an internal culture of awareness and preparedness through planning, education, and exercises in order to reduce preventable incidents from occurring.

In our experience, many organizations do not have the cybersecurity skills, investment, infrastructure, or capacity to deter even a modestly sophisticated intrusion, and especially not a significant breach. Consequently, we advise clients to:

- Consider augmenting their normal IT security spending (an average of 3.8% of the typical IT budget) to fund independent security assessments as a digital "second opinion,"
- Develop and exercise cyber incident response plans (CIRP), and
- Retain or arrange stand-by agreements with outside cyber forensic investigators and crisis communications experts, within the parameters established by their cyber insurance carriers.

But perhaps the most important step clients can take is to review their entire information security and privacy policy and upgrade it to be comprehensive, compliant, measurable, and "enforceable." Organizations are limited in what they can do to defend against sophisticated, outside cyber threats. However, good internal policies can dramatically limit the opportunity for breaches that could originate from the carelessness, mistakes, or ignorance of insiders—employees, partners, service providers, and vendors. Insider attacks are on the rise from privileged users, contractors/consultants, temporary workers, and regular employees. Sixty-two percent of organizations polled in the *Insider Threat Spotlight Report* by Crowd Research Partners found that insider attacks are more difficult to detect and prevent than outside attacks, and 53% said they lack or are not sure if they have appropriate controls in place to prevent insider attacks.

Consequently, the return on investment for policy development, awareness, and training of insiders may be as good as or better than the return on constantly escalating investments in prevention and detection software and infrastructure. In its 2014 Cyber Security Intelligence Index, IBM found that human error was involved in 95 percent of all security incidents—from what some have suggested are external attackers who exploit human weakness and lure employees into providing them with sensitive information.

Given the need for the capacity for competent management of response to cyber incidents, we believe that counsel plays an important role in how senior executives and the Risk Management Committee of the Board establish policy and set expectations around cybersecurity.

The "Extra-prise"

The "enterprise" has become considerably transformed by hyper connectivity with the outside world, creating a model far more difficult to digitally defend. Two trends continue to drive this transformation. First, organizations have become porous, by outsourcing operations to partners, affiliates, suppliers and third party service providers in order to control costs and focus on their core strengths by taking advantage of their providers' unique expertise. As organizations connect with these outside parties—and as they install connected devices like "smart building" and HVAC systems, vending machines, and CCTV cameras that are web-enabled or network-enabled—they inadvertently introduce potential cyber-attack vectors that they probably do not control well.

Second, as organizations extend the operational range of employees with mobile devices and laptops, they potentially introduce "1,000 points of risk", quite simply because humans make mistakes. We naturally prefer simplicity and usability to access control complexity, and may not have been adequately trained in the precautions we can take while operating our mobile devices. Because many organizations both permit employees to use their personal mobile devices and to download consumer applications on them, Gartner estimates that greater than 75% of the mobile devices would fail even a basic security test. Veracode reports that the average global enterprise has 2,400 unsafe apps installed in its mobile environment, so the scope of the vulnerability is profound.

This hyper-connectivity with the so-called "Internet of Things" and mobilization of the workforce has turned the enterprise into what we call the "extra-prise," creating—as an unintentional consequence—many digital access paths into the organization that the IT department simply may be ill-equipped to identify, analyze, or install effective countermeasures. We believe there is now a clear imperative for organizations to better security-align the extraprise with this growing vulnerability created by hyper-connectedness. We think that counsel can play an important role in helping organizations consider any legal implications of

these trends as they affect liability, such as becoming involved in how the risk manager negotiates elements of the cyber security insurance policy, or being aware of what kind of representations and warranties are negotiated into contracts with outside vendors and suppliers, so that cybersecurity responsibility between the parties is clear.

Appreciating the Threat

Most of us are treated to a steady litany of cyber incident data. Often these reports are the product of security analysts and research firms, and articulated in a way that may be too technical for the average senior executive or Board member to understand or apply to the circumstances in his or her own companies.

But their message is clear and alarming. It is impossible for the risk manager (or the Chief Information, Information Security, Privacy, Technology, Legal, Compliance, Financial or Executive officers) to guarantee a confident state of cybersecurity in any organization—technically sophisticated or not. The internet, internal systems infrastructure, systems control, and data acquisition (SCADA) systems, as well as the software development process underneath these systems, were almost never optimized for security. Instead, they were optimized for usability, convenience, and cost management. As a result, we ask clients to operate under the assumption that they will be successfully hacked. This is not only because of this embedded security vulnerability, but also because even well-funded IT security budgets may be inadequate to deal with bad actors and nefarious motives, and defenses are always reactions to new types of cyber offenses. Organizations are always playing catch-up, and thus remain vulnerable.

We have come to appreciate that attackers' motives seem creatively endless. Hackers steal and sell personally identifiable information (PII) and personal health information (PHI). Hacktivists punish corporate behavior they do not condone. Competitors engage in industrial espionage to steal trade secrets, and monitor competition. Sovereign states attack their adversaries. Disgruntled employees seek revenge. And common, everyday mistakes that result in cyber risk are made inadvertently by just about everyone.

For organizations that are not the "obvious" targets for theft of PII or PHI (e.g., banks, retailers, credit card companies, government agencies, and healthcare organizations), we caution that misinterpreting their circumstances should be reconsidered as a justification to underspend in information security. Many breaches have demonstrated motivations as benign-sounding as cyber-intimidation or industrial disruption, where the intent is not economic gain, but to embarrass, create chaos…. or even stop the theatrical release of a film. Perhaps of even greater—and growing—concern is the vulnerability of "closed systems" that monitor and control everything from airport operations and municipal water and sewer systems, to industrial controls, regional power grids, and even FAA or aircraft navigation systems. The potential for catastrophic damage—to a flight, a production line, potable water supply, or electrical power—is obvious. The threat is real and seems to be growing faster than organizations' capacity to counter it.

Good Practices

While escalating technical spending each year on breach prevention and detection solutions is good, we recommend additional actions that organizations should take around breach prevention/mitigation, preparedness, response and recovery. If we agree that information security incidents are essentially inevitable from a technical defense perspective for most organizations facing a determined adversary, and that information security policies are very often incomplete and insufficient, then remixing the cybersecurity budget so that it increasingly includes non-technical elements, seems to us appropriate. In addition to technical spending, we recommend that clients and their counsel consider the following additional actions to enhance their cyber-resilience.

Prevention/mitigation

Engage a third party expert to get an independent opinion of the security of the technical environment and the sufficiency of the organization's information security policies. If the organization responds reasonably to the risk and vulnerability mitigation recommendations that result from the assessment, it begins to build a tangible record of proactive management decision making around cybersecurity that is appropriate to its industry sector, risk factors, and risk appetite. Independent assessments can be a cost effective way to provide some level of credible assurance to top management and the board about vulnerabilities and exposures, as a part of a mature governance, compliance and enterprise risk management framework. Secure IT department leaders should welcome a second opinion. Assessments should map to one or more of the major standards frameworks like COBIT 5, ISO/IEC 27001, NIST, UCF, or CSA, as well as industry-specific regulatory guidance. Counsel can play a role in assuring that the organization understands its statutory or regulatory obligations around information security.

Preparedness

Information privacy and security policies that are determined to be lacking should get a major cross-organizational review. Weak polices should be appropriately upgraded and new policies developed, adopted, implemented, and actively managed. Both assessments and policy reviews should address the domains widely accepted by information security professionals, which include:

- Access Control,
- Telecommunications and Network Security,
- Information Security Governance and Risk Management,
- Software Development Policy,
- Cryptography,
- Security Architecture and Design,
- Operations Security,
- Business Continuity and IT Disaster Recovery Planning,
- Legal, Regulations, Investigation and Compliance, and
- Physical (Environmental) Security.

Policies should establish behavioral thresholds for staff, partners and vendors around items like portable devices, personal use, and strong password management. Information security policies should be made an ongoing part of onboarding, professional development, leadership training, the employee handbook, and enshrined in employment and contractor agreements and in terms of employment.

Compelled exercises that test employees' online awareness of common threats like phishing and social engineering should be regular and unannounced, under the notion that we all get better at what we practice and worse at what we do not. Staff may resist these tests, educational programs and exercises, but these practices raise awareness of the real risks in the use of the shortcuts that many take and in the inadvertently risky cyber behaviors we may engage in. Both the prevention and preparedness elements help establish a defensible record of employee engagement, and the use of professional experts to help the organization align with accepted standards if the organization is legally challenged.

Another recommended preparedness practice is the development of a comprehensive cyber incident response plan (CIRP). While markets, regulators, customers and shareholders may forgive the breach itself, they have become extremely unforgiving of management when an unprepared or bungled incident response to the breach occurs. Poor response points to poor preparation. The best way to prepare for an effective response to a cyber incident is to implement a CIRP that assigns specific roles and responsibilities across the organization; defines and documents response "play books"; describes response protocols based on data classifications in the areas of technical, legal, insurance, crisis communications and forensic response; gains formal Board approval; and is regularly exercised and updated as circumstances and risks evolve. Good CIRPs can be modeled around the widely accepted incident command system (ICS).

Response

While actual responses to cyber incidents often do not perfectly "follow the script" of the CIRP, they demonstrate thoughtful risk management and provide an excellent framework for performing an after-action report (AAR) and building improvements into the plan for the next event. Well-rehearsed and role-played CIRPs increase the likelihood that the organization will execute a more effective response, than if the markets view management as "winging it." Plans should be exercised at least annually (more often in the IT shop itself) in a tabletop or functional exercise, differing and complicating the emergency exercise scenario each time. A sober AAR should be performed after each exercise and any actual cyber incidents, as part of a continuous improvement cycle that nudges the organization closer toward maturity in its readiness.

Perhaps most important in cyber response is speed of detection (of behaviors, anomalies or actual breaches), speed and effectiveness of technical response, and well-managed crisis communications. A good response is about doing no additional harm, responding accurately to stakeholders about the facts and impact of the breach (so we "get it right"), and assertively taking control of the narrative. To do that, it is often best to pre-retain an independent forensic response team and crisis communications team with the specific and "battle-tested" skills unlikely to be found in the organization's law firm, PR or IR agency, or in-house IT security team. If a cyber response provider is not named on the organization's cyber insurance policy as a pre-approved vendor of these services, counsel can help negotiate its inclusion as the policy is written and bound. Once again, using outside third party experts can help create a record of effective management decision making and aid counsel in its work helping the organization respond to legal actions related to the breach.

Recovery

It takes an average of 80 weeks for market value and reputation to recover to their pre-breach level for organizations that are poorly prepared for substantial cyber incidents. We believe that the global pervasiveness of cyber incidents now requires a strong, well-prepared management response and recovery plan (by means of well-con-

structed and documented BCP and DR plans) as a management imperative. Readiness and vigilance are no longer optional management behaviors.

Sustaining organizational reputation depends on effective response and recovery. Reputation experts tell us that stakeholders and the media blame (or credit) the Chief Executive, Finance, Risk, and Legal officers for either ineffective or effective recovery from a cyber event. We believe that—over time—organizational value is rooted in the level of confidence that the markets and stakeholders have in senior management and the Board. Nowhere is that better illustrated than in management's ability to demonstrate resilience during and after the adversity of a widely reported cyber incident.

Counsel can play a significant advisory role to top management and directors in helping strategically prepare management for effective cyber response, crisis management preparedness, and reputation management. This can include helping clients' compliance with state notification laws and the privacy laws to which their data is subject; opening up an early and constructive dialogue with regulators and law enforcement, including state Attorneys General, the FTC, Secret Service, and FBI; appropriate disclosures to investors and other stakeholders (especially where a public company is concerned); assessing whether third-party data belonging to foreign residents or companies was exposed (implicating foreign privacy claims); working with forensic experts to determine the type and scope of data disclosed, and whether it was encrypted; providing notice to all potentially applicable liability, crime, property and cyber specialty insurance policies; and preparing for potential litigation (whether class actions, individual claims, regulatory proceedings, or card brand/banking litigation).

It should also be noted that cyber security, as a major component of operational risk management, is an important requirement embedded in the regulations of regimes globally that affect critical industry sectors, e.g., insurance, financial services, health care, and critical infrastructure. In its advisory role, counsel is in a position to help clients interpret and comply with these regulations by applying the recommendations discussed in this article.

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The views expressed herein are those of the author and not necessarily the views of FTI Consulting, Inc., its management, its subsidiaries, its affiliates, or its other professionals.

Recent Employment Laws Impacting Private Employers in New York

By Sharon Parella and Leah Ramos

Introduction

During 2014, the New York City Council and New York State Legislature enacted several laws that are particularly impactful on private employers and their workplaces. In addition, significant legislation regulating "abusive conduct" in the workplace (commonly referred to as "workplace bullying") is currently under consideration by the New York State Senate and Assembly, and is being closely watched by employers, employees, lawyers and advocates.

A summary of these laws is set forth below.

New York City Council Enactments

Prohibition of Discrimination Against Unpaid Interns

Effective June 14, 2014, an amendment to the New York City Human Rights Law both extended current prohibitions against workplace discrimination to unpaid interns and clarified that the current prohibitions are indisputably applicable to paid interns despite the generally short-term nature of their employment.

The New York City Human Rights Law (NYCHRL)[1] provides, among other things, that it is unlawful for an employer with four or more employees to discriminate against its employees on the basis of race, creed, color, age, national origin, gender (including gender identity and sexual harassment), disability (including pregnancy), marital status, partnership status, sexual orientation, alienage or citizenship status, arrest or conviction record, status as a victim of domestic violence, stalking and sex offenses or unemployment status in hiring, compensation or the terms, conditions or privileges of employment. The new law mandates that interns, both paid and unpaid, are covered by the foregoing protected categories, and defines an "intern" as follows:

> The term "intern" shall mean an individual who performs work for an employer on a temporary basis whose work: (a) provides training or supplements training given in an educational environment such that the employment of the individual performing the work may be enhanced; (b) provides experience for the benefit of the individual performing the work; and (c) is performed under the close supervision of existing staff. The term shall include such individuals without regard to whether the employer pays them a salary or wage.[2]

In addition, a New York City Council press release indicates that the new law "would require employers to make reasonable accommodations for interns in certain circumstances."[3]

This amendment to the NYCHRL was largely in response to the 2013 decision in *Wang v. Phoenix Satellite Television US, Inc.*,[4] in which the court held that an unpaid intern could not sue her employer for sexual harassment under the NYCHRL because she was unpaid and, therefore, not intended to be a covered person within the meaning of the statute. Ms. Wang, then a 22-year-old master's degree student, had alleged that she had been subjected to a hostile work environment, quid pro quo sexual harassment and retaliation by her supervisor. The court granted the employer's motion to dismiss these claims, concluding that:

> The plain meaning of the NYCHRL, the case law, interpretations of analogous wording in Title VII [of the Civil Rights Act of 1964] and the [New York State Human Rights Law], as well as the legislative history of the NYCHRL all confirm that the NYCHRL's protection of employees does not extend to unpaid interns.[5]

Ms. Wang also had asserted that Phoenix Satellite Television ("Phoenix") failed to hire her for full-time employment based on the discriminatory animus of her supervisor; these claims (brought under both the NYCHRL and the New York State Human Rights Law) survived Phoenix's motion to dismiss the second amended complaint.

Regulation of Electronic Cigarettes

Effective April 29, 2014, an amendment to New York City's Smoke-Free Air Act prohibits the use of electronic cigarettes in all locations where smoking is prohibited, including in places of employment.[6] Employers are required to modify their no smoking policies to include electronic cigarettes.

Provision of Paid Sick Time to Employees

Effective April 1, 2014, under New York City's Earned Sick Time Act ("Paid Sick Leave Law"), employers with five or more employees who are hired to work more than 80 hours each calendar year must provide employees with up to 40 hours of paid sick leave each calendar year.[7] Employers with fewer than five employees must provide an equal amount of sick leave on an unpaid basis. Employers with one (or more) domestic worker who has been employed for at least one year and works more than 80

hours each calendar year must provide two days of paid sick leave (in addition to the three days of paid rest provided under the New York State Labor Law[8]). Employees accrue sick leave at the rate of one hour for every 30 hours worked, up to a maximum of 40 hours of sick leave per calendar year (accrual differs for domestic workers, as well as for employees who are covered by collective bargaining agreements). Employees begin to accrue sick leave on April 1, 2014 or on their first day of employment, whichever is later (the date accrual begins differs for certain employees covered by collective bargaining agreements).

In addition, employers must provide employees with written notice of their rights to sick leave, and maintain records reflecting compliance with the law. A "Notice of Employee Rights" may be obtained on the NYC Department of Consumer Affairs website and is available in 26 languages.[9]

An employee may use sick leave when he or she:

(i) has a mental or physical illness, injury, or health condition; needs to get a medical diagnosis, care, or treatment of his or her mental or physical illness, injury or condition; or needs to get preventive medical care.

(ii) must care for a family member who needs medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition, or who needs preventive medical care.

(iii) works for an employer whose business is closed due to a public health emergency, or needs to care for a child whose school or child care provider is closed due to a public health emergency.

Under the law, "family members" are defined as a:

(i) child (biological, adopted or foster child; legal ward; child of an employee standing *in loco parentis*)

(ii) grandchild

(iii) spouse

(iv) domestic partner

(v) parent

(vi) grandparent

(vii) child or parent of an employee's spouse or domestic partner

(viii) siblings (including half, adopted or step sibling).

If the need for sick leave is foreseeable, an employer may require up to seven days' advance notice of the employee's intention to use sick leave. If the need is unforeseeable, the employer may require notice as soon as practicable.

Up to 40 hours of unused sick leave can be carried over to the next calendar year. An employer is only required, however, to allow an employee to use up to 40 hours of sick leave per calendar year.

Finally, employers may not retaliate against employees who (i) request and use sick leave, (ii) file complaints with the Department of Consumer Affairs for alleged violations of the law, (iii) communicate with any person, including coworkers, about any violation of the law, (iv) participate in an administrative or judicial action regarding an alleged violation of the law, or (v) inform another person of that person's potential rights. Retaliation includes any threat, discipline, discharge, demotion, suspension or reduction in hours, or any other adverse employment action for exercising or attempting to exercise any right under the law.

Prohibition of Discrimination Based on Pregnancy, Childbirth or a Related Medical Condition

Effective January 30, 2014, the New York City Pregnant Workers Fairness Act makes it illegal for an employer with four or more employees to refuse to provide reasonable accommodations to pregnant women and those who suffer medical conditions related to pregnancy and childbirth.[10] Reasonable accommodations may include bathroom breaks, breaks to facilitate increased water intake, periodic rest if the employee is required to stand for long periods of time, assistance with manual labor, changes to the employee's work environment and unpaid medical leave.[11] In addition, employers must provide written notice to their employees regarding the right to be free from this type of discrimination. In this regard, a poster which satisfies this written notice requirement, entitled "Pregnancy & Employment Rights," may be obtained on the NYC Commission on Human Rights website and is available in seven languages.[12]

Prohibition of Discrimination Based on an Individual's Status as Unemployed

Although this amendment to the New York City Human Rights Law was effective June 11, 2013, it is important to remember that employers with four or more employees are prohibited from considering an applicant's status as being unemployed when making employment decisions with regard to hiring, compensation or the terms, conditions or privileges of employment, unless there is a substantially job-related reason for doing so.[13] Employers are also prohibited from posting job advertisements that require applicants to be currently employed or that state that the employer will not consider applicants based on their unemployment status. Under the law, "unemployed" is defined as "not having a job, being available for work, and seeking employment."[14] In addition to providing that an employer may consider an applicant's

unemployment based on a substantially job-related reason, express exemptions contained in the law permit employers to (i) inquire into the circumstances surrounding an applicant's separation from prior employment, (ii) decide that only applicants who are its current employees will be considered for employment or given priority for employment or with respect to compensation, terms, conditions or privileges of employment, or (iii) publish an advertisement for a job vacancy that requires or takes into consideration certain job-related qualifications (such as a current and valid professional or occupational license, a minimum level of education or training, or a minimum level of occupational or field experience).

New York State Legislature

Protection of Unpaid Interns from Workplace Discrimination and Sexual Harassment

On July 22, 2014, Governor Andrew Cuomo signed into law an amendment to the New York State Human Rights Law which extends protections against workplace discrimination and harassment to unpaid interns.[15] The amendment was effective immediately upon signing.

The new law defines an "intern" as follows:

> [A] person who performs work for an employer for the purpose of training under the following circumstances:
>
> a. the employer is not committed to hire the person performing the work at the conclusion of the training period;
>
> b. the employer and the person performing the work agree that the person performing the work is not entitled to wages for the work performed; and
>
> c. the work performed: (1) provides or supplements training that may enhance the employability of the intern; (2) provides experience for the benefit of the person performing the work; (3) does not displace regular employees; and (4) is performed under the close supervision of existing staff.[16]

Pending Legislation Prohibiting Abusive Conduct in the Workplace

"Workplace bullying" is indisputably a hot topic in New York and throughout the United States. Nonetheless, although illegal in many countries, there is currently no law prohibiting workplace bullying alone in the United States. Federal and state courts prohibit workplace bullying only in cases where the bullying conduct relates to acts of discrimination and/or harassment based on protected categories under federal, state or local discrimination laws and/or retaliation based on the target of the bullying making a report of discrimination or harassment. In addition, in cases where discrimination or sexual harassment did not occur, New York courts may protect against workplace bullying under tort laws (such as laws prohibiting the intentional infliction of emotional distress) or pursuant to an employer's policies on professional conduct (finding a breach of contract if a policy prohibits workplace bullying and the employer does not take steps to correct a bullying situation).

New York was the ninth state to introduce legislation to prohibit "abusive conduct" in the workplace. The currently pending Senate and Assembly bills are based on a template that was created by Professor David Yamada of Suffolk University School of Law. Specifically, in 2001 Professor Yamada proposed legislation, entitled the "Healthy Workplace Bill" ("HW Bill"), with the intent that it would be enacted in each state throughout the United States. The text of this original bill was based on Professor Yamada's extensive research on workplace bullying and conclusion that there is a need for "status blind" harassment laws (i.e., protection from harassment in the workplace regardless of whether the harassment is based on one of the protected categories under federal, state or local discrimination laws). The text of the bill was later revised in 2009.

In 2010, a HW Bill was passed in the New York Senate.[17] This bill was subsequently "held" and extinguished in the New York Assembly. A new 2011 Assembly HW Bill was filed on February 2, 2011 by Assemblymember Steve Englebright.[18] The companion Senate HW Bill[19] was introduced by Senator Diane J. Savino and was referred to the Labor Committee on March 28, 2011. On February 13, 2013, Assemblymember Englebright reintroduced the HW Bill for the 2013-2014 Legislative Session.[20] On February 25, 2013, Senator Savino reintroduced the Senate version of the HW Bill,[21] and it was referred to the Senate Labor Committee. The Senate Labor Committee passed the HW Bill on June 3, 2013, and it is now before the Senate Finance Committee.

The proposed New York HW Bill establishes a civil cause of action for employees who are subjected to an "abusive work environment," and provides, among other things, that:

(1) It is unlawful to subject an employee to an "abusive work environment." Affected employees may bring legal actions in court against their employers and/or the bullies who target them.

(2) "Abusive conduct" is conduct (acts and/or omissions) that "a reasonable person would find abusive." The severity, nature and frequency of the behavior at issue are relevant when determining whether such conduct is "abusive." "Abusive conduct" includes (i) repeated verbal abuse (such

as derogatory remarks, insults and epithets); (ii) verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating; and/or (iii) the sabotage or undermining of an employee's work performance. Conduct that exploits an employee's known psychological or physical illness or disability is considered an aggravating factor.

(3) A single act will not constitute "abusive conduct," unless such single act is especially severe or egregious.

(4) An "abusive work environment" is a workplace where an employer or one or more of its employees, acting with intent to cause pain or distress to an employee, subjects that employee to "abusive conduct" that causes physical and/or psychological harm to the employee.

(5) One possible remedy is that employers must remove the bullies from their workplaces.

(6) Additional remedies include reinstatement, reimbursement for lost wages, front pay and medical expenses, compensation for pain and suffering, compensation for emotional distress, punitive damages and attorneys' fees.

(7) Affirmative defenses are available to both employers and purported bullies, and retaliation against an employee who complains about "abusive conduct" is prohibited.

(8) Any action in court must be commenced by the targeted employee within one year of the last incident of "abusive conduct" which is the basis of the allegation of an "abusive work environment."

It is noteworthy that neither the New York State Legislature nor the New York City Council has enacted a law requiring sexual harassment training by employers. By contrast, California law currently mandates that employers with 50 or more employees must provide at least two hours of sexual harassment training and education to all supervisory employees in California within the first six months of the employee's assumption of a supervisory role and every two years thereafter.[22] Moreover, in September 2014, California enacted a new law, effective January 1, 2015, which requires employers with 50 or more employees to include "prevention of abusive conduct" as part of the sexual harassment training that is provided to supervisory employees.[23]

Endnotes

1. N.Y.C. Admin. Code §§ 8-101 *et seq.*
2. *Id.* § 8-102(28).
3. Press Release, The Council of the City of New York Office of Communications, Council Votes to Protect Interns against Discrimination (Mar. 6, 2014), http://council.nyc.gov/html/pr/032614stated.shtml.
4. 976 F. Supp. 2d 527 (S.D.N.Y. 2013).
5. *Id.* at 537.
6. N.Y.C. Admin. Code §§ 17-501 *et seq.*
7. *Id.* §§ 20-911 *et seq.*
8. *See* N.Y. Labor Law § 161(1).
9. *NYC's Paid Sick Leave Law*, N.Y.C. Dep't of Consumer Aff., http://www.nyc.gov/html/dca/html/law/PaidSickLeave.shtml (last visited Nov. 20, 2014).
10. N.Y.C. Admin. Code § 8-107(22).
11. *See* N.Y.C. Local Law Int. No. 974-A, *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=2633222&GUID=F483E5BC-9A79-4704-B38B-063FA005267A (last visited Nov. 20, 2014).
12. *Pregnancy & Employment Rights Posters*, N.Y.C. Commission on Hum. Rts., http://www.nyc.gov/html/cchr/html/publications/pregnancy-employment-poster.shtml (last visited Nov. 20, 2014).
13. N.Y.C. Admin. Code § 8-107(21).
14. *Id.* § 8-102(27).
15. N.Y. Exec. Law § 296-c.
16. *Id.* § 296(c)(1).
17. S. 1823, 2009 Leg., Reg. Sess. (N.Y. 2009).
18. Assemb. 4258, 2013 Leg., Gen. Assemb. (N.Y. 2013).
19. S. 2489, 2011 Leg., Reg. Sess. (N.Y. 2011).
20. Assemb. 4965, 2013 Leg., Gen. Assemb. (N.Y. 2013).
21. S. 3865, 2014 Leg., Reg. Sess. (N.Y. 2013).
22. Cal. Gov. Code § 12950.1(a).
23. *Id.* § 12950.1(g) (as amended).

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A "Duty to Mitigate"? Civil Claims Against Liquor Establishments for Sexual Assaults Under Existing Premises Liability Law

By Nicholas B. Adell

American society must contend with the endemic problem of rape. Conservative statistics suggest that one in ten American women will be forcibly raped in her lifetime. An additional eight percent of all women have been assaulted while under the influence of alcohol or drugs and unable to give consent.[1] These formidable numbers are exacerbated by the fact that 85 to 95 percent of assaults are not reported to law enforcement.[2] Many victims who do seek police assistance often feel they've been raped twice: once by the perpetrator and again while being cross-examined.[3] Criminal law's high burden of proof and the defendant's constitutional right to cross-examination deter many rape victims from coming forward.[4] Accordingly, tort law presents novel routes for victims to pursue, particularly in assigning liability beyond the assailant.[5]

Tort law remedies private wrongs by trying to place a particular victim in the position she would have been in had the harm not occurred, deters future conduct by a similar class of negligent or intentional perpetrators, and apportions liability among various actors in a manner best serving societal interests. Tort does not act as a substitute for criminal proceedings nor for wider social deliberations about how to best ameliorate the offense and cultural conditions fostering rape. However, it can provide a vehicle for imposing a responsibility on culpable parties to trigger eventual legislative action.

This article argues for imposing liability on establishments serving liquor under a premises liability theory when a victim has been sexually assaulted as a result of a tavern's failure to provide an adequate level of care under a business's duty to its invitees. It further suggests the creation of an affirmative duty to mitigate such sexual assaults through various preventative measures founded on a "reasonably foreseeable" standard of premises liability.

There is a strong relationship between sexual violence and alcohol in our culture. A study of American men who had committed rapes revealed that 80.8% of the men reported raping women who were incapacitated because of drugs or alcohol.[6] Bars and nightclubs are necessarily public places. Both women and men gather to drink, and (occasionally) over-indulge, negating any possibility of consent in a sexual scenario. The assaults that follow are inexorably linked to a bar's service of liquor to its patrons. A bar owes a duty of care to all its customers. That duty extends to ensuring the safety and security of those drinking while in and after they leave the bar, provided such potential harms are foreseeable. Because of these twin obligations, bars can effectively be held liable for assaults that occur as a result of their proximate negligence.

Progressive organizations are addressing this exposure in a positive manner, advocating for deterrent steps alleviating a woman's exposure to potentially dangerous situations in and around taverns.[7] This effectively serves the purposes of both tort law and society at large; liquor establishments will be forced to devise heightened security measures and attempt to mitigate sexual assaults arising out of the consumption of alcohol, which—when carried out successfully—will insulate those same establishments from greater liability in the long-run.

Holding Bars Liable for Proximate Sexual Assaults Under a Premises Liability Theory

Tort law has long acknowledged a duty on behalf of businesses to shield their invitees from harm. This duty requires taking reasonable measures to prevent foreseeable harms.[8] [9] The Restatement (Second) of Torts § 344 (1965) defines the scope of liability affixed on landowners:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) *discover* that such acts are being done or are likely to be done, or (b) give a *warning adequate* to enable the visitors to avoid the harm, or otherwise to protect them against it.[10]

Many courts seeking to pen an appropriate field of accountability have analyzed Comment *f* to § 344:

> [The] possessor is not an insurer of the visitor's safety…He may, however, know or have reason to know…that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection.[11]

These generalized Restatement provisions—a duty to investigate reasonable potential harms and a duty to inform and protect based on a likelihood of conduct taking into account the totality of the relevant circumstances—have been further tailored into four approaches endorsed by various courts. The first, somewhat obsolete, is known as the *imminent harm* rule.[12] Under this theory, a landowner owes no duty unless he is aware of specific, imminent danger to his patrons. A second approach is a *prior incidents* test. Evidence of prior crimes on or near the premises is needed to establish a duty between owner and patron. Factors for this test follow a holistic negligence standard: Frequency, recency, and similarity of previous crimes are taken into account. These conservative tests reflect an unwillingness to, in the Restatement's words, make a landlord "the insurer of a visitor's safety."[13]

In a 2011 case, *Bass v. Gopal,* the Supreme Court of South Carolina criticized this limited scope of duty. Their logic loosely paraphrased Jackson Browne: "Don't think it won't happen just because it hasn't happened yet." The court reasoned it was inequitable to give a landowner "one free assault before he can be held liable for criminal acts which occur on its property." Such a policy means the first victim always loses. Reasonable accidents can be anticipated even if they have not yet occurred.[14] Thus, many courts have been willing to adopt a broader "totality of the circumstances" analysis. Under this test, courts widely examine the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance.[15] The nature, condition, and location of the land *alongside* prior similar incidents are taken into account.[16]

However, the totality test is by design quite wide-reaching. A goal of tort is to fairly allocate resources; the totality test can lead to landowners taking expensive and ineffective steps to insure their premises with marginal impacts on an invitee's safety. Thus, California, Louisiana, and Tennessee have adopted a "balancing" test that evaluates the foreseeability of the harm against the duty imposed.[17] As Judge Richard Posner wrote in a case involving a rape in a hotel: "…The hotel should increase its expenditures on security until the last dollar buys a dollar in reduced expected crime costs…to the hotel's guests."[18] Balancing the totality of the circumstances to determine the foreseeability of a crime with the appropriate reasonable security measures that ought to be taken forms the basis for assigning liability in sexual assault scenarios which occur within bars.

The Illinois Appellate Court examined the extent of reasonably foreseeable actions in *Loomis v. Granny's Rocker Night Club*. In *Loomis,* a bar ran Wednesday night "fanny contests," drawing a "rowdy crowd." A fight broke out in the bar following words exchanged between two men. The court held that "evidence was presented that the altercation was reasonably foreseeable by Granny's Rocker and that defendant could have prevented it or could have at least interfered in the altercation prior to Loomis sustaining the injuries to his ear."[19] A Supreme Court of Texas case involving a closing-time fight between parties who had been threatening each other for at least ninety minutes, resulting in an injury to a third party, also found that the bar was under a duty to take actions to make the condition of the premises reasonably safe.[20] Additionally, the Supreme Court of North Dakota imposed liability under similar circumstances—albeit without any provocative warning signs—for a barroom assault.[21]

Sexual assaults are as—if not more—serious as violent physical altercations. They, like fights, are naturally associated with a condition that bars and nightclubs promulgate—serving alcohol in a crowded space. Based on the enumerated factors inherent to the "balancing" approach, particularly the magnitude of the harm to be prevented, bars are conceivably liable for sexual assaults which happen on their premises. Accordingly, an analysis based on the "character of the business" itself speaks to the conclusion that there is an intrinsic possibility that a woman may be sexually assaulted while out at a bar. The first victim need not lose out so that potential future plaintiffs may recover. Judge Posner's contention that security expenses should be commensurate with reduced expected crime costs to patrons provides the appropriate scope of a bar's duty to mitigate against sexual assaults. However, an analysis of the harm falters without factoring in the many consequential results bars take indirect responsibility for.

Cases assigning liability after subjecting the facts at hand to a balancing test consistently emphasize the importance of the "character of the business" coupled with an inquiry into whether a "reason to know" such a violent crime might reasonably be perpetrated on the premises.[22] A Tennessee case, *McClung v. Delta Square Ltd. Partnership,* involved a woman who was abducted from a parking lot and later raped and murdered. The woman's husband brought an action against the owners and operators of the lot for negligently failing to provide adequate security. The court held that the burden of installing surveillance cameras, improved lighting, and posting signs may be both cost-effective and greatly reduce the risk to customers. Given the magnitude of the harm associated with abduction, such measures should reasonably have been undertaken.[23] It reasoned that "the merchant is in the best position to know the extent of crime on the premises and is better equipped than customers to take measures to thwart it and to distribute the costs."[24] A whole line of "parking lot" cases have consistently affirmed the principle that criminal events occurring on a lot, leading to further criminal conduct, are not superseding causes abating liability when the landowner is on reasonable notice of the inherent dangers within the situation.[25]

Similarly, liability for sexual assaults occurring off bar premises can be imposed. Liability has been found in instances where a party injured by an intoxicated driver brings an action against the bar in which the driver was drinking. In one Illinois case, two men who brought their own alcohol to a strip club were subsequently ejected from after one became visibly intoxicated and was vomiting in

the restroom. The two then got into an accident, killing three.

Even though the club did not serve alcohol to the men, a duty was established. Through selling the men ice, glasses, and mixers, and a valet attendant's pulling their car around and opening the door, the court reasoned that it was proximately reasonable to infer that the two would drive drunk and cause a risk to others. The club assumed a duty once it threw the men out; merely ejecting trouble-makers from the premises does not abate a duty, and in this instance, actually created one.[26] Thus, a "duty to protect" patrons and innocent third-parties does not end at the door; bars must keep in mind the logical actions of such persons after they leave the premises as well.

This rationale is analogous to a Nebraska case where a bartender told two quarreling patrons to "take it outside." The two fought, and one of the patrons brought an action against the bar for trying to escape liability by kicking the two out and failing to prevent a foreseeable altercation.[27] The defendant claimed that the subsequent fight was an intervening cause as a matter of law. The court disagreed, citing a New Jersey parking lot case:

> The doctrine that an intervening act cuts off a tortfeasor's liability comes into play only when the intervening cause is not foreseeable. Foreseeability that affects proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's alleged breach of duty.[28]

Thus, actions which are "reasonably foreseeable within the scope of the risk occasioned by the defendant's negligence cannot supersede that negligence."[29] Neither court makes mention of an on-off premises distinction. Accordingly, the test for determining liability for criminal actions regardless of where they occur is foreseeability subject to a balancing assessment incorporating a cost-benefit security analysis taking into account the nature and context of the establishment.

Imposing a Duty to Mitigate Sexual Assaults Under Existing Premises Liability Law

Case law forms a framework for civil negligence suits against liquor establishments based upon a failure to take reasonable precautions to prevent foreseeable felonious behavior. Judge Posner's theory of balancing harms with prudent preventative security measures stipulating safety methods proportionate to the harm at hand serves a resource-allocative function protecting bars and patrons alike.

A "light hand" duty already imposes a responsibility on a bartender not to over-serve his customers. Certain other obligations in line with premises accountability stemming from a failure to protect female customers ought to be implemented. *A "zero tolerance" policy on groping and unwanted advances, banning repeat "problem customers," framing a training program fostering awareness for bar employees, and generally securing a location with added personnel and structural improvements form the basis for a more robust duty to female customers, in turn insulating the establishment from large-scale legal culpability.*

In 2003, the federal government enacted the Illicit Drug Anti-Proliferation Act. The Act imposed accountability on anyone knowingly owning, renting, or maintaining a place for the distribution of such a controlled substance (in this instance, the popular "club drug" ecstasy as well as GHB: the "date rape" drug).[30] The law helped to foster a more serious approach to combating the presence of drugs on the part of club owners.[31] "Prosecutors now have discretion to prosecute legitimate rave promoters for the personal, casual drug use of their patrons."[32] Such a policy deters reckless conduct on behalf of club owners and furthers public safety. It generates an incentive to diminish drug use and distribution by stopping the buck at the very first on-premises sale.

Analogies can be drawn and comparable obligations imposed with regard to combating pervasive antagonistic sexual conduct within bars. Similar to lax drug enforcement, a lack of intervention fosters the impression that casually aggressive sexual behavior is acceptable.[33] Knowing that such behavior—backside gropes on the dance floor, unwanted physical impositions at the bar—creates a more permissive environment; bars ought to take proactive steps to limit their tolerance of it. Doing so would protect women *and* lessen the probability of further proximately liable assaults.[34] A "zero tolerance" policy is a straightforward and enforceable message that doesn't contradict the fun and rambunctious elements of a bar. Such policies could be both explicit and implicit, in writing and imposed by physical action. They reinforce the message that certain currently tolerated behaviors are put on notice, fashioning new social norms stigmatizing petty yet unnerving conduct. Accordingly, by preemptively addressing actions often indicative of potentially more serious consequential crimes, bars can compellingly alter an often-hostile climate to female patrons.[35]

A 2002 study of admitted rapists found that 63.3% acknowledged committing multiple rapes, at an average of 5.8 each.[36] This shocking statistic further bolsters the theory that a bar can be an inherently dangerous place to a woman. Consequently, "problem customers" whose past behavior highlights a pattern of malicious acts must be closely scrutinized and barred when necessary.[37] Banning customers shown to have acted inappropriately more than once comports with a zero-tolerance policy on aggressive sexual behavior. Such repeat aggressors "cruise" for victims, preying on inebriated women: research confirms that "the fact that [aggressors] tend to go for drunken women suggests they know their overtures are unwanted: a tipsy target can't protect herself as effectively as a sober one."[38] These slick operators undermine the holistic safety of all patrons and are a scourge on both the rapport and economic health of a bar. One habitual lurker can give an

entire establishment an underserved reputation for seediness, deterring potential patrons.

Integral to these duties is having a properly trained staff capable of spotting potential issues. In Boston and Washington, programs training bar staff to recognize and deter inappropriate sexual aggression have begun to gain traction.[39] These programs emphasize the value of vigilant staff; the Boston Area Rape Crisis Center (BARCC) implores owners to reinforce that "patron safety and well-being" trumps generating sales.[40] BARCC suggests that owners encourage staff to keep patrons safe as part of overall good service: highlighting Dram Shop liability and the right of refusal. It further argues that owners should post signs in bathrooms and other corridors letting patrons know that management is willing to help in an uncomfortable situation, giving the name of a Manager-on-Duty. Finally, while monitoring individual patrons' drinks may be impractical, BARCC nonetheless recommends posting signs and giving patrons verbal reminders to watch their beverages.[41] These steps provide assistance to potential victims by providing "safety, empowerment, empathy, and knowledge."[42]

Underpinning the establishment of duties to implement a zero-tolerance policy, ban repeat offenders, and train staff is the legal imperative for implementing adequate security measures. Taking relatively easy steps such as installing high-wattage lighting in bathroom corridors, posting notice of the potential danger of sexual assaults in prominent areas, providing easy access to local taxi companies, and regular staff sweeps of back areas are low-cost safety practices that significantly heighten awareness of a lurking problem. A prudent cost-benefit analysis bears out the simple reality that nearly all reasonable methods protect rather than expose property owners to unnecessary expense. As one commentator has noted: "Social and commercial providers of alcohol should expect their burden of responsibility to continue to increase as more lawsuits are filed and the public becomes more aware of dollar long-necks and $35 million dollars in damages."[43] Owners have an obligation to physically secure their premises through hiring security and training staff to spot malicious behavior as well as installing lighting, cameras, and signage to mitigate against a permissive climate of sexually antagonistic conduct.

Why Hold Bars Liable in the First Place?

These obligations appear on their face to miss the true offender of sexual aggression: the perpetrator himself. Yet the offender is often impervious to criminal liability; only 8% of rapes result in a criminal prosecution. Few victims still are willing to bring a personal civil action against their assailant.[44] While tort law presents a lower burden of proof, few victims are comforted by the lesser anonymity provided by a civil action, the length of the action itself, and the limited verdicts imposed upon low-income perpetrators.[45] Obtaining a personal debt from an offender to the victim is thus often precluded by the limits of personal assets as well as indignity inherent in making rape restitution a matter of monetary exchange.[46]

Third-party responsibility in the form of premises liability gets at the next-in-line culpable party as a means of encouraging better safety procedures and making the victim whole. Civil liability against proximately negligent bars serves a similar purpose in going after the "next best" available defendant to foster a societal shift in attitudes toward sexual assault prevention.[47]

How Liability Both Serves Social Justice and Protects Bars

Imposing duties of care manifestly creates a safer situation for women in bars. Mandating that bars mitigate against a known danger calls awareness to a rampant problem and promotes reasonable safety measures enhancing the security of patrons and staff alike. Yet owners themselves stand to gain a great deal from an expansion of this form of premises liability. As one commentator has noted: "By looking at [relevant] cases, companies can clearly see the high cost of premises security liability—and the true value of putting in adequate security measures before it's too late."[48] The extreme probative value of one large damages award to a plaintiff can cripple an otherwise successful and law-abiding business. It is simply prudent to acknowledge the legal basis for a duty to ensure adequate security and deterrence and reckon with it—paying limited out-of-pocket costs for training and structural upgrades preemptively to avoid a protracted lawsuit. Expanding liability could in turn reduce incidents and limit litigation to only the most egregiously negligent cases.

An enlarged duty, too, addresses both of the principal schools of thought on tort law: corrective justice and deterrence theory. Sexual assault victims often cannot obtain the justice they desire through criminal law; civil remedies make such plaintiffs whole by targeting third-parties with both sufficient assets and an existing premises duty of care. In the absence of a strong legislative signal, the onus is on the victim to assume the burden of suing an expansion and enforcement of legal duties and accordant damages to foster social change. Such suits would send a powerful signal that certain behaviors are beyond the realm of acceptable actions and must be mitigated against by property owners.

Tort law's deterrent function potentially serves even greater social utility. Judge Posner has argued that "the fear of a negligence suit [creates] incentives on the part of enterprises to make their activities safer, up to the point that it [becomes] cheaper to pay tort damages."[49] Resource optimization, rather than altruism, underpins the acceptance of new duties. In line with Judge Learned Hand's "negligence calculus," the burden of adequate security clearly is preferable to take on given the magnitude of resultant injuries (and damage awards) and probability of assaults occurring.[50] Hand's formula, based in part on the seminal Coase theorem, posits the possibility of a

social and economic equilibrium; bars insulating against a heightened negligence standard will in turn pass such costs on to customers, who conversely accept such premiums as a reasonable guarantee of their safety.

In short, the expansion of legal duties for liquor establishments for proximately caused sexual assaults based on a premises liability theory makes victims whole, fosters a safer drinking environment for women, and insulates establishments themselves from potentially crippling high-stakes lawsuits.

Endnotes

1. Jody Raphael, Rape is Rape 88 (2013).
2. Lorna J.F. Smith, Concerns About Rape, Home Office Research Study No. 106, at 1 (1989).
3. Sandra Laville, *Degraded Victim Abandons Anonymity,* The Telegraph, May 18, 2001, http://www.telegraph.co.uk/news/uknews/1330709/Degraded-victim-abandons-anonymity.html.
4. *State v. DeLawder*, 344 A.2d 446 (Md. 1975).
5. Ellen M. Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 SMU L. Rev. 55 (Winter 2006).
6. David Lissak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists,* 17 Violence and Victims 1 (2002).
7. BARCC and Collective Action DC are two such organizations the author has contacted regarding their work in this field.
8. *Troxel v. Iguana Cantina, LLC*, 29 A.3d at 1048 (Md. 2011).
9. Additionally, finding liability under a premises liability theory requires the four elements of a common law negligence claim to be proven: Duty, Breach, Causation (Factual & Proximate), and Injury. See *Pipher v. Parsell,* 930 A.2d 890 (Del. 2007).
10. Restatement (Second) of Torts § 344 (1965).
11. *Seibert v. Vic Regnier Builders, Inc.,* 856 P.2d 1332 (Kan. 1993).
12. *Bass v. Gopal*, 716 S.E.2d 910 (S.C. 2011).
13. Restatement, *supra* note 10.
14. *Bass*, *supra* note 12.
15. *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968).
16. *Bass, supra* note 12.
17. *Ann M. v. Pacific Plaza Shopping Ctr.,* 863 P.2d 207, 214–15 (Cal. 1993).
18. *Shadday v. Omni Hotels Management Corp.*, 477 F.3d 511 (7d Cir. 2007). Also see *Clohesy v. Food Circus Supermarkets, Inc.*, 694 A.2d 1017 (N.J. 1997).
19. *Loomis v. Granny's Rocker Nite Club,* 250 Ill.App.3d 753, 620 N.E.2d 664 (1993).
20. *Del Lago Partners Inc. v. Smith,* 307 S.W.2d 762 (Tx. 2010).
21. *Zueger v. Carlson,* 542 N.W.2d 92 (N.D. 1996).
22. *Seibert*, *supra* note 11.
23. *McClung v. Delta Sq. Ltd. Partnership,* 937 S.W.2d 891 (Tenn. 1996).
24. *Id.*
25. *See Seibert v. Vic Reginer Builders Inc.; Clohesy v. Food Circus Supermarkets, Inc.; Martinko v. H-N-W Associates*, 393 N.W.2d 320 (Iowa 1986).
26. *Simmons v. Homatas*, 236 Ill.2d 459, 925 N.E.2d 1089 (2010).
27. *Sacco v. Carothers*, 567 N.W.2d 299 (Neb. 1997).
28. *Id.*
29. *Id.*
30. Michael V. Sachdev, *The Party's Over: Why the Illicit Drug Anti-Proliferation Act Abridges Economic Liberties*, 37 Colum. J.L. & Soc. Probs. 585, 602 (2004).
31. Christopher Haas, *Owner and Promoter Liability in "Club Drug" Initiatives*, 66 Ohio St. L.J. 511, 531 (2005).
32. Sachdev, *supra* note 30, at 606.
33. Jake Blumgart, *Sexual Aggression in Bars and Clubs: Bartenders and Bouncers Need to Step Up to Protect Customers,* Slate, April 2, 2014, http://www.slate.com/articles/double_x/doublex/2014/04/sexual_aggression_in_bars_and_clubs_bartenders_and_bouncers_need_to_step.html.
34. Such a duty could conceivably encompass a "zero-tolerance" policy on the "date rape" drug GHB. Given existing penalties for allowing drug use and distribution within a premises, it makes strong economic sense to forcibly eradicate the presence of drugs.
35. Laura Bates, *Everyday Sexual Assault*, Huffington Post, March 9, 2012, http://www.huffingtonpost.co.uk/laura-bates/everyday-sexual-assault_b_1847497.html provides a good overview of the types of behavior I am referring to. So does http://www.collectiveactiondc.org/programs/safe-bars/. 3 adverbs.?
36. Lissak & Miller, *supra* note 6.
37. *Supra* note 25.
38. Katy Waldman, *Sexual Aggressors in Bars Aren't Necessarily Drunk, But Their Targets Are,* Slate, March 6, 2014,http://www.slate.com/blogs/xx_factor/2014/03/06/study_sexual_aggression_in_bars_and_clubs_depends_on_the_woman_s_level_of.html.
39. Blumgart, *supra* note 33. CASS's Safe Bars program provides the following documents directly to bars: BARCC, e-mail message directly to author, April 25 2014.
40. *Id.*
41. *Id.*
42. *Id.*
43. Elizabeth A. Ryan, *Can I Start You Off with Some Drinks?": An Analysis of Commercial Alcohol Provider Liability in Texas,* 39 Tex. Tech L. Rev. 45, 65 (2006). The $35 million refers to a Texas Dram Shop Act case where the seller of alcohol sold a twelve-pack of beer to an obviously intoxicated customer.
44. Morgan O. Reynolds, *Crime and Punishment in America, 1999,* Natl. Center for Policy Analysis, March 1, 1999, http://www.ncpa.org/pub/st229.
45. Ellen Bublick, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, National Resource Center on Domestic Violence, http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=2150.
46. Claire Bushey, *Why Don't More Women Sue Their Racists*, Slate, May 26, 2010, http://www.slate.com/articles/double_x/doublex/2010/05/why_dont_more_women_sue_their_rapists.html.
47. The "least-cost avoider" principle popular in strict and products liability cases is relevant here.
48. Teresa Anderson, *Laying Down the Law: A Review of Trends in Liability Lawsuits*, Security Management 43-51, October 2002.
49. Christopher J. Robinette, *Can There Be a Unified Theory of Torts: A Pluralist Suggestion From History and Doctrine*, 43 Brandeis L.J. 69 (Spring 2005).
50. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (1947).

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Employment Investigations by Independent Investigators: Priorities, Privileges and Protocol

By Christopher A. D'Angelo and Alfred G. Feliu

The complaint comes in. The allegations are serious, the odor of potential litigation is strong. An investigation is clearly warranted. Who is the organization going to ask to conduct the investigation? A human resources representative, in-house counsel, regular outside counsel, or a fully independent investigator?

Increasingly, employers are opting for the independent investigator—one without any affiliation with the organization. The reasons are many, and sound.

An independent investigator, unburdened by any history with the organization or any connection to this particular dispute, is well situated to provide a fresh, less incestuous, and unbiased perspective. The final result therefore is likely to be more clear-sighted and honest. An independent investigator will also more likely carry enhanced credibility with the complainant (and that person's counsel if one has been retained), a government agency, arbitrator, judge, and jury should legal proceedings ensue. On a more practical level, if the investigator is a lawyer (and generally that is the case), the organization's regular counsel will not be conflicted out of representing it, as would likely be the case if counsel conducted the investigation, should a legal action be subsequently filed. Also, the prospect for application of privilege to the investigation would be improved.

What follows are some key considerations for in-house counsel in retaining an independent investigator and managing the investigation process itself, as well tips for boosting the likelihood that the investigation will be a successful one.

Selecting the Investigator

The investigator selected should be one best suited to the particular dispute at hand and the nature of the issues raised. One size does not fit all. If the risk of litigation is real, that would argue for a lawyer-investigator, and one with some litigation experience. If public relations are a concern, the investigator's reputation and credibility in the marketplace may trump his or her experience as an investigator. If the claim is sex-based, some argue that the gender of the investigator should be considered. And, of course, the reputation and independence of the investigator and his or her standing in the community and anticipated credibility with government officials, arbitrators, judges, and juries, is of utmost importance. Time availability is also key—there is no point in retaining someone whose schedule will not allow for him or her to conduct and complete the investigation in a timely fashion.

How do you find an investigator well-suited to your matter? The best sources for potential investigator candidates are outside counsel, who often have occasion to retain investigators for their clients, and other in-house counsel. While credentials are important, more valuable are recommendations from users of the investigator's services. Do not be afraid to ask investigator candidates for the names of counsel with whom they have recently worked.

Terms of Engagement

Once the investigator is selected, the terms of the engagement must be memorialized. Most investigators have standard agreements. Those agreements generally reflect that the investigator is retained as an independent contractor and will provide for indemnification for their services. Most investigators work on an hourly basis and require that their expenses be reimbursed. If travel is required, payment for travel time, if any and on what terms, should be made clear.

It is also important to confirm that the investigation is to be conducted on a confidential basis. Return of investigatory materials at the conclusion of the investigation should also be addressed. A representation that the investigation will be conducted on an expeditious basis is standard; the setting of deadlines is generally not standard as the identity and availability of witnesses before the investigation commences is generally not known.

Scope of Investigation

One of the key decisions to be made in any investigation is as to its scope. John, an African-American in the Marketing Department, alleges that his boss discriminated against him and that the atmosphere in the office is hostile towards employees of color. The first issue to be decided is the scope of the investigation. Is it limited to John's claims against his supervisor? Will it encompass the broader hostile environment claim? Are company policies and controls implicated and should they be put to the test? Whatever the decision is, it must be made prior to the commencement of the investigation and the scope of the investigation must be clearly delineated at that time.

One common and often effective approach is to conduct the investigation in "stages." For example, a preliminary inquiry may be made by the investigator to determine, in effect, what the real issues are and whether they are worthy of being pursued further. The investigator may then report back to management, which then determines what the investigator's mandate will be going forward. Staging comes in many varieties. For example, the investigator may be directed to explore individual issues first,

for example John's discrimination claim, and structural concerns thereafter.

The role that the organization wants the investigator to play must also be delineated. Is the investigator only collecting facts? Is he or she finding facts and making credibility determinations? Is the investigator being asked to determine whether the facts found constitute a violation of the organization's policies or applicable law? Finally, is the organization asking the investigator to recommend remedies to any ills uncovered? These mandates are quite different and must be made clear to the investigator at the time of retention.

Point of Contact for Investigator

The investigator will generally need two points of contact—one logistical and one substantive.

The investigator, being an outsider, will need a designated "chaperone" who will assist in the gathering of information and documents, scheduling interviews, securing interview rooms, and addressing practical and logistical issues, large and small. Where that person is in the organization's hierarchy will depend on such factors as the nature and sensitivity of the dispute at hand. Generally, a lower level human resources professional will suffice. However, if the issue is a claim of sexual harassment involving the CEO, the universe of appropriate persons to serve the logistical role will be severely limited.

On the substantive side, there will likely be several decision points along the way. It would be best to have someone with authority designated to interface with the investigator as issues arise. Take, for example, the situation where a new issue, unrelated or only tangentially related to the underlying issues, arises. The decision must be made by the organization as to whether that issue is to be addressed in this investigation, at a later time, or not at all. In addition, the investigator will generally benefit from having available to him or her someone with institutional knowledge who can add some efficiency to the process. For example, it would greatly aid the investigator who is in need of certain information to be able to consult with someone who can guide him or her as to how best to obtain it. ("Joe and Sally both could help, but Joe is disorganized and unfocused, so let me put you in touch with Sally…").

Confidentiality of Process—Legal and Practical Issues

During the course of an investigation it is tempting to promise confidentiality to witnesses, as a means to encourage candor and detail. Complete and absolute confidentiality is never an attainable goal, however, for several reasons. First, even if the complainant or accused is not revealed by name, it is often not difficult for witnesses to deduce their identity either by the nature of the questions asked, or the information sought. In addition, human nature being what it is, the "rumor mill" or "grapevine" is bound to start churning when such an investigation is being conducted. Hence, the better practice is to encourage confidentiality, and state that it will be provided to the extent possible under the circumstances.

A promise of absolute confidentiality, or instructions to witnesses to maintain confidentiality under penalty of discipline, has run into some unexpected legal hurdles over the past few years. Indeed, it has been subject to the scrutiny of an unlikely source, the National Labor Relations Board ("NLRB"). Recent rulings by the NLRB indicate that it will be considered an unfair labor practice for employers to instruct employees not to speak about internal investigations if interviewed, or to refrain from soliciting support from other employees in support of a claim that has been made, or discipline an employee for violating such an instruction. *NLRB Advice Memorandum,* 30-CA-089350 (January 29, 2013); *Banner Health Systems,* No. 28 CA-123438 (July 30, 2012). This analysis can be applied in both the union and non-union setting. The NLRB has reasoned that such direction from the employer, or the imposition of discipline, violates the employee's right to engage in conduct "for the mutual aid or protection" of the workforce. The issue is still working its way through the NLRB and the courts, however, and has been met with much criticism from employers and their representatives. Hence, it is too early to tell whether these initial rulings will gain any significant legal traction.

Gathering and Sources of Information

Again, there is no "one size fits all" approach to determine the scope of discovery. Some organizations and investigators may be tempted to search under every rock and behind every nook and cranny to gather information relating to the investigation. Others may prefer to narrow or limit the information and data obtained to the minimum possible. The nature and scope of the allegations must govern the gathering and sources of information to be employed. The investigator will want to identify the key sources of information and documents that are unequivocally relevant to the investigation, and build from there, to identifying witnesses and documents that may be more broadly relevant. As stated above, there will be many decision points during the investigation, so an initially narrow but thorough investigation can always be expanded, if warranted.

In general, the personnel files of the complainant and the accused are typically reviewed by the investigator. If the complainant has made similar complaints in the past, or there have been other complaints against the accused, that information should be gathered as well.

But identifying witnesses or potential witnesses is usually the easy part. We live now in the information age, where information exists electronically and is maintained in many different forms and environments. This fact can be both a blessing and a curse when conducting an investigation, as the sources of potentially relevant information are varied and not always obvious. Again, the investigator

will be guided by the nature of the allegations. For example, in a harassment case, do the allegations indicate that social media or e-mail was used as a means to harass the complaining party? If so, those communications should be reviewed even before the interviews begin. Even if there are no claims that electronic communications are at issue, the investigator may choose to look to email or social media for information concerning the claim for context as to the nature of the relationship between the disputants.

Investigation strategies decided upon at the beginning of the investigation, however, should not be deemed immutable. The strategy and sourcing of relevant information can and should be flexible, and altered depending upon the information learned during the course of the investigation. Thus, if information arises during the investigation suggesting the existence of relevant electronic data, the investigator is likely to pursue it. The same holds true for witnesses. That is, the investigator may choose to interview individuals not identified at the beginning of the investigation as possible witnesses if the information gathered indicates that they have, or may have, relevant information.

Selecting Witnesses

Speaking of witnesses, the employer should be prepared to assist the investigator in determining the identity of the proper witnesses for the investigation. There can sometimes be tension between the employer, which may want to limit the disruption to its workforce by limiting the number of interviews conducted, and the independent investigator, whose goal it is to gather as much information as possible in order to conduct a thorough investigation. Even if such tension exists, it should not present an insurmountable obstacle to conducting an appropriate investigation.

Consider, for example, a sexual harassment complaint which specifies the operational unit, times, dates and locations of the relevant events; this complaint will itself suggest who the potential witnesses are, even if witnesses themselves are not specifically identified. Those names can be given to the investigator in advance. A complaint that lacks such specificity often requires a more in-depth interview with the complaining party before witnesses other than the most obvious can be identified. In either case, once the likely or potential witnesses are identified, the investigator will determine who will be interviewed, and in what order. To the extent the list of potential witnesses is larger than anticipated, the investigator, of course, can at the very least reassess the list, and the necessity of interviewing each witness, as the investigation progresses.

Representation of Witnesses

A question that often arises during the course of an investigation is the right of a witness to have "representation" during the course of an interview. The issue is often raised by the complainant and accused, but from time to time fact witnesses also seek or desire to be accompanied by an attorney or other representative as well.

Many organizations reflexively object to the presence of an attorney or other outside representative during the course of an interview. The rationale is that the company is conducting an internal investigation that should be free of outside influence and potential disruption.

It has been our experience that the presence of a representative is not nearly as disruptive or negative as often anticipated, provided certain conditions are met. If the request for representation is from a complainant or the accused, it is generally advisable to allow the representative to be present during the interview, provided that the representative's involvement is limited to listening to the questions and answers, and not interrupting unless necessary to preserve the witness's legal rights. The investigation is the employer's and not the representative's to conduct.

If the employer happens to be unionized, a different set of rules applies. Any union member being interviewed who reasonably believes that discipline is possible is entitled to have a union representative present without any conditions attached, pursuant to a 1975 Supreme Court decision, *NLRB v. Weingarten*, 420 U.S. 251 (1975). Known as *Weingarten* rights, the NLRB and courts have gone back and forth over the years as to whether Weingarten rights apply to non-union workers. Currently, the answer is "no," but that could change.

Attorney-Client and Work Product Privileges

Many organizations that hire an attorney to investigate a claim assume that the investigator's communications with it are protected by the attorney-client privilege, and/or the attorney work product privilege. This is not necessarily the case. Indeed, many courts that have confronted the issue have ruled that the communications of independent investigators with the employer are not privileged, because the attorney was not hired to provide legal advice. Certainly, when the employer seeks to use the investigation as a shield against liability in a lawsuit connected to the claims that prompted the investigation, any privilege that may have existed will likely be deemed to have been waived.

If maintaining the existence of either the attorney-client or work product privilege is an important goal for the organization, it is best that the independent investigator report directly to outside counsel. Under these circumstances, there is a better argument that the investigator's communications with outside counsel are protected by the work product privilege, and outside counsel's communications with the company are protected by the attorney-client privilege. Even under these circumstances, however, if the findings and conclusions of the investigation are used as a defense in a subsequent litigation, the privilege will most likely be lost, in whole or in part.

Memorializing Witness Interviews

What kind of "record" should the investigator make? The investigator's role is short-term, but his or her findings may have long-term implications. How is the investigator's work to be memorialized? In particular, how are witness accounts to be preserved?

We do not favor an obvious choice, tape recording interviews, as it tends to inhibit free discussion and may be viewed as intimidating by witnesses. That leaves two basic approaches. First, the investigator may draft memoranda to the file summarizing witness accounts. Alternatively, investigators may prepare draft statements and provide them to witnesses to review, revise, and execute. The latter approach locks in the witnesses' accounts and provides comfort to witnesses that their information has been accurately reported to management. It also, however, may serve to delay the proceedings by adding a step to the process and may compromise the confidentiality of the investigation as draft statements may make their way into circulation. The former approach is more efficient but leaves the investigator's work subject to later challenge as a result of varying recollections or after-the-fact rewriting of history. ("I never told the investigator that!").

Form and Substance of Report

A related question is what form should the final report take—oral, a summary written report, OR a detailed written report? In making that determination, the risk that the report may not be privileged and therefore may be discoverable is a consideration. To whom the final report is directed and who is provided access to it must also be determined, with confidentiality and potential privilege concerns in mind.

Another practical question is whether exhibits, including witness memoranda and witness statements, should be attached to the report. One concern that is often overlooked is the possibility of a retaliation claim brought later by a witness who alleges that he or she was punished for cooperating with the investigation. That risk would be minimized if the witnesses' individual accounts are not disclosed by the investigator but are rather subsumed in the larger tapestry of the report. Of course, if the issue is a "he said/she said" scenario, that it not possible. However, where the issues are more systemic or atmospheric and a larger number of witnesses are interviewed, the investigator may be in a position to provide a thorough report without necessarily identifying particular witnesses. For example, instead of naming the witness who observed certain problematic behavior, the investigator might instead report that a "respected marketing professional observed…"

Final Thoughts

We have conducted many independent investigations and have had a chance to experience first-hand what works and what does not work. If the goal is solely to enhance the organization's defenses to litigation, then an independent investigation may not be the best vehicle to accomplish that goal.

An organization that proactively pursues an independent investigation must understand the implications of its decision and must be willing to risk an unfavorable investigatory result. Most significantly, control over the process is to a large degree bestowed on an outsider. The organization must accept that the process has its own logic. The mistake most commonly made by in-house counsel is the assumption that the independent investigator, like outside counsel, takes direction from them. Certainly, the initial mandate is for in-house counsel and the organization to make, but the manner in which the investigation is conducted is generally not.

The underlying premise in agreeing to an independent investigation should be the desire to take an honest look at the issues at hand and be prepared to remedy them, if wrongdoing or mismanagement is uncovered. While the investigation will undoubtedly provide some benefit should legal action ensue, that should not be the principal goal in agreeing to an independent investigation. Rather, a problem-solving, forward-looking approach is called for, as remedying the events of the past, if appropriate, should be paired with the goal of learning from any mistakes made and reducing the litigation risk going forward. The success of an independent investigation depends, to a significant degree, on the willingness of the organization and its in-house counsel to work as a team with the investigator selected to accomplish these goals.

Chris D'Angelo is a Partner at Vandenberg & Feliu, LLP and has been practicing labor and employment law his entire career, representing management clients in all aspects of employment law. Mr. D'Angelo has published articles and chapters in employment law treatises and the *New York Law Journal*, as well as client bulletins regarding newsworthy developments. He has lectured extensively on employment law issues, and has served on the pro bono mediation panel for the Southern District of New York since 1999.

Al Feliu is a past Chair of the NYSBA's Labor and Employment Law Section and a nationally recognized arbitrator and mediator on the AAA's Commercial, Class Action, and Employment Disputes Panels. He has served as the EEO Officer for the Port of NY/NJ since 2006 and frequently as an independent investigator. Mr. Feliu is finishing his fourth book for Bloomberg/BNA, entitled *ADR in Employment Law*, to be published this summer.

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Rights to Compensation During Imprisonment

By Martin Minkowitz

Once Workers' Compensation benefits have been awarded, there are only rare instances when they can be terminated. One notable instance is the conviction and incarceration of a claimant for a crime. The Workers' Compensation Law was amended in 2007 to specifically provide that "any person incarcerated upon conviction of a felony shall be deemed ineligible for all benefits provided under this chapter." The benefits would cease to be paid for any period of time the claimant was incarcerated. Payments would be made, however, for the period of time that preceded incarceration and could be paid out even after incarceration.[1]

Even prior to the 2007 statutory revision it was generally understood that a worker who voluntarily withdrew from the labor market was not entitled to receive workers' compensation benefits. If the inability to work is caused by the injury for which the claimant was awarded benefits, the withdrawal from the labor market is not deemed to be voluntary. If the worker left the labor market for a reason other than this disability the claimant ceased to be entitled to compensation benefits. If a claimant is convicted of a crime for which he or she is incarcerated, the claimant is deemed to be voluntarily out of the labor market, and, therefore, not entitled to benefits. The workers' compensation case would be closed upon incarceration.[2] That would be the case unless the courts believe that the 2007 statute limits the ineligibility to only circumstances of incarceration following a **felony** conviction.

A recent case brought this issue to the Appellate Division. The claimant received an award from the Workers' Compensation Board for a total disability. A year later he was convicted of a sexual abuse crime and sentenced to 10 years' probation. Although convicted of sexual abuse in the first degree, he was not incarcerated. Therefore, that conviction did not result in a disqualification under §10 (4) WCL, of the right to receive benefits. However, two years later the claimant was detained in Texas by the U.S. Bureau of Immigration and Customs Enforcement pending a deportation hearing. He was detained for two years and then released. While he was detained in Texas he failed to file updated medical reports in New York and his compensation benefits were suspended. When he was released he returned to New York and sought to reestablish his benefits, including for the time he spent in detention in Texas. The employer contended that the detention was the same as the statutory ineligibility for benefits for incarceration. The court did not agree with the employer.

The court referred to the specific language of §10 (4) WCL and concluded "that benefits should not be paid if a sentence of incarceration is imposed as punishment for a felony conviction." However, claimant's conviction did not include incarceration and "his confinement for immigration purposes, on the other hand, was civil and non-punitive in nature, and its purpose was to determine whether he should be deported." It therefore affirmed the Board's award of benefits. The court distinguished the detention process as not being a criminal conviction and the detention not being an incarceration from a felony conviction. There was no discussion of whether the claimant was voluntarily out of the labor market while in detention. The plain language or a literal interpretation of the statute only references a felony conviction and an incarceration resulting from that felony conviction.[3]

The statute also provides that "all those whose benefits have ceased by operation of this section may apply to the board for benefits upon their release from custody." If the Board reopened the case and allowed benefits to be payable again, it would be from the date of the release from incarceration and not prior. An award which could be made after release could be made to be effective as of the date of the release from prison and not necessarily from the date of the award.

In contrast it should be noted that a claimant who voluntarily commits him or herself to a mental institution does not necessarily cause a suspension of benefits. The rationale is that if benefits were stopped because a person was institutionalized for treatment in a mental institution, it would add to the hardship of the illness and discourage seeking medical treatment.

In conclusion I offer one more case of the courts' literal interpretation of the law. There was a decision that a claimant who murdered people in Italy and was confined to a psychiatric ward for the criminally insane was entitled to continue to receive benefits while committed because there was no criminal conviction.[4]

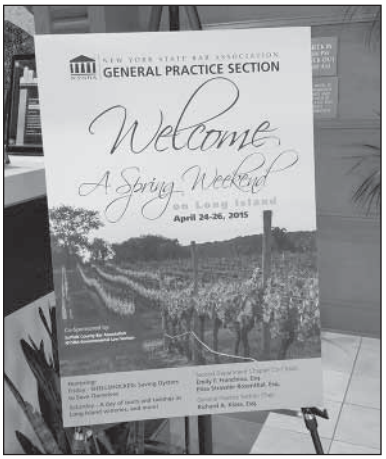
Endnotes

1. *See* §10 (4) WCL.
2. *See* West's New York Practice Series Vol. 27 New York Workers' Compensation §3:15 by Martin Minkowitz.
3. *Islam v. Bd. Construction Building*, 116 A.D.3d 1174; 984 N.Y.S.2d 196 (2014).
4. *Tallini v. Martino & Sons*, 58 N.Y.2d 392, 461 N.Y.S.2d 754 (1983).

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

Spring Weekend Program
Hotel Indigo
Riverhead, New York
April 24th to 26th

By Richard A. Klass



In April 2015, the General Practice Section held its Spring Weekend Program at the Hotel Indigo in Riverhead, organized by Event Chairs Emily F. Franchina and Elisa Strassler Rosenthal.

On Friday evening, a very informative and interesting continuing legal education course was presented at the Long Island Aquarium about the importance of oysters in our ecosystem and the poor state of oysters in the New York area. The documentary "Shell Shocked" was shown to the attendees, followed by questions and answers from its director, Emily Driscoll. In addition to Ms. Driscoll, Aram Terchunian, a coastal geologist, and Raymond J. Dowd of the law firm of Dunnington Bartholow & Miller LLP spoke about oyster preservation.

On Saturday, the group boarded a luxury bus for a tour of several wineries for tastings, including Diliberto Winery, Osprey's Dominion Vineyards and Sparkling Pointe. An evening dinner was held in a private dining room at the Hotel Indigo at a which there was a demonstration of cigar rolling presented by Rock A Feller Cigars.

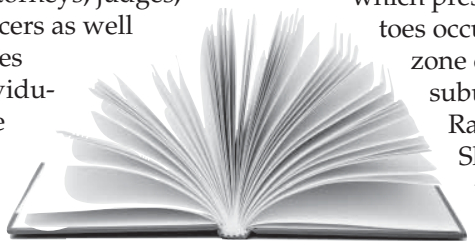
Book Review

Ghettoside—A True Story of Murder in America

By Jill Leovy (Spiegel & Grau, an imprint of Random House, 2015)

Reviewed by James Riley

Ghettoside—A True Story of Murder in America is a masterful, extraordinary book; it should be read by anyone associated with criminal justice—attorneys, judges, police officers, detectives, probation officers as well as anyone else interested in the homicides occurring in neighborhoods where individuals of color reside and handgun violence is a fact of life. The initial title word—"Ghettoside"—was coined by a Watts gang member as a corollary to those other "cides"—homicide, suicide and patricide. Webster's New World Dictionary, 3rd Unabridged, states that the word homicide is derived from Latin and old French—*Homicidium and Homicid*—meaning manslayer.



Jill Leovy knows a lot about homicide as a nationwide phenomenon; also, she knows even more about homicide as accomplished by members of various street gangs in south Los Angeles—especially in those neighborhoods which were developed beyond the terminus of racially restrictive covenants outlawed by the U.S. Supreme Court in 1948 in *Shelley v. Kraemer*, 334 U.S. 1. Ms. Leovy knows so very much about homicide in those neighborhoods due to her 8-year tenure as a *Los Angeles Times* reporter assigned to an actual desk in the Seventy Seventh Division Police Precinct in the heart of gang territory in south L.A. Jill Leovy is not a reporter who accompanied the police on a few tours of duty for a month or two and then chose to write about it—such as in a recent work of fiction such as *The Whites* by Harry Brandt (actually Richard Price). Instead, Ms. Leovy worked her craft as an embedded reporter and writer for 8 full years on a daily basis side by side with "good people and knuckleheads" (her words) of south Los Angeles ghettoes including homicide detectives, loved ones and friends of victims, evidence clerks, attorneys, court officers, judges, probation officers and with the ordinary people of this community—challenged as it is by gun violence and gang intimidation—and, as far as the miscreants are to be observed, general foolishness and stupidity which nevertheless results in many young, and not so young , lives lost for no good reason.

And always to the extent humanly possible, as non-fiction—of course with names changed—to protect all of those involved. If the subject of *Ghettoside* were economic, there would be components addressed to both macroeconomics and microeconomics—including the national socio-economic and demographic issues and the local occurrences. The macro portion of her study is described in her book as Part I: "The Plague" and the micro portion of her study is described as Part II: "The Case of Bryant Tennelle."

We all recognize that handgun violence is a nationwide problem; we all also know that there are local areas which present special difficulties—often the ghettoes occupied by persons of color with "war zone death rates ten minutes from peaceful suburbs" (here Ms. Leovy quotes scholar Randall Kennedy) including southeast L.A. She quotes an L.A. homicide detective who noted to her that there was a banner headline in the *L.A. Times* about a weekend bomb in Beirut that killed 6 people; however, there was not one report in the same paper about 9 murders in L.A that weekend. None of those murders was even mentioned. Jill Leovy adds a second detective's comment, "You are dealing with problems and people that the majority of society doesn't want to think about." In short, do "black lives matter"? a phrase which has taken center stage subsequent to the publication date of Ms. Leovy's work.

The book contains a detailed analysis, somewhat sociological in form and very concerning, about the history of violence including violence among young black men in the neighborhoods she covered where "modern L.A. black men are murdered two to four times more frequently than young Hispanic men…as if black men had bulls eyes on their backs." In this climate, she asserts, "The systematic failure to catch killers effectively [can] make black lives cheap; …where the criminal justice systems fails to respond vigorously to violent injury and death, homicide [ghettoside] becomes endemic." She explores the work of noted anthropologist Hortense Powdermaker on social consequences of the Jim Crow south as transported to portions of America's urbanized areas.

Enough said about the general, or "macro" aspects of *Ghettoside,* which are set forth in an eye opening manner; now on to the specifics—that is, the "micro"—Part II: "The Case of Bryant Tennelle." We are introduced to the procedures of the L.A. police and its homicide detective force. This is all realistic and professional—very little fictional "cop talk" here. In fact, she notes that social life between various police personnel is "so balkanized that people working in separate cubicles in the same squad room sometimes do not know each other's names…They are linked by a shared dark legacy and a battle to put things right." In short, no police camaraderie as a continuing repartee in this book.

Forensic science and technology do play an important part—including detailed descriptions of the National Integrated Ballistic Information database test fire exemplars--which are discussed in detail.

But there is something much larger: the case Ms. Leovy elects to concentrate on, is a handgun homicide on a sunny afternoon of the adolescent son of an L.A. homicide detective for no other apparent reason than the randomness of his wearing a Houston Astros' baseball cap. This is Bryant Tennelle, the son of a police detective, who with his wife, had elected to raise his family in south L.A.—the locale where he worked. This story is primarily about John Skaggs, a diligent and effective police detective assigned to solve this random incident of *Ghettoside* murder; of course, there are no witnesses available to come forward and very little other evidence to work with other than the victim lying dead in the street next to his bicycle. The detective who was the father of the victim, Wally Tennelle, did not know John Scaggs who was the lead detective assigned the case; remarkably, the father of the victim stayed clear of the investigation as it proceeded and went on with his other work.

As practicing lawyers, what can we gain from the remaining portions of this phenomenon? Answer—a tremendous amount, much of it fascinating and much disturbing. As a start, the essential area of interrogations of suspects and witnesses is detailed. First, as to witnesses, there is always the 800-pound gorilla in the room—witness intimidation (including messages delivered out loud right in the courtroom) and retaliation directed against prospective witnesses. As practitioners, we all know the challenges involved in convincing a witness to testify—the challenge is multiplied in those situations when there are friends of the accused working on his behalf and carrying heat and not just threatening the witness but the mother and other loved ones of the witness also. The steps undertaken by Detective Skaggs, the phenomenal, caring detective who occupies the role of protagonist in *Ghettoside,* are nothing less than fantastic; his work with the former girlfriend of an accused killer is one primary example. How does one convince a witness, residing in a neighborhood occupied by street gangs aligned with the accused, to testify? Ms. Leovy's descriptions of the strategy utilized to secure the testimony of the accused's girlfriend and others in the face of potential life-threatening retaliation are most telling.

Further, what about actual interrogation of suspects; we all think we know the drill from our law practice experience and from television—from CBS to PBS, from NCSI to Midsomer Murders. But do we really? There is a masterpiece of an interrogation in *Ghettoside,* including a great description on the essential need for the questioner to slow down at vital points; this also provides ample grounds to oppose any mandatory videotaping of police interrogations. I have personally arrived at the this conclusion in part from Ms. Leovy's book although she does not address that issue directly; we all recognize that there is a political movement in support of videotaping in New York.

On this point, why would an individual who is a suspect or target in a homicide investigation voluntarily submit to an interrogation by an accomplished detective after the delivery of Miranda warning? According to Ms. Leovy, "…although there were those who refused to talk, or bailed midinterview, the more common scenario was a tense tit for tat in which suspects offered detectives bits of information in exchange for finding out what the police knew. This approach was not as irrational as it seemed. Without an attorney present, gang suspects could get a sense not just of what the police were thinking, but what was happening on the streets…."

The book is not only about the craft of police detective work; it also describes aspects of the craft of lawyering, including a trial. The two experienced defense attorneys involved (in the end two defendants were indicted for Bryant Tennelle's murder) are described as "high end"; that is not necessarily big firm high end but criminal courts high end—both were qualified to try capital cases and both had considerably more experience than the prosecutors. As to the defense counsel, one was about to retire with this defense being his last case. During the trial, the author emphasizes, "Good defense attorneys know that if a witness [in this case a singularly brave witness] is telling the truth, it can only hurt their case to attack."

Towards the end of the trial, one of the defendants (this being, after all, a work of non-fiction about the real world) "decided that his attorney was incompetent, dismissed his attorney, and decided on his own to take the stand. There is a lot here, including a sterling cross-examination by one of the prosecutors—a great cross—of the shooter.

Subsequently, one of the defense counsel noted, "If all the cases were investigated like Tennelle [son of a southeast L.A. detective], there would be no unsolved cases." Well, maybe, but it also helped that a phenomenal detective, John Skaggs, whose name was not even known to a homicide lieutenant at headquarters, was dedicated and committed—and he maintained a clean loose-leaf—the homicide book—as he followed up on his various cases with compelling diligence and persistence.

Ghettoside is a fascinating and important work; it deserves to be read and discussed. There is an epilogue, which stands on its own. Jill Leovy emphasizes that one-third of all state prison inmates suffer from mental illness. She emphasizes the importance of the 2005 Second Chance Act, which is intended to provide Supplemental Security Income (SSI) to such prisoners on reentry as a substantial safe harbor. She notes that many may "criticize this program and decry the expense of SSI. But this author

can't condemn a program that appears to have saved so many from being murdered or maimed." She also notes "imprisonment brings down homicide rates because it keeps black men safe, and they are far less likely to become victims in prison than outside it. …But this is, it need hardly be said, a rotten—and expensive—way to combat the problem." As an aside, in the first week of September 2015, the *New York Times* now reports significant increases in urban homicide rates but L.A. was not mentioned.

There is so much more in *Ghettoside*. One of the author's premises is that in the United States the criminal justice "system's failure to catch killers made black lives cheap"—that premise would include the life of the black adolescent son of a Los Angeles homicide detective." Black lives must matter whether it is the life of the adolescent son (black or white but in the case of *Ghettoside*, black) of a L.A. police detective, any other life of a black person of any age and the lives e of police officers in this society of unlimited availability of handguns. Something must be done to protect them all and *Ghettoside*, by Jill Leovy, is both a foundational work, and a great read, as to that task.

James K. Riley is an attorney who practices in Pearl River, N.Y. and Montvale, N.J.

New York State Bar Association Committee on Professional Ethics Ethics Opinions 1043-1052

Opinion 1043 (1/8/15)

Topic: Lawyer's Receipt of Referral Fee from a Real Estate Broker

Digest: A lawyer may not accept, as a referral fee, a portion of a real estate broker's commission in lieu of charging a fee to the lawyer's client.

Rules: 1.7(a)

Facts

1. A lawyer represented an estate in the sale of real property through a real estate broker the lawyer had recommended to the executors of the estate. The broker has offered to pay the lawyer a referral fee of 25% of the broker's commission, which the lawyer proposes to accept in lieu of the lawyer charging legal fees to the estate for services rendered in the real estate transaction.

Question

2. May a lawyer accept a referral fee from a real estate broker whom the lawyer recommended for a real property transaction in lieu of charging the lawyer's client for legal fees the lawyer would otherwise charge for legal services on the real estate transaction?

Opinion

3. We have long and consistently stated that a lawyer may not act as a lawyer and a broker in the same real estate transaction, with or without client consent, and whether or not the lawyer charges for legal services. *See, e.g.*, N.Y. State 916 (2012); N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 208 (1971). In N.Y. State 916, we explained: "The rationale of [our earlier] opinions is that the broker's personal and financial interest in closing the transaction interferes with the lawyer's ability to render independent legal advice with respect to the transaction consistent with the principles now embodied in Rule of Professional Conduct 1.7(a). Otherwise put, the problem primarily stems not from the fee the lawyer receives from rendering purely legal advice, but from the separate and independent financial interest of the lawyer/broker arising from compensation for the non-legal services."

4. This rationale applies as long as the lawyer has a financial interest in the real estate broker's commission, whether or not the lawyer is acting as a broker. The disabling conflict that these opinions identify is a lawyer's pecuniary interest in the broker's success and attendant commission, which irredeemably interferes with the lawyer's distinct obligation to exercise independent professional judgment on the client's behalf. That the estate beneficiaries may benefit from the arrangement does not remedy this circumstance, any more than a lawyer/broker's waiving a legal fee, which is also of benefit to the client, can do so. Our conclusion is the same whether the broker's offer of compensation was made before or after the completion of the transaction.

Conclusion

5. A lawyer may not accept a referral fee consisting of a portion of a real estate broker's commission in place of charging a fee to the lawyer's client, even with a client's informed consent.

(32-14)

* * *

Opinion 1044 (1/8/15)

Topic: Attorney Payment of Expense of Litigation

Digest: Whether an attorney may advance the client's taxi and other transportation costs to and from (i) an independent medical examination under the New York no-fault insurance law or (ii) other appointments with doctors or for other medical treatments, depends on whether the cost qualifies as an expense of the litigation. Transportation to an IME clearly qualifies as such an expense, since an IME is a condition to receiving no-fault payments. Whether the cost of transportation to and from other appointments with doctors or for medical treatment are expenses of litigation depends on whether they are necessary to diagnose, assess or demonstrate the client's condition, or the client's efforts to treat that condition, for litigation purposes. We believe many such costs will qualify as expenses of litigation. However, some costs of routine medical care necessary to treat the client's

injuries may not so qualify. The determination of what is a necessary expense of litigation is a question of fact that is beyond our jurisdiction to determine. If a client is indigent or pro bono, the attorney may pay qualifying expenses without seeking reimbursement.

Rules: 1.8 (a) & (e)

Facts

1. The inquiring attorney represents a client in a matter covered by no-fault insurance. Once a claim for coverage is filed with the insurance carrier, the carrier may demand that the client-claimant see a doctor chosen by the insurance company for an Independent Medical Examination or "IME." Failure to attend the IME may result in a cut off or reduction in benefits. The client also may have appointments with treating physicians or for other medical treatments. In either case, the client will incur taxi and other transportation costs to and from appointments with doctors or for other medical treatments. These transportation costs are included in the client's claim under the no-fault law for "basic economic loss" arising out of the accident, up to $25 per day. The client is indigent and unable to pay these transportation expenses and has asked the inquirer to advance them.

Question

2. May the inquiring attorney advance the client's taxi and other transportation costs to and from (i) the IME, and (ii) appointments with doctors or for other medical treatments, either subject to repayment out of the no-fault insurance, or on a contingent basis?

Opinion

3. Rule 1.8(e) of the New York Rules of Professional Conduct (the "Rules") provides:

   (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 that:

   (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

   (2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client….

4. As stated in Comment [9B] to Rule 1.8, paragraph (e) limits permitted financial assistance to court costs and expenses directly related to litigation. Comment [9B], however, cautions that permitted expenses do not include "living or medical expenses" other than those listed in Comment 9B. Comment [10] provides the rationale for this Rule:

   [10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition against a lawyer lending a client money for court costs and litigation expenses, including the expenses of medical examination and testing and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fee arrangements and help insure access to the courts. Similarly, an exception is warranted permitting lawyers representing indigent or pro bono clients to pay court costs and litigation expenses whether or not these funds will be repaid.

5. Assuming that the representation involves a pending or contemplated litigation,[1] the issue under Rule 1.8(e)(1) is whether the transportation expenses constitute "expenses of litigation." As examples of permitted litigation expenses that a lawyer may advance, Comment [9B] to Rule 1.8 lists "expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence." Professor Simon indicates that "expenses of litigation" would include such items as fees of a private investigator, the lawyer's travel expenses to visit witnesses or attend depositions, long distance phone bills, costs of clandestine videos and any other expenses that a lawyer or lawyer's agents incur while investigating the facts of the case. R. Simon, Simon's New York Rules of Professional Conduct Annotated 484 (2014 ed.).

6. The cost of the client's transportation to and from the IME is clearly an expense of the litigation, since it is a condition to receiving no-fault payments. Without it, the goal of the proceeding is unlikely to be met. With respect to transportation to other doctors or medical treatment, whether these costs are expenses of litigation depends on whether they are

necessary to diagnose, assess or demonstrate the client's condition, or the client's efforts to treat that condition, for litigation purposes. For example, if the doctor or service provider will be testifying about the extent of the client's injuries, or, if the client otherwise cannot afford to travel to treatment and if failure to obtain treatment may be used by the insurer to minimize the extent of the client's injuries, then such costs certainly would qualify as costs of litigation. They are essentially "costs of obtaining…evidence" of the fact that the client requires and is obtaining ongoing medical treatment because of the injury. We believe many such expenses would qualify.

7. However, some costs of routine medical care necessary to treat the client's injuries may not qualify as costs of litigation, and the lawyer would not be authorized to pay them under Rule 1.8(e). The dividing line between what is and is not a necessary cost of litigation is a question of fact that is beyond our jurisdiction to determine.

8. Under Rule 1.8(e), the lawyer may advance permitted transportation costs, contingent on the outcome of the matter. In addition, if the client is indigent or represented on a pro bono basis, the lawyer may pay such costs. *See* Comment [9B] to Rule 1.8(e) (quoted above), as well as N.Y. State 852 (2011) and N.Y. State 840 (2010). In N.Y. State 786 (2005), interpreting the predecessor to Rule 1.8(e) in the Code of Professional Responsibility, we noted that the Code contained no definition of "indigent," but that New York courts have defined the term as "destitute of property or means of comfortable subsistence; needy; poor; in want; necessitous," (*citing Healy v. Healy*, 99 N.Y.S.2d 874, 877 (Sup. Ct. Kings County 1950). We note that Comment [3] to Rule 6.1 now contains a definition of "poor person" in the context of pro bono representation.[2] Such a person would in our opinion be "indigent" under Rule 1.8(e).

Conclusion

9. Whether an attorney may advance the client's taxi and other transportation costs to and from (i) an independent medical examination under the New York no-fault insurance law or (ii) other appointments with doctors or for other medical treatments, depends on whether the cost qualifies as an expense of the litigation. Transportation to an IME clearly qualifies as such an expense, since an IME is a condition to receiving no-fault payments. Whether transportation to other appointments with doctors or for medical treatment are "expenses of litigation" depends on whether they are necessary to diagnose, assess or demonstrate the client's condition or the client's efforts to treat that condition, for litigation purposes. We believe many such expenses would qualify as expenses of litigation. However, some costs of routine medical care necessary to treat the client's injuries may not so qualify. The determination of what is a necessary expense of litigation is a question of fact that is beyond our jurisdiction to determine. If a client is indigent or pro bono, the attorney may pay qualifying expenses without seeking reimbursement.

Endnotes

1. If there were no contemplated or pending litigation, Rule 1.8(e) would not by its terms apply. The lawyer could make a gift of the travel expenses. If the lawyer advanced the expenses, the financial arrangement would be subject to the provisions of Rule 1.8(a) on lawyer-client business transactions.
2. "Poor persons" under Rule 6.1 include both individuals who qualify for participation in programs funded by the Legal Services Corporation and individuals whose incomes and financial resources are slightly above the guidelines utilized by Legal Services Corporation programs but nevertheless cannot afford counsel. The Legal Services Corporation services those with annual income at or below 125% of the federal poverty guidelines, which, in 2014, were $14,588 for an individual and $29,813 for a family of four.

(33-14)

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Opinion 1045 (1/8/15)

Topic: Lawyer as witness

Digest: In-house counsel for a corporation may submit to an interview with an administrative agency that is investigating alleged wrongdoing by the client, where the facts to be disclosed by the lawyer will not constitute confidential information. However, if the agency's investigation results in a proceeding before a tribunal, and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer may not also act as an advocate before the tribunal in such proceeding, absent an exception to the advocate-witness rule.

Rules: 1.0(w), 1.1(c), 1.6(a), 3.7(a)

Facts

1. In-house counsel for a corporation has been asked to submit voluntarily to an interview with an administrative agency that is investigating a charge by a third party of wrongdoing by the client. The interview will involve what occurred at a meeting between the corporation and the third party, at which the lawyer was a participant. The lawyer's interview may help to avert a formal complaint against the client, and therefore may be beneficial to the client. The corporation has no objection to its lawyer appearing for such interview. The facts the lawyer would discuss during the interview are

not subject to the attorney-client privilege and do not otherwise constitute confidential information of the client (*e.g.* will not be embarrassing or detrimental to the client and will not reveal information the client has requested be kept confidential). If, after its investigation, the agency believes the charge against the client has merit, it could file charges, in which case a hearing would be held before a tribunal.

Question

2. May in-house counsel for a corporation voluntarily submit to an interview with an administrative agency that is investigating a charge by a third party of wrongdoing by the client, where the facts disclosed by the lawyer will not constitute confidential information?

Opinion

3. Rule 1.6 of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from knowingly revealing confidential information (as defined in that Rule) unless the client gives informed consent, as defined in Rule 1.0(j). Confidential information includes information gained during the representation that (a) is protected by the attorney-client privilege, (b) is likely to be embarrassing or detrimental to the client if disclosed, or (c) the client has requested be kept confidential. We have been told, and we assume for purposes of this opinion, that the information the lawyer would relate to the agency concerns the conduct of the client at a meeting at which the adversary was present (and thus would not be protected by the attorney-client privilege), and that the information related by the lawyer will not be embarrassing or detrimental to the client, and that the client has not requested that it be kept confidential. Consequently, we see no issue under Rule 1.6. If the information might be embarrassing or detrimental to the client, or if the client had requested that the lawyer not disclose it, the lawyer could not voluntarily disclose it without the informed consent of the client.

4. Rule 3.7(a) prohibits a lawyer from acting as an advocate before a "tribunal" in a matter in which the lawyer is likely to be a witness on a significant issue of fact. The term "tribunal" is defined in the Rules to include not only a court or arbitrator but also an administrative agency "acting in an adjudicative capacity," meaning that a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter. Rule 1.0(w).

5. Although the interview here is with an administrative agency, the agency at this stage is exercising its investigative functions, rather than acting in an "adjudicative capacity." Consequently, Rule 3.7(a) is not currently implicated.

6. If the agency determines to bring a formal complaint against the client following the interview, then the agency will be acting in its "adjudicative capacity." At that point, if the lawyer is "likely" to be a witness on a significant issue of fact, Rule 3.7(c) will come into play, and the lawyer will not be able to act "as advocate before" the tribunal unless one of the exceptions in Rule 3.7(a) applies. *See* N.Y. State 642 (1993) (lawyer may not serve as both lawyer for a union and as a witness in an arbitration concerning a collective bargaining agreement the lawyer negotiated).[1]

7. If the agency determines to bring charges against the client, the lawyer will need to determine if he is likely to be a witness on a significant issue of fact. This requires evaluating other available testimony. As the court stated in *MacArthur v. Bank of New York,* 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981), "An additional corroborative witness would almost always be of some use to a party, but might nevertheless be essentially cumulative. At some point, the utility of additional corroboration is de minimus [sic] and does not require the attorney's disqualification." In that case, the court found that an independent lawyer would likely call the lawyer, both to supply his own account of the events in question (even if corroborative) and to prevent the jury from speculating about his absence. It therefore found the lawyer's testimony would be far from cumulative, because his role was pivotal, and his conduct had been brought into question by the adversary. Determining whether the lawyer is likely to be a witness on a significant issue of fact is a factual question beyond the jurisdiction of this Committee.

8. If the lawyer is likely to be a witness on a significant issue of fact, Rule 3.7(a) does not authorize the lawyer to choose whether to be a lawyer or a witness. The lawyer must not act as an advocate before the tribunal. The rule applies whether the lawyer would be called as a witness by the lawyer's client or the client's adversary, and whether or not the lawyer's testimony would be favorable to the client. Under the former Code of Professional Responsibility, EC 5-10 elaborated on the predecessor to Rule 3.7 as follows: "Where the question [of whether to be a witness or an advocate] arises, doubts should be resolved in favor of the lawyer testifying and against the lawyer's becoming or continuing as an advocate." *See MacArthur v. Bank of New York*, *supra* ("[T]he stricture is mandatory:

the party cannot choose between the attorney's testimony and his representation. The rule embodies a conclusive preference for testimony . . . . A party can be represented by other attorneys, but cannot obtain substitute testimony for a counsel's relevant, personal knowledge.") This obligation is not eliminated by client consent. *Id*. at 1209. Although the language of EC 5-10 was not carried over into the comments to Rule 3.7, we believe it is implicit in the language of the rule itself.

9. Similarly, Rule 1.1(c) prohibits a lawyer from intentionally prejudicing or damaging the client during the course of the representation, except as permitted or required by the Rules. Such prejudice might arise if the lawyer withheld material testimony on a significant issue of fact, either in the investigatory stage of the matter or at a later hearing before a tribunal.

Conclusion

10. In-house counsel for a corporation may submit to an interview with an administrative agency that is investigating alleged wrongdoing by the client, where the facts to be disclosed by the lawyer will not constitute confidential information. However, if the agency's investigation results in a proceeding before a tribunal, and if the lawyer is likely to be a witness on a significant issue of fact, the lawyer could not also act as an advocate before the tribunal in such proceeding, absent an exception to the advocate-witness rule.

Endnote

1. While the lawyer could not appear before the tribunal as counsel in the matter, he or she could participate in the case outside the courtroom, for example, by directing outside counsel. Rule 3.7(a) (lawyer shall not act *as advocate before a tribunal*); *see* ABA Inf. 89-1529 (1989). But that is not the issue at this stage.

(44-14)

* * *

Opinion 1046 (1/8/15)

Topic: Representing incapacitated client; conflict of interest

Digest: A lawyer may accept court appointments to serve as Court Evaluator or Guardian for an Alleged Incapacitated Person in a guardianship proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility represented by the law firm in matters unrelated to AIP. The lawyer does not represent the AIP as counsel and Rule 1.7(a) is not implicated. Whether a lawyer may accept a court appointment to serve as counsel for the AIP in a guardianship proceeding in which the petitioner is the health care facility depends on (1) whether the interests of the AIP and the health care facility are "differing interests" and whether the lawyer has a disabling personal interest, which are questions of fact beyond the jurisdiction of this Committee, and (2) whether the lawyer can obtain consent to the potential conflict, which requires a careful assessment by the lawyer of whether the AIP is capable of giving informed consent.

Rules: 1.0(f), 1.7(a) & (b), 1.14(a)

Facts

1. The inquiring law firm or its lawyers receive court appointments under the Mental Hygiene Law to serve as Court Evaluator or Guardian to an Alleged Incapacitated Person ("AIP") or Counsel to an AIP. These appointments are necessary when there is no family member or close associate willing to serve on behalf of the AIP.

2. Often, it is the residential care facility (the "Care Facility") where the AIP resides that is the petitioner in the proceedings, because there are no family members or close associates to act as petitioner.

3. The duties of a Court Evaluator are to interview the AIP and determine whether the AIP understands English, to explain the nature and possible consequences of the proceeding and the rights of the AIP, to determine whether the AIP wishes legal counsel of his or her own choice, to interview the petitioner or others familiar with the AIP's condition, affairs and situation, to determine whether sufficient resources are available to provide for the personal needs or property management of the AIP without the appointment of a guardian, and to make a written report and recommendation to the court.

4. The role of a Guardian is to manage the property and provide for the personal needs of the AIP, if the court determines (as a result of the guardianship petition) that the AIP cannot manage his or her own personal needs and either (i) the AIP agrees to the appointment, or (ii) the court determines that the AIP is incapacitated as defined in section 81.02(b) of the Mental Hygiene Law. Where the AIP does not have sufficient assets to manage his or her personal needs, the Guardian will apply for Medicaid to help to defray the costs of the Care Facility.

5. The role of independent counsel to the AIP is to represent the interests of the AIP where (i) the AIP has requested counsel, (ii) the AIP wishes to contest the petition or does not consent to the authority requested in the petition to move the AIP from

where the AIP presently resides to a nursing home or other residential care facility, or (iii) the court determines that there is a potential conflict between the court evaluator's role and the advocacy needs of the AIP.

6. The inquiring law firm also represents residential care facilities in various matters involving Medicaid benefits, guardianship, litigation and collection. However, the law firm does not represent the Care Facility in any matter in which it has accepted an appointment to serve on behalf of a resident. Such work is handled by other law firms that regularly represent the Care Facility.

Question

7. May lawyers in a firm accept court appointments to serve as Court Evaluator, Guardian or Counsel to an Alleged Incapacitated Person in a proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility if their law firm simultaneously represents the health care facility in matters unrelated to the AIP?

Opinion

8. The answer to the question depends upon whether there is a conflict of interest under Rule 1.7. Rule 1.7(a) states, in part, "a lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (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." Thus the answer to the question turns on (a) whether the lawyer or others in the lawyer's firm represent both the AIP and the Care Facility, and (b) whether the interests of the AIP and the Care Facility are "differing interests" or there is a significant risk that the lawyer's professional judgment on behalf of the AIP would be adversely affected by the lawyer's personal interest in remaining in the good graces of the Care Facility.

9. Rule 1.0(f) defines "differing interests" as including "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." Comment [8] under Rule 1.7 explains:

> Differing interests exist if there is a significant risk that a lawyer's exercise of professional judgment in considering, recommending or carrying out an appropriate course of action for the client will be adversely affected or the representation would otherwise be materially limited by the lawyer's other responsibilities or interests…. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will adversely affect the lawyer's professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of a client.

Court Evaluator for an AIP

10. The responsibilities of a Court Evaluator differ from those of counsel to an alleged incapacitated person. The person acting as court evaluator is required to make inquiry into an AIP's assets, mental state and ability to handle his or her affairs, and then to report the findings to the court, so that the court may decide whether a guardian is needed and who that guardian should be. A Court Evaluator need not be a lawyer.

11. An appointment by a court to serve as a Court Evaluator under the Mental Hygiene Law does not create a lawyer-client relationship. Consequently, the limitations of Rule 1.7(a)(1) do not apply to a lawyer serving in such role,[1] because the lawyer does not "represent" the AIP.

Guardian for an AIP

12. The responsibilities of a Guardian do not begin until the court determines a Guardian should be appointed. For a general description of guardianship proceedings, see N.Y. State 986 (2013). As in the case of a Court Evaluator, a Guardian does not have an attorney-client relationship with the AIP. Consequently, the limitations Rule 1.7(a)(1) do not apply to a lawyer serving in such role.

Counsel for an AIP

13. Unlike a Court Evaluator or a Guardian for an AIP, Counsel for an AIP does have an attorney-client relationship with the AIP. Consequently, it is important to determine whether the AIP and Care Facility have "differing interests" in the guardianship proceedings under Rule 1.7(a)(1) and whether the lawyer's professional judgment on behalf of the AIP will be adversely affected by the lawyer's personal interests in remaining in the good graces of his or her firm's regular client, the Care Facility, under Rule 1.7(a)(2). It is irrelevant that the lawyer does not represent the AIP and the Care Facility in the same matter. *See* Rule 1.7, Comment [6] ("a lawyer may not advocate on one matter against another client that the lawyer represents in some

other matter, even when the matters are wholly unrelated.") .

Differing interests

14. Guardianship proceedings are not typical adversarial court proceedings and the interests of the AIP and the Care Facility are not always differing. The guardianship proceeding often is commenced by the Care Facility for the purpose of providing financial assistance to the AIP to remain in the Care Facility. These proceedings are rarely contested. Consequently, although the interests of the petitioner in a guardianship proceeding theoretically conflict with those of the AIP, we have concluded that, where the AIP does not oppose the guardianship, or is incapacitated and cannot express an opinion, the lawyer does not represent such a differing interest. *See* N.Y. State 986 (2013) (lawyer may serve as the petitioner), N.Y. State 746 (2001) (same). On the other hand, if the AIP has requested independent counsel, or if the court has appointed counsel for the AIP after determining that there is a potential conflict between the court evaluator's role and the advocacy needs of the AIP, then it is quite possible there are more than theoretically differing interests. Because determining whether the interests of the AIP and the Care Facility are "differing interests" raises questions of fact, such determination is beyond the jurisdiction of this Committee.

The Lawyer's Personal Financial Interests

15. Where the lawyer or the lawyer's firm have a continuing relationship with the Care Facility that is the petitioner in a guardianship proceeding, or into which a Guardian might place the AIP, the relationship between the law firm and the Care Facility could adversely affect the independent professional judgment of the lawyer in representing the AIP, thus creating a personal interest conflict for the lawyer.

Consent to Conflicts of Interest

16. If the court appointment as counsel for the AIP creates a differing interest conflict or a personal interest conflict under Rule 1.7(a), the next step is to determine whether the conflict is consentable under Rule 1.7(b), and, if so, whether the lawyer may obtain informed consent from both the Care Facility and the AIP.

17. The process of obtaining consent to a conflict under Rule 1.7(a) requires a lawyer to satisfy the four subparagraphs of Rule 1.7(b). Specifically, the lawyer must determine that (i) he or she can provide competent and diligent representation to each affected client, (ii) the representation is not prohibited by law, and (iii) the representation does not involve the assertion of a claim by the Care Facility against the AIP (or vice versa). Rule 1.7(b)(1), (2) and (3). Finally, each client must give "informed consent, confirmed in writing." Rule 1.7(b)(4). In N.Y. State 986, we applied Rule 1.7(b)(1)-(3), concluding that the inquirer could not represent both the AIP and his sister, who wished to be appointed guardian, because their positions as to the AIP's living arrangements were inconsistent. However, we did not reach the issue of consent.

18. In N.Y. State 836 (2010), we concluded that a conflict analogous to the one here was consentable. There, the lawyer had represented an incapacitated client in connection with the appointment of a guardian (one of the client's adult children). However, the client had subsequently been living independently and no longer needed a guardian. In addition, the guardian was planning to move across the country. Accordingly, the client and the guardian wanted the lawyer to represent them jointly in applying for termination of the guardianship. We noted that the interests of the client and the guardian were potentially differing, although we determined that the lawyer could reasonably believe that the lawyer could provide competent and diligent representation to both parties. Consequently, because the representation would not be adversarial and because the matter would be supervised by the court, we concluded that the conflict was consentable.

19. Before accepting a court appointment to represent the AIP in the proceeding here, the inquirer must obtain the informed consent of both the Care Facility and the AIP. Obtaining consent of the Care Facility ordinarily will not be problematical (even after explaining that the lawyer's obligation is to provide diligent representation to the AIP). However, obtaining informed consent of the AIP is more complicated.

20. In N.Y. State 836 (2010), we discussed the ability of an AIP to give consent. We noted that a lawyer must take special care when obtaining consent from a person who may be, or has been deemed to be, incapacitated and under guardianship. This careful assessment was necessary because, if the client's capacity to make reasoned decisions was so diminished that the client could not give informed consent, then the lawyer could not satisfy the informed consent requirement of Rule 1.7(b)(4). There, however, we concluded that a client may consent to dual representation despite the possible determination of incapacity. We relied on Rule 1.14(a) (which directs the lawyer to maintain a conventional relationship with the client to the extent possible), on the Mental Hygiene Law (which states that an incapacitated person retains

all powers and rights except those that are specifically granted to the Guardian), and on our opinion in N.Y. State 746 (2001) (which stated "there is generally no bar to representing a client whose decision making capacity is impaired, but who is capable of making decisions and participating in the representation").

22. Because the inquirer needs to obtain consent before accepting a court appointment to act as counsel to an AIP where the lawyer's firm also represents the Care Facility in other matters, the lawyer should make sure that the court is aware that the firm represents the Care Facility in unrelated matters, and that the lawyer will need to obtain consent to a potential conflict from both the Care Facility and the AIP before proceeding.

Conclusion

A lawyer may accept court appointments to serve as Court Evaluator or Guardian for an Alleged Incapacitated Person in a guardianship proceeding under the Mental Hygiene Law for an individual who is a resident of a health care facility represented by the law firm in matters unrelated to AIP. The lawyer does not represent the AIP as counsel and Rule 1.7(a) is not implicated. Whether a lawyer may accept a court appointment to serve as counsel for the AIP in a guardianship proceeding in which the petitioner is the health care facility depends on (1) whether the interests of the AIP and the health care facility are "differing interests" and whether the lawyer has a disabling personal interest, which are questions of fact beyond the jurisdiction of this Committee, and (2) whether the lawyer can obtain consent to the potential conflict, which requires a careful assessment by the lawyer of whether the AIP is capable of giving informed consent.

Endnote

1. In the role of Court Evaluator or Guardian, a lawyer will receive information of a sensitive nature from the individual. This information is not "confidential information" covered by Rule 1.6(a) because it is not received from a client, although the Mental Hygiene Law or other law may create other responsibilities of confidentiality.

(47-14)

* * *

Opinion 1047 (2/17/15)

Topic: Government Lawyer; No contact rule

Digest: A government lawyer whose duties include investigation of fraud is subject to Rule 4.2. Whether the government lawyer may interview a party to a proceeding before the agency about the conduct of his or her private lawyer in that proceeding as part of an investigation of the private lawyer depends on whether the investigation is part of a separate matter and, if so, whether the government lawyer knows that the interviewee is represented by counsel in the separate matter. Even if the matter is the same, or, if it is not the same but the lawyer knows that the interviewee is represented in the separate matter, the government lawyer may interview the private lawyer's clients without the consent of the private lawyer if the contact is "authorized by law." That is a question of law beyond our jurisdiction.

Rules: 1.7, 4.2, 4.3

Facts

1. A lawyer for a government agency (the "Government Lawyer") is performing an investigation involving accusations of fraud against a private lawyer (the "Private Lawyer") relating to claims submitted to the agency. The accusation may have been made in a number of different ways: (i) by the Private Lawyer's client; (ii) by one of the agency's administrative law judges; or (iii) by an anonymous tip on the agency's website. In some cases, the accusation will affect only the Private Lawyer, *e.g.*, a claim that the Private Lawyer has left the law firm that is counsel of record, and has fraudulently signed a consent to change attorneys and therefore is not the person entitled to counsel fees. But in other cases the accusation may involve charges that will affect the rights of the Private Lawyer's client (the "Client"), *e.g.*, by reducing the amount to which the Client is entitled or voiding the Client's claim.

2. The Government Lawyer's duties include investigating such accusations. If, as a result of the investigation, the agency believes there has been fraud or a violation of law, the agency will report the violation to the attorney general or another appropriate law enforcement agency. As part of the investigation, the Government Lawyer would like to interview one or more of the Private Lawyer's Clients. Each Client has a pending administrative case before the agency, but the inquirer states they are not targets of the investigation.

3. The agency has the statutory authority to investigate violations of the laws and regulations enforced by the agency. That includes the authority to conduct investigations of possible fraud and other violations of laws and regulations enforced by the agency. Nothing in the statute or regulations specifically authorizes the agency to interview witnesses represented by counsel when that counsel is not present and has not consented to the interview.

Question

4. May a government lawyer interview the clients of a Private Lawyer alleged to have committed fraud in connection with a proceeding before the government lawyer's agency, without the consent of the Private Lawyer?

Opinion

5. This inquiry turns on Rule 4.2 of the New York Rules of Professional Conduct (the "Rules"), known as the "no-contact" rule, which concerns communication with a person represented by counsel. Rule 4.2(a) provides as follows:

> (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

6. Comment [1] to Rule 4.2 explains that the Rule "contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship, and uncounseled disclosure of information relating to the representation."

7. The issues under Rule 4.2 are evident from the language of the Rule. The rule prohibits a lawyer who represents a client in a matter (Lawyer A) from communicating with (1) a "party," (2) who Lawyer A "knows" is "represented by another lawyer" in the matter (Lawyer B), (3) about the subject of Lawyer A's representation, (4) unless Lawyer A has the prior consent of Lawyer B, or (5) Lawyer A is "authorized by law" to engage in the communication without the consent of Lawyer B.

Is the Client a "Party" Within the Meaning of Rule 4.2?

8. To determine the application of Rule 4.2 to this inquiry, we must also determine whether the Client is a "party" in connection with the investigation of the Private Lawyer. A number of federal courts in the Second Circuit interpreting Rule 4.2 or its predecessor in the Code of Professional Responsibility—DR 7-104—in a criminal context have held that a "party" must be a party to a litigation. *See, e.g., In re Chan*, 271 F. Supp. 2d 539, 544 (S.D.N.Y. 2003); *Grievance Comm. for S. Dist. of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995) (criminal defense attorney not subject to discipline for interviewing a cooperating witness who was represented in another matter but was not a "party" to the matter for which he was interviewed; court holds that narrow reading of "party" and "matter" is critical to allow the investigation essential to a defense attorney's preparation for trial.) *But see United States v. Hammad*, 846 F.2d 854, *amended*, 858 F.2d 834 (2d Cir. 1988) (court assumes the disciplinary rule would otherwise apply, but determines that the prosecutor was "authorized by law" to employ legitimate investigative techniques, including the use of an informant).

9. As we noted in N.Y. State 735 (2001), the scope and application of the no-contact rule have been hotly debated in the criminal context.[1] However, in the non-criminal context, we have uniformly interpreted the rule to apply to any represented party. Indeed, the legal definition of "party" is much broader than the plaintiff or defendant in pending litigation. *See* Black's Law Dictionary (9th ed. 2009) (a party is "1. One who takes part in a transaction. 2. One by or against whom a lawsuit is brought"); Black's Law Dictionary (4th ed. 1968) (a party is "a person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually"). As we said in N.Y. State 904 (2012):

> In the narrowest sense, the term "party" means a plaintiff or defendant (or the equivalent) in pending litigation. But this Committee has never read the term "party" so narrowly. Rather, in civil matters, the definition of "party" as used in Rule 4.2—and in the definition of "matter" in Rule 1.0(l)—is not limited to formal parties to litigation. In N.Y. State 735 (2001), which addressed "noncriminal matters," we stated that the no-contact rule "applies to one who retains counsel in connection with a dispute even prior to the filing of a lawsuit; and during a civil lawsuit it applies to represented witnesses, potential witnesses and others with an interest or right at stake, although they are not nominal parties to the lawsuit."

A number of other bar associations, interpreting Rule 4.2 or its predecessor in the Code of Professional Responsibility (DR 7-104), also have read the rule as applying absent a pending litigation. *See, e.g.,* Indiana Opin. 2008-02 (2008); Illinois Opin. 04-02 (2005); Utah Opin. 95-05 (1995); ABA Formal Opin. 95-396 (1995).[2] The adoption of the Rules effective in 2009 has not changed our opinion on the scope of the term "party."[3] Consequently, we believe the Client is a "party" within the mean-

ing of Rule 4.2, even if the investigation of the Private Lawyer is a separate matter, and even if the Client is only a witness.

Is the Client Represented in the Matter?

10. Rule 4.2(a) by its terms prohibits a lawyer from communicating about a matter with a party that the lawyer "knows" is represented by another lawyer in the same matter. Comment [2] to the Rule explains that paragraph (a) applies to communications with any party who is "represented by counsel *concerning the matter to which the communication relates*" (emphasis supplied). Although the Definition Section of the Rules contains a definition of "matter," it does not define the scope of a single matter, but rather lists more than a dozen different types of matter that are included within the term. *See* Rule 1.0(*l*). Significantly, the term "matter" is not limited to litigation, but includes an investigation, an application, a contract, a negotiation or "any other representation involving a specific party or parties."

11. The term "matter" is also discussed in the comments to other Rules, and they make clear that the scope of the term is not defined mechanically but is sensitive to the particular facts and context of the inquiry. For example, Rule 1.9(a), the former-client conflict rule, prohibits a lawyer who has represented one client in a matter from representing another person in the same or a substantially related matter. Comment [2] to Rule 1.9 states: "The scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited." Rule 1.11(a) prohibits a lawyer who has formerly served as a public officer or employee from thereafter representing a client in connection with a matter in which the lawyer participated personally and substantially as a public officer. Comment [10] to Rule 1.11 provides: "[A] 'matter' may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which (i) the matters involve the same basic facts, (ii) the matters involve the same or related parties, and (iii) time has elapsed between the matters." *See* N.Y. State 1029 (2014) (discussing the facts, parties and time tests); N.Y. State 904 (2012) (asking whether representation in the first matter necessarily would include representation in the second matter).

12. In N.Y. State 904, we discussed whether two matters were the same, so as to determine whether representation in one demonstrated representation in the other for purposes of Rule 4.2. One was a criminal investigation and the other was a civil suit. Although they involved the same underlying conduct and were inextricably intertwined, we determined they were different matters, because the parties, processes and issues were different. Thus, we have determined that the same underlying conduct is not, on its own, sufficient to constitute the same "matter." Rather the extent of a matter depends on a variety of factors, including whether the two matters involve (i) the same underlying events or alleged actions, (ii) the same or related parties, (iii) the same or related issues (which includes whether the matters involve the same interests that the Client has hired the lawyer to protect and whether the outcome of the second matter can affect the outcome of the first matter), and (iv) whether the matters are ongoing at the same time or close in time.

13. Here, the Government Lawyer knows that the Private Lawyer represents the Client in a claim before the government agency. Whether a communication in connection with the Government Lawyer's investigation (which is going on at the same time as the Client's claim proceeding and involves the same or related parties) involves the same "matter" in which the Government Lawyer knows the Private Lawyer represents the Client will depend on the extent to which the central events and issues of the claim proceeding are the same and on whether the communication may have an effect on the outcome of the claim proceeding.

14. We believe the overlap between the Client's claim before the agency and the Government Lawyer's investigation will often be greater than the overlap we analyzed in N.Y. State 904. If the investigation concerns an allegation of fraud in the prosecution of the Client's claim before the agency, the central facts underlying the claim are also likely to be at the center of the investigation, even if the issues are somewhat different. (For example, the issues in the investigation would include not only whether the facts as presented were true but also the circumstances leading to any misstatement in the application and who participated in that misstatement.) In that case, the investigation would likely constitute the same "matter" as the Client's claim proceeding before the agency, and the Client should be considered represented in the investigation for purposes of Rule 4.2. This is particularly true if the Client's claim is still pending and the investigation may materially affect the amount or validity of the Client's claim or if a prosecutor who receives the results of the investigation may decide to bring charges against the Client, whether or not the Client currently is a "target" of the investigation. In that circumstance, the Client

and the Private Lawyer would ordinarily expect the Private Lawyer hired in connection with the Client's claim to protect the Client's interests, at least until the Client retained other counsel to defend the Client against those charges. If, however, the fraud did not involve the Client's claim before the agency, and the investigation cannot affect the outcome of the Client's claim—for example, where the agency is investigating whether the Lawyer fraudulently forged a consent to change of attorney form—then the agency's investigation of the Private Lawyer's conduct and the Client's claim before the agency would be different "matters," in which case representation of the client in one of those matters would not imply representation in the other.

15. Even if the investigation of the Private Lawyer's conduct is a separate matter, there is still a question of whether the Government Lawyer "knows" in some other way that the Client is represented in the second matter. The definition of "knows" requires actual knowledge of the fact in question, although a person's knowledge may be inferred from the circumstances. *See* Rule 1.0(k). We concluded in N.Y. State 904 that, where two matters are closely related and there is a strong possibility that the lawyer represents the client in both, then the lawyer must ask the client if he or she is represented in the matter, because "when a lawyer has a reasonable basis to believe that a party may be represented by counsel, then the lawyer has a duty of inquiry to ascertain whether that party is in fact represented by counsel in connection with a particular matter." N.Y. State 904 (2012) (*citing* N.Y. State 768 (2003), which in turn cites N.Y. State 735 (2001), N.Y. State 728 (2000) and N.Y. State 663 (1994)). *See also* N.Y. State 607 (1990) (when it is unclear whether a party is represented by counsel in a matter, the safest approach is to inform the party that, if he or she is represented by counsel, the communication should be referred to counsel). N.Y. State 904 added that the "necessary extent of such an inquiry will depend on the circumstances of a particular matter."

16. If the investigation into the Private Lawyer's actions is part of the same matter as the Client's claim before the agency, then the Government Lawyer will know that the Client is represented by the Private Lawyer in the matter. If, however, the investigation into the Private Lawyer's conduct involves different facts and issues, and cannot affect the outcome of the Client's claim, then it is a separate matter, and it is likely that Government Lawyer would not "know" that the Client was represented by the Private Lawyer with respect to the investigation. The two are especially likely to be separate matters if the Private Lawyer's Client, rather than a third party, made the allegation of fraud that the Government Lawyer is now investigating. In that case, it would be unlikely that the Private Lawyer also represented a witness in the investigation. Indeed, representing the Client as the complaining witness would probably involve a personal interest conflict for the Private Lawyer under Rule 1.7(a)(2) (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 personal interests.)

17. If the Client is not represented in connection with the investigation, the Government Lawyer may treat the Client as an unrepresented person with respect to the investigation. *See* Comment [4] to Rule 4.2 ("This Rule does not prohibit communication with a represented party or person… concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party or person…does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter."). In doing so, the Government Lawyer must observe the requirements of Rule 4.3 ("Communicating with Unrepresented Persons"), which provides:

> In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested…. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

Is the Government Lawyer Authorized by Law to Communicate with the Represented Person?

18. Rule 4.2 by its terms authorizes a lawyer to communicate about a matter, even with a party that the lawyer knows is represented by another lawyer in the matter, if the lawyer is "authorized to do so by law."

19. A number of courts have held that contacts between prosecutors or their agents and represented persons in criminal matters are an investigative technique "authorized by law." *See United States v. Hammad*, 858 F.2d 834 (2d Cir. 1988). In a Report and Recommendation in *In re Amgen Inc.*, 2011 WL 2442047, *adopted in its entirety*, 2011 WL 2418815 (E.D.N.Y. 2011), U.S. Magistrate Judge James

Orenstein points out that neither *Hammad* nor subsequent cases identify the specific "law" that authorizes the uncounseled contact. Magistrate Judge Orenstein finds that a statute that authorizes prosecutors to enforce the law does not authorize specific investigative techniques, but that the part of *Hammad* that held a Federal prosecutor's communication with a represented target to be "authorized by law" continued to be good law in the Second Circuit.

20. We have issued only one prior opinion based on the "authorized by law" exception. That opinion involved a statute that specifically authorized a limited form of communication with a party that the lawyer knew to be represented by counsel in the matter. *See* N.Y. State 894 (2011) (because the Real Property Actions and Proceedings Law provides for process to be personally served upon the respondent, a lawyer may personally serve process on a represented party and ask certain related questions, but may not go beyond service of process to communicate on the subject of the representation without the consent of such party's lawyer). The ABA ethics committee, in ABA 95-396 (1995), approved such service of process and also additional interactions "authorized…by law," including "a constitutional provision, statute or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel, such as court rules providing for service of process on a party, or a statute authorizing a government agency to inspect certain regulated premises."

21. Ultimately, what is "authorized by law" is a legal question beyond the jurisdiction of this Committee. Comment [5] to Rule 4.2 states: "Communications authorized by law *may*…include investigative activities of lawyers representing governmental entities…prior to the commencement (as defined by law) of criminal or civil enforcement proceeding." (emphasis added). In our opinion, this statement does not constitute a blanket exemption from Rule 4.2 for government lawyers conducting investigations in criminal and non-criminal proceedings, unless the communications are indeed authorized by law.

Conclusion

22. A government lawyer whose duties include investigation of fraud is subject to Rule 4.2. Whether the government lawyer may interview a party to a proceeding before the agency about the conduct of his or her private lawyer in that proceeding as part of an investigation of the private lawyer depends on whether the investigation is part of a separate matter and, if so, whether the government lawyer knows that the interviewee is represented by counsel in the separate matter. Even if the matter is the same, or, if it is not the same but the lawyer knows the interviewee is represented in the separate matter, then the government lawyer may interview the private lawyer's clients without the consent of the private lawyer if the contact is "authorized by law," but that is a question of law beyond our jurisdiction.

Endnotes

1. In N.Y. State 735, we cited Bruce A. Green, *A Prosecutor's Communications with Defendants: What Are the Limits?*, 24 Crim. L. Bull. 283 (1988). The debate has continued since then. *See, e.g.*, Bruce A. Green, *Prosecutors and Professional Regulation*, 25 Geo. J. of Legal Ethics 873 (2012) (citing authorities expressing various opinions). *See also* Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. Pitt. L. Rev. 291, 325 n. 4 (1992).
2. Many of the non-New York ethics opinions and court cases arose before the ABA amended Rule 4.2 of the Model Rules of Professional Conduct in 1995 to change the term "party" to "person." While a handful of states, including New York, retained the reference to "party," most changed the term "party" to "person," thus eliminating any argument about the meaning of "party," and making it more likely that future disagreements with law enforcement officers in these states would center on the scope of the "provided by law" exception rather than the scope of the term "party."
3. We noted in N.Y. State 884 (2011) that the Committee had applied the no-contact rule more broadly in the past, but we concluded that Rule 4.2 does not apply to a non-party witness in a criminal matters, citing *Grievance Committee for the Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995), while stressing that this conclusion did not extend to civil matters.

(12-14)

* * *

Opinion 1048 (3/3/15)

Topic: Waiver of appeal on grounds of ineffective assistance of counsel as part of plea bargain

Digest: A defense lawyer may advise the defendant as to a proposed plea agreement including waiver of challenges to the conviction based on ineffective assistance of counsel unless a reasonable lawyer would find a personal interest conflict of interest, i.e., a significant risk that the lawyer's professional judgment on behalf of the defendant would be adversely affected by the lawyer's own interest in avoiding an allegation of ineffective assistance of counsel. In case of such conflict, the lawyer may continue in the representation if the conflict is waivable and properly waived by the defendant, but otherwise must seek the court's permission to withdraw from the representation.

Rules: Scope ¶7, 1.0(j), 1.2(c), 1.4(a) 1.7(a) & (b), 1.16(d), 1.8(h), 8.4 (a) & (d)

Facts

1. The inquirer is a criminal defense attorney practicing in a county in which the District Attorney's Office conditions certain plea bargains on the defendant's execution of a form in which the defendant waives challenges to the judgment of conviction (the "Waiver"). The Waiver is signed during the plea proceedings, in court, by the defendant and the defense attorney.

2. The Waiver states that the defendant, in consideration for the plea agreement, waives all rights to appeal from the judgment of conviction; waives all right to make post-conviction motions challenging the judgment of conviction; and waives and withdraws all pre-trial motions that may have been made. It states that the defendant understands and intends that the plea agreement will be a complete and final disposition of the matter, and that the defendant understands that the terms of the plea agreement and the Court's sentence promise are conditioned upon the defendant's waiver of rights to challenge the judgment of conviction.

3. The inquiry focuses on one potential ground for challenging a conviction by plea: ineffective assistance of counsel (an "IAC" challenge). The inquirer claims that the Waiver would on its face preclude such challenges by waiving "any and all rights to make post-conviction motions challenging the underlying judgment of conviction," and cites various authorities for the proposition that it is unethical for prosecutors and defense attorneys to participate in a defendant's waiver of the right to challenge a conviction on grounds of ineffective assistance.

Question

4. May a defense lawyer participate in a plea bargain process in which the lawyer advises the defendant as to a waiver of the defendant's right to challenge the conviction on grounds including ineffective assistance of counsel?

Opinion

5. This question has been the subject of much attention. Ethics opinions in at least twelve jurisdictions have answered it in the negative.[1] Opinions in two other jurisdictions have concluded that a defense attorney is not necessarily barred from participating in a plea agreement including an IAC waiver.[2]

6. Many of these opinions also address the question whether *a prosecutor* may ethically condition a plea offer on an IAC waiver, and that question also has been addressed recently by the Department of Justice.[3] The inquiry before us, however, is from a defense attorney and we limit our analysis accordingly. Thus we do not here opine as to whether a prosecutor may ethically condition a plea offer on an IAC waiver; we analyze only whether, if a prosecutor does condition a plea offer in that way, the defense lawyer may ethically participate in the plea bargain process.

Would the Waiver Preclude Challenges Based on Ineffective Assistance of Counsel?

7. As the inquirer points out, the Waiver *on its face* would apply to IAC challenges, given its broad language precluding all challenges to the conviction whether through appeal or post-conviction motion. There is nevertheless a threshold question as to whether the Waiver would *actually* bar IAC challenges. A subsidiary question is whether, in New York, a defendant may lawfully waive an IAC challenge as part of a plea proceeding. Whether a pleading defendant may effectively waive an IAC challenge is a question of law beyond our jurisdiction; we briefly survey case law only because the answer to the question could render the ethical analysis unnecessary.

8. It is settled in New York that plea waivers are valid, subject to certain exceptions:

> A criminal defendant's waiver of the right to appeal, obtained as a condition of a sentence or plea bargain, will be upheld if it is voluntary, knowing and intelligent, **and implicates no larger societal interest or important public policy concern**. As long as those conditions are satisfied, the scope of the waiver of the right to appeal can be fully comprehensive, and is enforceable consistent with the actual intent underlying its execution.

People v. Muniz, 91 N.Y.2d 570, 573 (1998) (citations omitted and emphasis added). Barring an exception, a general waiver "will be upheld completely even if the underlying claim has not yet reached full maturation," and even if the kind of underlying claim is not explicitly named in the waiver. 91 N.Y.2d at 574-75 (citations omitted).

9. The *Muniz* opinion states that the exceptions are:

> certain defects in the proceedings leading to a conviction which are unwaivable as part of a plea bargain. This narrow class of appellate claims, grounded in the integrity of our criminal justice system and "the reality of fairness in the process," implicate either an infirmity in the waiver itself or a public policy consideration that

> transcends the individual concerns of a particular defendant to obtain appellate review.

Muniz, 91 N.Y.2d at 573 (1998) (citations omitted). The opinion cites three kinds of challenges that may be asserted despite a general waiver: constitutional speedy trial rights, illegality of a sentence, and lack of competency to stand trial. 91 N.Y.2d at 574. But the opinion does not state that this list is exhaustive, and it does not address whether there is another exception for IAC challenges. There are Appellate Division cases indicating that there is an exception for *some* IAC challenges.[4] The question has also been addressed by courts in other jurisdictions, which have often declined to enforce waivers when the alleged ineffective assistance relates to the plea proceedings or the waiver itself.[5]

10. If New York law clearly excluded all IAC challenges from the Waiver, then the inquirer could advise the defendant as to the merits of the Waiver and the ethical issues discussed below would not even arise. But it appears from the case law to date that New York might deny enforcement of only those challenges that relate to ineffective assistance in connection with the voluntariness of the plea. Since New York courts may enforce waivers at least as to other kinds of IAC challenges, the ethical issues cited in the inquiry do arise for a defense lawyer confronted with a blanket IAC waiver, and we turn to an analysis of those issues.

Rule 1.7: Personal-interest conflicts

11. Some of the ethics opinions cited in endnote 1 conclude that a *per se* and unwaivable conflict bars a defense counsel from ever advising a defendant as to waiver of IAC challenges. We believe, however, that the personal interests at stake are not so invariably strong as to justify such a *per se* rule. Instead, the potential conflict should be analyzed based on the facts and circumstances of each case. *See, e.g.*, Texas Opinion 571 (2006).

Rule 1.7(a)(2): Existence of a conflict

12. Under Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules"), 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 a client will be adversely affected by the lawyer's own financial, business, property or other personal interests," unless that conflict is waivable and properly waived by the client under Rule 1.7(b).

13. An IAC challenge is meant to result in favorable consequences for the defendant (such as vacating a conviction, resulting in a trial) that typically would not be directly contrary to the personal interests of the defense lawyer. But there also may be indirect effects of such a challenge. For that reason, a criminal defense lawyer no doubt has a personal interest in avoiding challenges to the effectiveness and propriety of his or her professional services. Even a challenge that is neither meritorious nor successful could require the lawyer to spend time responding, and could cause the lawyer reputational damage. Stronger challenges could lead to more concrete harms like malpractice awards[6] or professional discipline. The *degree* of the lawyer's personal interest will be a factor in determining whether that interest gives rise to a Rule 1.7 conflict and, if so, in determining whether the conflict is waivable.

14. The degree of personal interest implicated by a lawyer's advice as to the Waiver here will in turn depend on a number of factors including the likelihood that, in the absence of such a waiver, the defendant would make a subsequent IAC challenge;[7] the various negative consequences likely to result directly or indirectly from such a challenge; the seriousness of the personal detriment that each of those consequences would be likely to cause the lawyer; and the chance that the waiver would avoid such consequences.

15. In a given case, a reasonable lawyer could perceive low risk or high risk that the defense lawyer's professional judgment on behalf of the defendant would be adversely affected by the prospect of an IAC challenge. For example, a reasonable lawyer could conclude that the likelihood of an IAC challenge is low if the client has acknowledged guilt, if the conviction involves a minimal sentence for a minor charge, or if it resulted from a plea bargain very favorable to the defendant. The likelihood of such a challenge may be much greater in case of a severe sentence or significant collateral consequences such as deportation. Even then, other factors may limit the risk of an adverse effect on professional judgment. If the defense lawyer has provided highly skilled representation, a reasonable lawyer may find that an IAC challenge is less likely to be made, or at least less likely to be successful. When the evidence of skilled representation is highly visible, such as when a defendant fares substantially better than similarly situated codefendants, then there may be a low likelihood of an IAC challenge even being asserted. But if the defense lawyer has provided deficient representation, especially of a nature that might well lead to severe reputational, financial or disciplinary consequences, then a reasonable lawyer might well find a significant risk of adverse effect on professional judgment.[8]

16. We cannot give a blanket answer to the fact-specific question of whether, in a particular case, a reasonable lawyer would find a significant risk that the prospect of an IAC waiver would adversely affect a defense lawyer's professional judgment on behalf of the defendant. The defense lawyer in a particular case will be aware of the relevant facts bearing on personal interest. The decision of the Kentucky Supreme court affirming Kentucky Opinion E-435 (cited in endnote 1) argues that it will be hard for the lawyer to answer this question fairly, given studies in the field of behavioral economics showing that it is "extremely difficult for professionals…to appreciate the deleterious consequences of conflicts of interest," and that "people tend to overestimate their ability to act ethically." *United States v. Kentucky Bar Ass'n*, 439 S.W.3d 136, 154-55 (Ky. 2014) (citations omitted) (*aff'g* Kentucky Opinion E-435 (2012)). We agree that it may be hard to be objective, but lawyers routinely need to assess the ethics of their own potential conduct even when, as with Rule 1.7(a)(2), their personal interests may be implicated. To the extent that conflict analysis is conducted case by case rather than based on broad *per se* rules, such assessments are, even if difficult, unavoidable.

17. When a reasonable lawyer would conclude that the risk of adverse effect on professional judgment is not a significant one, then there is no conflict under Rule 1.7(a)(2) that would preclude the defense lawyer from advising the defendant as to the Waiver. On the other hand, when a reasonable lawyer would conclude that the risk is significant, then there is a personal-interest conflict, and the next step in the analysis is to consider waivability. Of course even when a defense lawyer is *inclined* to think that there is no conflict, the lawyer may choose to seek a conflict waiver as a matter of precaution and prudence. A lawyer who continues a representation in the absence of informed consent could face discipline if it later is determined that there actually was a conflict.

Rule 1.7(b): Waiver of a conflict

18. Under Rule 1.7(b), even if there is a significant risk that the lawyer's professional judgment on behalf of the client would be adversely affected by the lawyer's personal interest in the client agreeing to an IAC waiver, the lawyer may continue the representation if the criteria of Rule 1.7(b) are met.

19. Rule 1.7(b) lists four criteria that must be met for effective waiver of a lawyer's personal-interest conflict. Two of them—requiring that the representation not be prohibited by law and not involve assertion of a claim by one client against another in the same proceeding—are not applicable to the current inquiry. Waivability of any conflict will therefore turn on the other two criteria: A defense lawyer with a personal-interest conflict may nonetheless represent a defendant and provide advice on an IAC waiver if "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation" to the defendant, Rule 1.7(b)(1), and the defendant "gives informed consent, confirmed in writing," Rule 1.7(b)(4).

20. The first criterion—that the lawyer reasonably believes he or she will be able to provide competent and diligent representation—has both a subjective and an objective component. The defense lawyer must believe that the lawyer will be able to give the defendant competent and diligent representation despite the conflict, and that belief must be reasonable. Whether such a belief is reasonable will depend on some of the same factors that bear on whether there is a conflict in the first place, as discussed in paragraphs 13-15 above. That is, the stronger the potential challenge to the lawyer's ineffective assistance prior to the negotiation of the plea agreement, the less likely that the lawyer could reasonably believe he or she will be able to provide competent and diligent representation in advising the defendant on the accepting a plea agreement with an IAC waiver.

21. If there is a fairly limited likelihood that an IAC challenge would result in serious detriment to the lawyer, then the lawyer may reasonably conclude that the lawyer can provide competent and diligent representation. For example, depending on the circumstances, such as the strength of the prosecution's case, the terms of the plea offer, and whether the defendant has admitted guilt to the lawyer, it might be quite clear that it would be in the interest of the defendant to accept the offer. On the other hand, if the defense lawyer believes that the defendant has a colorable claim of legal malpractice arising from defense services already provided, then it may not be reasonable to believe that the lawyer could provide competent and diligent representation. *Cf*. N.Y. State 865 (2011) (noting "manifestly untenable position of having to counsel the [client] executor on whether to sue himself (the lawyer)"). The inquiry is fact-specific, so we identify the relevant analysis but do not undertake to apply it to each kind of circumstance that could be covered by the current inquiry.

22. If the defense lawyer reasonably expects to provide competent and diligent representation, then the lawyer may continue the representation and advise the defendant as to the Waiver if the defendant "gives informed consent [to the conflict], confirmed in writing." Rule 1.7(b)(4). It is a prerequisite of informed consent that a lawyer "has ad-

equately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j). Here, again, whether the lawyer will be able to provide such an adequate explanation may depend on the strength of the defendant's IAC claim. *See* Rule 1.7, Cmt. [10] ("if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.").

23. If the defendant chooses not to waive the conflict, or if it is unwaivable—whether because the conflict is so stark that a belief in the possibility of competent and diligent representation would not be reasonable, or because serious questions about the probity of the lawyer's conduct preclude the kind of advice necessary for informed consent—then the lawyer would generally be required to withdraw from the representation.[9] There is an exception, however, if the lawyer needs, but cannot obtain, permission of court to withdraw. Rule 1.16(d).

24. If a defense lawyer's conflict results in withdrawal, another lawyer can be retained or appointed to represent the defendant. The new lawyer, having not previously represented the defendant and having no exposure for deficient representation up to that point, will likely be able to provide conflict-free representation.[10]

Rule 1.8(h): Limitation of liability

25. Rule 1.8(h)(1) provides that a lawyer shall not "make an agreement prospectively limiting the lawyer's liability to a client for malpractice." Some ethics opinions in other states have concluded that such provisions bar a defense lawyer's participation in a defendant's plea waiver of potential IAC challenges. We discuss first whether this Rule bars such participation by its literal terms, and then whether waiver of IAC challenges impermissibly violates the Rule's policy or spirit.

26. For several reasons, the literal terms of Rule 1.8(h)(1) do not bar a defense lawyer's participation in a plea process that includes a waiver of IAC challenges. First, the lawyer's participation typically will not constitute "mak[ing] an agreement" of the described type. A plea agreement is between the defendant and the prosecution; the defense lawyer may advise and may document that advice, but is not a party to the agreement.[11] Theoretically there could be a case in which the defense lawyer induces the prosecutor to require a plea waiver, in which case the defense lawyer's own conduct could be at issue. *See* Rule 8.4(a) (providing that a lawyer shall not violate the Rules "through the acts of another"). But we do not opine as to this unlikely situation of a defense lawyer proposing an IAC waiver as part of a plea agreement. In the usual case, it is the prosecutor who seeks a waiver of appeal as part of a plea agreement.

27. Second, an instrument such as the Waiver is not, literally speaking, one "limiting the lawyer's liability to a client for malpractice."[12] It may limit the client's ability to pursue in criminal court a challenge to the conviction, but the client would remain legally entitled to sue the lawyer in civil court for any perceived malpractice.[13] Some ethics opinions have argued that the waiver nevertheless "limit[s]" the lawyer's malpractice liability in a practical sense. If this were a valid argument, it could well apply in New York, which precludes IAC malpractice claims by defendants whose criminal convictions remain intact.[14] But the argument is not valid. The Rule cannot mean that a plea agreement's indirect, preclusive effect on malpractice liability bars the defense lawyer from participating in its negotiation. If that were the case, it would lead to the absurd result that a defense lawyer could not negotiate any plea agreement or counsel any guilty plea, whether or not involving a waiver of appeal.

28. Some ethics opinions have reasoned that even if an IAC waiver does not violate the letter of Rule 1.8, it is nevertheless violates the Rule's policy or spirit. Even if there is some merit to that concern, we find it too attenuated to bar a defense lawyer from performing the crucial function of providing comprehensive and useful advice to a defendant who has been offered a potentially beneficial plea agreement.[15]

Rule 8.4(d): Conduct prejudicial to the administration of justice

29. The inquirer has also asked whether advising a defendant as to a plea waiver of IAC claims would violate Rule 8.4(d), which provides that a lawyer shall not "engage in conduct that is prejudicial to the administration of justice." But this provision is generally meant to address flagrantly improper kinds of conduct.[16] In considering prejudice to the administration of justice as a matter of ethics, it is relevant to bear in mind rules that guide the justice system as a matter of law.[17] We have noted certain ethics and policy issues as to IAC waivers, but the fact that such waivers are accepted to a significant extent in case law belies any claim that advising a defendant as to a waiver would run afoul of Rule 8.4(d). *See* cases cited in endnotes 4 and 5.

Conclusion

30. A defense lawyer may advise the defendant as to a proposed plea agreement including waiver of chal-

lenges to the conviction based on ineffective assistance of counsel unless a reasonable lawyer would find a personal interest conflict of interest, i.e., a significant risk that the lawyer's professional judgment on behalf of the defendant would be adversely affected by the lawyer's own interest in avoiding an allegation of ineffective assistance of counsel. In case of such conflict, the lawyer may continue in the representation if the conflict is waivable and properly waived by the defendant, but otherwise must seek the court's permission to withdraw from the representation.

Endnotes

1. Alabama Opinion 2011-02; Florida Opinion 12-1; Kentucky Opinion E-435 (2012), *aff'd*, *United States v. Kentucky Bar Ass'n*, 439 S.W.3d 136 (Ky. 2014); Missouri Opinion 126 (2009); Nevada Opinion 48 (2011); North Carolina Opinion 129 (1993); Ohio Opinion 2001-06; Pennsylvania Opinion 2004-100; Tennessee Opinion 94-A-549; Utah Opinion 13-04; Vermont Opinion 95-04; Virginia Opinion 1857 (2011). Some of these opinions conclude that participation is barred by a personal-interest conflict of interest; some conclude that a participating defense lawyer is impermissibly seeking to limit malpractice liability; and others rely on both theories.

2. Arizona Opinion 95-08 (concluding that a defense lawyer may participate in a plea agreement with an IAC waiver without violating the rule against limiting malpractice liability "or any other ethical rule"); Texas Opinion 571 (2006) (concluding that, depending on the facts of a given case, a criminal defense lawyer "may or may not have a conflict of interest" in advising defendant about a plea waiver of IAC claims, and that the rule against malpractice limitation does not prohibit such advice, assuming that a court would not interpret the plea agreement to limit malpractice liability).

3. The Department of Justice has stated that it perceives no ethical bar to the practice, but has nonetheless adopted a policy providing that United States Attorneys will no longer seek plea waivers of challenges based on ineffective assistance of counsel. The new policy states:

> While the Department is confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical, in order to bring consistency to this practice, and in support of the underlying Sixth Amendment right, we now set forth uniform Department of Justice policies relating to waivers of claims of ineffective assistance of counsel.
>
> Federal prosecutors should no longer seek in plea agreements to have a defendant waive claims of ineffective assistance of counsel….

Deputy Attorney General James Cole, Memorandum for All Federal Prosecutors (Oct. 14, 2014). Prior to the new policy, 35 of 94 U.S. Attorney's Offices had been seeking plea waivers extending to IAC claims. Press Release, "Attorney General Holder Announces New Policy to Enhance Justice Department's Commitment to Support Defendants' Right to Counsel" (Oct. 14, 2014), available at http://www.justice.gov/justice-news.

4. *See People v. Abdullah*, 122 A.D.3d 958 (3rd Dept. 2014) (appeal waiver foreclosed an IAC claim that did not "impact the voluntariness" of the plea); *People v. Smith*, 119 A.D.3d 1088 (3d Dept. 2014) (same); *People v. Montalvo*, 105 A.D.3d 774 (2d Dept. 2013) ("Because the defendant voluntarily waived his right to appeal, his claim that he was deprived of his right to effective assistance of counsel is precluded, except to the extent that the alleged ineffective assistance may have affected the voluntariness of his plea.").

5. *See*, *e.g.*, *United States v. Craig*, 985 F.2d 175, 178 (4th Cir.1993) (waiver does not foreclose "a claim that the waiver of appeal as well as the guilty plea itself was tainted" by ineffectiveness); *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002) (following "wealth of authority" that IAC challenges survive a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself"); *Davila v. United States*, 258 F.3d 448, 451 (6th Cir.2001) (enforcing waiver as to IAC claim relating to sentencing rather than plea or waiver); *Hurlow v. United States*, 726 F.3d 958, 964 (7th Cir. 2013) ("[A]ppellate and collateral review waivers cannot be invoked against claims that counsel was ineffective in the negotiation of the plea agreement."); *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) (doubting "that a plea agreement could waive a claim of ineffective assistance of counsel based on counsel's erroneously unprofessional inducement of the defendant to plead guilty or accept a particular plea bargain"); *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001) (holding that a plea waiver does not bar IAC claims "challenging the validity of the plea or the waiver" but does bar other IAC claims), *cert. denied*, 534 U.S. 1085 (2002).

6. *But see Dumbrowski v. Bulson*, 19 N.Y.3d 347, 971 N.E.2d 338, 948 N.Y.S.2d 208 (2012) (limiting damages in legal malpractice cases based on negligent representation in a criminal matter to pecuniary damages, such as lost wages, which often are negligible in indigent criminal representation).

7. In *Strickland v. Washington*, 466 U. S. 668 (1984), the U.S. Supreme Court ruled that, before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." It also established a two-prong inquiry into determining whether the defendant has received such effective assistance: (1) counsel's representation must fall "below an objective standard of reasonableness," 466 U. S., at 688, and (2) there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id*.000 at 694. The Court in *Strickland* recognized some of the drawbacks in winning an IAC claim: (a) judicial scrutiny of counsel's performance must be highly deferential, since attorney errors are as likely to be harmless as they are to be prejudicial, (b) to obtain relief on an IAC claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances (*citing Roe* v. *Flores-Ortega*, 528 U. S. 470, 480, 486 (2000)), and (b) it is difficult for petitioners to satisfy *Strickland*'s prejudice prong if they have acknowledged their guilt. The Court also commented that collateral challenges at the plea stage are made less frequently than those after trial (e.g., pleas account for nearly 95% of all criminal convictions, but only approximately 30% of the habeas petitions filed).

8. We are analyzing conflicts of interest, but we note also that deficient representation may give rise to a disclosure obligation whether or not the lawyer will continue to represent the client. *See* N.Y. State 789 ¶13 (2005); N.Y. State 734 (2000) (noting obligation to inform client of "significant error or omission that may give rise to a possible malpractice claim").

9. Rule 1.16(b)(1) (providing that a lawyer who "knows that the representation will result in a violation of the Rules" generally must withdraw). Some of the prior ethics opinions finding an unwaivable conflict seem to assume that the remedy is for the lawyer merely to refrain from advising the defendant as to the waiver. But since the waiver is an integral part of a plea offer, the defense lawyer's duties would seem to require such advice. *See*, *e.g.*, Rule 1.4(a)(1)(iii) (requiring lawyer to promptly inform client of plea offers), Rule 1.4(a)(2) (requiring reasonable consultation about means to obtain objectives) and Cmts. [1] – [3]. In some circumstances, a lawyer may limit the scope of the representation with the client's informed consent, Rule 1.2(c), and such a limitation may serve to avoid conflicts, *see* N.Y. City 2001-3. But a criminal defense lawyer contemplating this approach would have to consider whether refraining from advice as to plea offers would be a limitation "reasonable under the circumstances," as required under Rule 1.2(c), and how it would comport with the defendant's right to effective assistance of counsel.

10. The reason we do not adopt a *per se* conflict rule against defense lawyers participating in IAC waivers is that we see no circumstances to justify a departure from case-by-case analysis. But our discussion of withdrawal leads us to note an additional benefit of the case-by-case approach. A *per se* and unwaivable conflict rule would mean that when a prosecutor requires a plea bargain to include an IAC waiver, not only would the existing defense attorney have to withdraw, but so would every replacement defense attorney. Because defendants do need lawyers, the resolution might be for the court to order continued representation, despite the conflict, under Rule 1.16(d). A *per se* approach thus prevents any real solution to the claimed personal-interest conflict, while the case-by-case approach allows for a conflicted lawyer to be replaced by one without a conflict.

11. *See* Arizona Opinion 95-08 (noting that in plea context, "the defense lawyer is not entering into an agreement with his client" to limit liability, because generally the government is seeking to put end to proceedings in consideration for plea to lesser charge, and "[t]he government, not the defense lawyer, is requiring the waiver"); Virginia Opinion 1857 (2011) (opining that rule does not apply "because the defense lawyer is not making the agreement in this case—he is advising his client whether to enter into an agreement sought by the government").

12. If the waiver were an agreement limiting the lawyer's liability to the client for malpractice, it would apply to a large extent retrospectively, rather than prospectively, and, to that extent, would not be prohibited by Rule 1.8(h).

13. *See* Arizona Opinion 95-08 (stating that Rule 1.8(h) is "specific and unambiguous" and that there is a "significant difference" between an IAC challenge to a conviction and a malpractice claim); Texas Opinion 571 (2006) (stating that plea waiver of IAC challenges "does not expressly limit the defense counsel's liability to the defendant for malpractice," and assuming that in a malpractice dispute, a court "would not allow a waiver in the plea agreement to be used or interpreted as an agreement limiting a defendant's malpractice claim").

14. *See Carmel v. Lunney*, 70 N.Y.2d 169, 173 (1987); *Kaplan v. Sachs*, 224 A.D.2d 666, 667 (2d Dept. 1996) (stating that "plaintiff's plea of guilty in the criminal proceeding bars recovery for legal malpractice allegedly committed by the defendant in that proceeding"); *accord McClinton v. Suffolk County Police 3rd Precinct*, 2014 WL 1028993 (E.D.N.Y. 2014) (applying New York law).

15. *See* Rule 1.4(a)(1)(iii) (requiring a lawyer to promptly inform client of "material developments in the matter including settlement or plea offers"); *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."); *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) ("[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.").

16. Comment [3] to Rule 8.4 provides: "The prohibition on conduct prejudicial to the administration of justice is generally invoked to punish conduct, whether or not it violates another ethics rule, that results in substantial harm to the justice system comparable to those caused by obstruction of justice, such as advising a client to testify falsely, paying a witness to be unavailable, altering documents, repeatedly disrupting a proceeding, or failing to cooperate in an attorney disciplinary investigation or proceeding."

17. Rules Scope ¶7 ("The Rules presuppose a larger legal context shaping the lawyer's role. That context includes…substantive and procedural law in general.").

(50-14)

* * *

Opinion 1049 (3/2/15)

Topic: Solicitation

Digest: A. Where a potential client posts a message on a website asking to be contacted by a lawyer about a particular legal problem, a New York lawyer may respond in the manner invited by the potential client. A response invited by the potential client does not constitute "solicitation," but a communication about the services of the lawyer or law firm for the purposes of securing retention would constitute "advertising."

B. An attorney may post on a website to solicit plaintiffs for a case, unless the post relates to a specific incident involving potential claims for personal injury or wrongful death and is disseminated before the end of the cooling off period in Rule 7.3(e). The communication is subject to the Rules on attorney advertising. If the post referred to a specific incident, it also would constitute a solicitation and Rule 7.3, including the filing requirements of Rule 7.3(c), would apply as well.

Rules: 1.0(a) & (c), 7.1, 7.1(f), (h) & (k), 7.3(a), (b), (c) & (e)

Facts

1. An attorney frequents internet websites, such as Reddit and Twitter, which allow members to post questions about a variety of issues. A non-lawyer has posted a message on such a website describing a legal problem, and asking to be contacted by a lawyer who can help with the problem.

2. Our understanding of such social networking sites is that they are forums where registered community members can submit content, such as text posts. For example, in the case of Reddit, content is divided into categories, including a subcategory called "discussion based" that enables members to submit questions to other community members. Members can post comments about the submission, and respond back and forth in a thread or conversation-tree of written comments. Similarly, in the case of Twitter, users may post and read short messages posted by users, but members receive messages directly only from those they are "following," that is, from those with whom they have signed up to receive such messages.

Questions

3. A. May an attorney respond by email or through a social media website to an individual who posts about a specific problem on an internet forum or other similar website and who asks to be contacted by a lawyer about that problem to discuss undertaking a representation?

B. May an attorney who wishes to find plaintiffs for a potential case post an invitation on a third-party website, such as Reddit or Twitter, for individuals to contact him if they experienced a particular problem? If so, what requirements must be followed?

Opinion

Responding to a Request from a Potential Client Seeking Counsel

4. The first question asks whether an attorney may contact an individual by email or through a social media website, such as on Twitter or Reddit, to discuss undertaking a representation, based on the individual's posting on the internet site, which includes a request to be contacted by a lawyer about the individual's problem.

5. The threshold issue is whether such a contact would constitute "solicitation" of, or "advertising" directed to, the potential client by the lawyer. If the contact constitutes an "advertisement" as defined in Rule 1.0(a), then the contents must comply with Rule 7.1 of the New York Rules of Professional Conduct (the "Rules"), including the requirements for labeling as "advertising," retention of copies for specified periods and inclusion of the address and telephone number of the lawyer's "principal law office." *See* Rule 7.1(f), (h), (k). If the advertisement has additional characteristics that transform it into a "solicitation" as defined in Rule 7.3(b), then (1) the lawyer may not solicit the potential client by in-person or telephone contact, or by "real-time or interactive computer-accessed communication,"[1] unless the recipient is a close friend, relative, former client or existing client, *see* Rule 7.3(a)(1), and (2) the solicitation must comply with Rule 7.3(c), including the restrictions on communications relating to a specific incident involving potential claims for personal injury or wrongful death. Moreover, the lawyer must file a copy of the solicitation at the time of its dissemination with the attorney disciplinary committee of the judicial district or department where the lawyer or law firm maintains its principal office, *see* Rule 7.3(c)(1).

6. Rule 7.3(b) defines "solicitation" for purposes of Rule 7.3 as:

> [A]ny 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…the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.

Thus, in order to constitute a solicitation, the communication must first be an advertisement.

7. The term "advertisement" is defined in Rule 1.0(a) as:

> [A]ny 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. It does not include communications to existing clients or other lawyers.

A communication to discuss the lawyer or law firm's services (as opposed to merely discussing the client's legal problem, as set forth below in paragraphs 12 and 13) is advertising, as long as the primary purpose of the communication is to secure retention of the lawyer or law firm and the potential client is not an existing client of the lawyer or law firm. Since we have been told that the purpose of contacting the potential client would be to secure retention, any discussion of the lawyer or law firm's services would constitute an "advertisement." But would it also constitute "solicitation" as defined in Rule 7.3(b), quoted above?[2]

8. The definition of "solicitation" in Rule 7.3(b) makes an important distinction between communications initiated by the lawyer and those initiated by a potential client. That is, solicitation is an advertisement directed at a specific recipient that is *initiated by or on behalf of* a lawyer or law firm. Where a potential client contacts the lawyer to discuss a possible engagement, any response the lawyer makes to the contact does not constitute "solicitation." This distinction is made clear in Comment [2] to Rule 7.3, which says: "A 'solicitation' means any advertisement…that is initiated by a lawyer or law firm (as opposed to a communication made in response to any inquiry initiated by a potential client)." This distinction also existed in the former Code of Professional Responsibility between 1970 and 1999. *See* DR 2-103 (prohibiting a lawyer from seeking professional employment from a person *who has not sought advice regarding employment of the lawyer*).

9. We note that the final sentence of Rule 7.3(b) states that a lawyer's proposal or other writing in response to a specific request of a prospective client does not constitute "solicitation." We believe the reference to written responses to "requests for proposals" provides a safe harbor, and is not the

exclusive means of responding to a request for communication initiated by the client.

10. When a potential client requests contact by a lawyer, either by contacting a particular lawyer or by broadcasting a more general request to unknown persons who may include lawyers, any ensuing communication by a lawyer that complies with the terms of the invitation was not initiated by the lawyer within the meaning of Rule 7.3(b).[3] Thus, if the potential client invites contact by Twitter or email, the lawyer may respond by Twitter or email. But the lawyer could not respond by telephone, since such contact would not have been initiated by the potential client. See N.Y. State 1014 (2014). If the potential client invites contact by telephone or in person, the lawyer's response in the manner invited by the potential client would not constitute "solicitation."

11. In N.Y. State 1014, the inquirer was contacted by a current client (a detainee in a detention center), was given the name and telephone number of a potential client (another detainee), and was told that the potential client would like the lawyer to contact him to discuss his defense. We opined that the prohibition of Rule 7.3 against in-person or telephone solicitation was not applicable, since the contact had been initiated by the potential client. We said:

> The provisions of Rule 7.3(a)(1) which prohibit "in-person or telephone" solicitation (with exceptions not here pertinent) are also inapplicable. Solicitation is advertising initiated by or on behalf of a lawyer. Comment 2 to Rule 7.3 further emphasizes the point that to be solicitation the contact must be initiated by the lawyer. The Comment provides that solicitation means an advertisement "that is initiated by a lawyer or law firm (*as opposed to a communication made in response to an inquiry initiated by a potential client*.)"…. If upon the initial contact with the potential client it is apparent that the potential client did not request to be contacted by the lawyer, the lawyer must cease the conversation as further contact would constitute proscribed solicitation under Rule 7.3(a)(1).

12. Here, since the potential client initiated the communication through a posting on the internet, any response by the inquirer in the manner invited by the potential client would not constitute "solicitation." We further conclude that a communication that merely discussed the client's legal problem would not constitute advertising either. However, a communication by the lawyer that went on to describe the services of the lawyer or his or her law firm for the purposes of securing retention would constitute "advertising." In that case, the lawyer would need to comply with Rule 7.1, including the requirements for labeling as "advertising" on the "first page" of the post or in the subject line, retention for one-year (in the case of a computer-accessed communication) and inclusion of the law office address and phone number. *See* Rule 7.1(f), (h), (k).

13. The definition of "advertising" must be applied with some measure of common sense. In a strict sense, every communication between a lawyer and a potential client prior to actual retention is for the "primary purpose" of being retained. But not every email in the back-and- forth between the potential client and the lawyer, such as a discussion of the steps the lawyer would take in a particular case, a response to a particular question from the potential client about the lawyer's experience or the negotiation of the fees that the lawyer would charge in that case, needs to be labeled "Attorney Advertising" and contain the lawyer's law office address. For example, Comment [7] to Rule 7.1 states:

> Communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer's services, are not advertising. Accordingly, the special restrictions on advertising and solicitation would not apply to a lawyer's response to a prospective client who has asked the lawyer to outline the lawyer's qualifications to undertake a proposed retention or the terms of a potential retention.

In this case, however, we believe that the initial communication between lawyer and client in which the lawyer describes his or her capabilities and experience in response to a broadly disseminated request by the potential client meets both the express terms and the purpose of the definition.

14. Since the inquiry here asks whether the lawyer may reply using the internet website or email, the reply would be in writing and thus compliance with the labeling, retention and address requirements described above in paragraph 12 would be straightforward. We do not address how those requirements might be applied to a permitted non-written reply in response to the client's request.

Soliciting Clients on Twitter or Reddit

15. The second question asks whether the inquirer may post an invitation on a third-party website, such as Twitter or Reddit, for individuals to contact the lawyer if they have experienced a particular problem. In N.Y. State 1009 we held that a post on a third-party website, such as Twitter or Reddit, is not a real-time or interactive computer-accessed communication. Since that type of invitation does not generally constitute solicitation, the issue is whether the content of the attorney's post could transform it into a solicitation under Rule 7.3(b), thus subjecting the post to the requirements of Rule 7.3.

16. As noted above, Rule 7.3(b) defines "solicitation" as an "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…the primary purpose of which is the retention of the lawyer or law firm." Comment [4] to Rule 7.3 explains that an advertisement in a public medium, seeking retention and pecuniary gain, does not become a solicitation simply because it is intended to attract potential clients with needs in a specified area of law. But it *does* become a solicitation if it "makes reference to a specific person or group of people whose legal needs arise out of a specific incident to which the advertisement explicitly refers."

17. Here, the inquiring attorney has "become aware of a potential case, and wants to find plaintiffs," and the message the attorney intends to post will be directed to, or intended to be of interest only to, individuals who have experienced the specified problem. If the post referred to a particular incident, it would constitute a solicitation under the Rules, and the attorney would be required to follow the Rules regarding attorney advertising and solicitation, s*ee* Rules 7.1 & 7.3. In addition, depending on the nature of the potential case, the inquirer's post might be subject to the blackout period (*i.e.*, cooling off period) on solicitations relating to "a specific incident involving potential claims for personal injury or wrongful death," *see* Rule 7.3(e).

Conclusion

18. A. Where a potential client posts a message on a website asking to be contacted by a lawyer about a particular legal problem, a New York lawyer may respond in the manner invited by the potential client. A response invited by the potential client does not constitute "solicitation," but a communication about the services of the lawyer or law firm for the purposes of securing retention would constitute "advertising."

B. An attorney may post on a website to solicit plaintiffs for a case, unless the post relates to a specific incident involving potential claims for personal injury or wrongful death and is disseminated before the end of the cooling off period in Rule 7.3(e). The communication is subject to the Rules on attorney advertising. If the post referred to a specific incident, it also would constitute a solicitation and Rule 7.3, including the filing requirements of Rule 7.3(c), would apply as well.

Endnotes

1. The term "computer-accessed communication" is defined in Rule 1.0(c) as:

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

The terms "real time" and "interactive" are explained in Rule 7.3, Comment [9], which states that "[o]rdinary email and web sites are not considered to be real-time and interactive communication," but "[i]nstant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication."

2. The rules of lawyer ethics have long disfavored certain types of solicitation, because they pose serious dangers to potential clients. As Comment [9] to Rule 7.3 explains:

> [I]n person solicitation poses the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration. These same risks are present in telephone contact or by real-time or interactive computer-accessed communication and are regulated in the same manner.

3. *See* N.Y. City 2000-1, which involved an internet-based system in which law firms could respond to requests for proposals of representation, and which concluded that, since the request had been initiated by the potential client, not the lawyer, the lawyer's response would constitute neither advertising nor solicitation. That opinion predates the issuance of the current rules on advertising and solicitation that were promulgated in 2007 and that are discussed in this opinion.

(31-14)

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Opinion 1050 (3/25/15)

Topic: Legal expenses; Credit Card Processing Fees

Digest: A lawyer may charge a client, as an administrative convenience, a nominally greater amount than the processing fees imposed on the lawyer's account by a credit card company in connection with the client's payment by credit card of the lawyer's advance payment retainer, as long as (i) the client receives disclosure of the up-charge and consents to it before the lawyer imposes it, (ii) the

amount of the up-charge is nominal, and (iii) total amount of the advance payment retainer and the processing fees (including the up-charge) are reasonable under the circumstances.

Rules: 1.5(a) & (b)

Facts

1. A law firm wishes to accommodate clients who want to pay the firm's advance payment retainers by credit card. (For a description of advance payment retainers, see N.Y. State 816 (2007), ¶3.) The law firm wishes to have its clients pay the credit card company's processing fee for such credit card payments. Those processing fees vary from 2.75% to 3.2% of the amount paid. The law firm is concerned that it will not be able to recoup the entirety of the processing fee if it passes along to the client the precise amount of the initial processing fee, since the client is likely to want to pay even the processing fee by credit card.

2. For example, if the client pays an advance payment retainer of $10,000 by credit card, the law firm would pass along to the client for payment the credit card processing fee of 2.75%, *i.e.*, $275.00. If the client wants to pay the amount of that processing fee by credit card as well, then there will be a 2.75% credit card processing fee on the payment of that fee, *i.e.*, $7.56. If the client wants to pay that processing fee on the processing fee by credit card, there will be another processing fee passed along to the client, and so on.

3. The law firm wants to know whether it can charge a single charge for credit card payment of its advance payment retainer that is slightly higher than the actual credit card processing fee. Specifically, it wants to know whether it is ethically permissible to charge its clients a single fee of 3% to cover the credit card company's processing fee of 2.75% and a flat fee of 3.5% to cover the credit card company processing fee of 3.2%. In the example above, the application of that single fee of 3% instead of the triple application of 2.75% would result in the law firm's receiving $300.00 instead of a reimbursement of approximately $283.00 ($275.00, plus $7.56, plus $.21), roughly a $17.00 up-charge ($300.00 payment from client minus $283.00 charged by the credit card company).

Question

4. May a law firm charge its clients who wish to pay its advance payment retainer by credit card an amount that is greater than the processing fee the credit card company actually imposes on the law firm?

Opinion

5. For more than 40 years, it has been recognized that in certain circumstances New York lawyers may allow their clients to pay their attorneys' fees by credit card. *See, e.g.*, N.Y. City 2014-3; Nassau County 13-5 (2013); N.Y. State 763 (2003); N.Y. State 362 (1974), as modified by N.Y. State 763 (2003). Those opinions establish that lawyers may accept credit card payments of their fees as long as (i) the amount of the fees is reasonable, (ii) the lawyer complies with the duty to protect the confidentiality of client information, (iii) the lawyer does not allow the credit card company to compromise the lawyer's independent professional judgment on behalf of the client, (iv) the lawyer notifies the client before charges are billed to the credit card and offers the client the opportunity to question any billing errors, and (v) in the event of any dispute regarding the lawyer's fee, the lawyer attempts to resolve all disputes amicably and promptly and, if applicable, complies with the fee dispute resolution program set forth in 22 N.Y.C.R.R., Part 137. *See* N.Y. State 763 (2003) and nn. 3 & 4.

6. In N.Y. State 763 (2003), this Committee considered whether a collection lawyer could deduct, from a settlement payment due the lawyer's client, charges imposed by a merchant credit card bank on the lawyer when the third party debtor made the settlement payment by credit card. The Committee stated: "With regard to charges by the merchant credit card bank incurred in consequence of the firm's credit card program, such charges may be deducted from the sum remitted to the client if this arrangement is part of the understanding with the client; otherwise these charges should be deducted from the firm's operating account and not passed on the client." N.Y. State 763 also noted South Carolina Opinion 98-08 for the proposition that the attorney may pass on the administrative fee as long as the total fee is "objectively reasonable." *See* New York Rules of Professional Conduct (the "Rules") 1.5(a) ("A lawyer shall not…charge…an excessive…fee or expense"); Rule 1.5(b) ("A lawyer shall communicate to a client…the basis or rate of the fee and expenses for which the client will be responsible").

7. Since 2003, ethics opinions from bar associations in other states have reached similar conclusions. *See, e.g.*, Hawaii Opinion 45 (2003); Kentucky Opinion 426 (2007); District of Columbia Opinion 348 (2009).

8. Thus, with respect to the credit card company processing fees at issue here, it is clear that the lawyer may pass along for payment by the client the actual amount of the processing fees imposed on the lawyer by the credit card company as long as

(i) the client has been advised of those charges and has agreed to pay them in advance of their imposition, and (ii) the processing fees, along with the amount of attorneys' fees paid, are reasonable in amount.

9. Neither N.Y. State 763 (2003) nor the out-of-state ethics opinions cited above have addressed the specific question raised here: If a client wants to pay an advance payment retainer by credit card, may the law firm charge the client more than the processing fee that the credit card company charges the lawyer. We perceive reasons for and against allowing a lawyer to charge the client an "up-charge" exceeding the credit card company's processing fee to the lawyer. On one hand, the additional processing fee may be determined to the penny mathematically, so the lawyer is not compelled to estimate the total out-of-pocket cost to the lawyer. On the other hand, calculating the processing fee (including the processing fee on any financed processing fee) will cause the lawyer to incur an administrative expense.

10. A number of ethics committees have addressed the question of lawyer billing of expenses. In ABA 93-379 (1993), the ABA Committee concluded that the lawyer may recoup expenses reasonably incurred in connection with the client's matter for services performed in-house (such as photocopying, long distance telephone calls, computer research, special deliveries, secretarial overtime, and other similar services) if the charge reasonably reflects the lawyer's actual cost for the services rendered, plus a reasonable allocation of related overhead. ABA 93-379 stated, however, that it is impermissible for a lawyer to charge more than the actual cost of such disbursements, plus overhead, unless the lawyer makes full disclosure to and obtains the agreement of the client to the higher charge and the total charge is reasonable. Similarly, in N.Y. City 2006-3, the New York City Bar ethics committee concluded that, unless the client agrees otherwise in the retainer agreement, a lawyer may not charge the client more than the direct cost associated with the outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service.

11. The conclusions of the ABA and New York City opinions are reflected in New York's Comment to Rule 1.5. *See* Rule 1.5, Cmt. [1] ("A lawyer may seek payment for services performed in-house, such as copying…either by charging an amount to which the client has agreed in advance or by charging an amount that reflects the cost incurred by the lawyer, provided in either case that the amount charged is not excessive.")

12. We believe that a similar Rule 1.5 analysis also applies to the lawyer's proposed up-charge. Thus, a lawyer may charge the client more than the processing fee the credit card company imposes on the lawyer as long as (i) the client receives disclosure of the up-charge and consents to it before the lawyer imposes it, (ii) the amount of the up-charge is nominal, and (iii) the total amount of the advance payment retainer and the processing fees charged (including the up-charge) are reasonable in the circumstances. At what point the up-charge becomes excessive is a matter of fact that depends upon, among other things, the amount of the up-charge, the amount of the advance payment retainer, and the client's opportunity to avoid the up-charge entirely by paying the advance retainer by cash or check.

13. The Committee is aware of at least three prior opinions that have disapproved of interest charges in certain circumstances. In N.Y. City 1997-1, the New York City Bar ethics committee opined that, when a lawyer representing a client in a contingency fee matter borrowed money to pay for the client's litigation expenses, the lawyer was prohibited from charging the client interest in an amount greater than the interest charges the lawyer actually incurred. In N.Y. State 729 (2000), which concerned a lawyer's imposition of an interest charge on disbursements the lawyer was advancing on the client's behalf in a contingency fee matter, this Committee said that a lawyer could not pass along to a client a charge for interest that is greater than the charge the lawyer actually incurred (or, if the lawyer did not borrow funds, greater than the lawyer's actual or putative cost of funds). In N.Y. State 754 (2002), this Committee concluded that a lawyer borrowing funds to advance expenses in a contingent fee litigation may pass on to the client the interest the lawyer incurs in such borrowing (implying that the lawyer may not charge more than the actual cost incurred). Both N.Y. State 729 and N.Y. State 754 cited N.Y. City 1997-1.

14. These three opinions do not affect the conclusion here that the lawyer may charge the client a nominal amount over the actual processing fee charged by the credit card company as a matter of administrative convenience, as long as (i) the lawyer discloses the up-charge and the client consents to it in advance of its imposition, (ii) the amount of the up-charge is nominal, and (iii) the total amount of the advance payment retainer and the processing fees charged (including the up-charge) are reasonable in the circumstances.

15. In reaching this conclusion, the Committee assumes three things. First, we assume that up-charging the client for the credit card company's

processing fee does not in itself violate the law or the credit card contract between the lawyer, on the one hand, and the credit card company or the bank issuing the credit card, on the other. We are aware that the use of credit cards may subject lawyers to regulations under certain federal and state laws, such as consumer protection and data breach notification statutes, but such requirements of law are outside the scope of this Committee's jurisdiction. *See* N.Y. City 2014-3 n.1.

16. Second, we assume that the lawyer satisfies the general ethical conditions for accepting credit card payments by clients (*see* ¶ 5, above).

17. Third, insofar as the lawyer is passing along to the client an up-charge based on the credit card company's processing fee to the lawyer, we assume that an explanation of this up-charge will be included as part of any required written engagement letter under 22 N.Y.C.R.R. § 1215.1. *See* Rule 1.5(b) and N.Y. State 763, n. 6. This disclosure is especially important with respect to the payment of credit card company processing fees, because the lawyer's imposition of such a charge on the client reverses what we understand to be the normal mercantile practice in New York, when the merchant, not the customer, pays the credit card company's processing fee.

Conclusion

18. A lawyer may, as an administrative convenience, charge a client a nominal amount over the actual processing fees imposed on the lawyer by a credit card company in connection with the client's payment by credit card of the lawyer's advance payment retainer, as long as (i) the client receives disclosure of the up-charge and consents to it before the lawyer imposes it, (ii) the amount of the up-charge is nominal, and (iii) the total amount of the advance payment retainer and the processing fees charged, including the up-charge) are reasonable under the circumstances.

(48-14)

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Opinion 1051 (3/25/15)

Topic: Attorney's fees, amending fee agreement, litigation funding

Digest: Where a contingent fee agreement provides for the fee to be calculated on the amount of the recovery "by settlement or judgment," whether the lawyer may take a percentage of the amount loaned to the client by a third party is a question of law beyond the jurisdiction of the Committee. A retainer agreement may ethically provide for such a payment *ab initio*. If it does not, the lawyer may ask the client to amend the retainer agreement to provide specifically for such payment. However any such amendment would be subject to scrutiny under Rule 1.8(a) as a business transaction with a client, because (1) there has been no apparent change of circumstances, other than the fact that the client has determined to pay a litigation funding firm for earlier access to funds, (2) the lawyer apparently would be taking funds from property other than that recovered through the lawyer's efforts in the litigation, (3) the amendment would benefit solely the lawyer, (4) the advance would likely come at a significant cost to the client, and (5) it is likely that the client would be looking to the lawyer to exercise professional judgment on behalf of the client in connection with the amendment.

Rules: 1.5, 1.8(a).

Facts

1. The inquirer represents numerous plaintiffs in a mass tort action that has been settled. The settlement establishes a fund to which the various plaintiffs may apply in the future if they should meet specific criteria regarding damages.

2. The settlement fund might not pay out to a particular member of the plaintiff class for years because the settlement covers many currently asymptomatic individuals, and will pay out only if they develop the defined symptoms under the settlement. Some class members may not want to wait to see if they develop the defined symptoms. They are interested in taking an "advance" settlement, rather than risking that they will never qualify for a payout under the settlement.

3. One company is offering an immediate payment to individuals covered by the settlement. That company would lend money to a client (an "advance"), in exchange for any of the proceeds the individual recovers under the settlement, up to the amount of the advance, plus interest. Amounts due under the advance would be secured with a lien on the individual plaintiff's monetary recovery, if any. If the individual never recovered under the settlement, he or she would not owe anything to the lender and could keep the advance.

4. The inquirer's engagement agreement states, "If a monetary recovery is obtained for CLIENT by settlement or judgment, ATTORNEYS will be entitled to compensation for their services in the amount of 25% of the recovery and attorneys shall also be entitled to recovery of costs."

Question

5. Where an attorney has a retainer agreement with a plaintiff in a lawsuit giving the lawyer a contingent fee based on any recovery "by settlement or judgment," may the attorney take the contingent fee from an advance the client has received in exchange for a lien on the plaintiff's monetary recovery?

Opinion

6. At the outset, we note that this inquiry does not raise, and we do not opine on, the ethical issues that arise in connection with litigation funding. This Committee has addressed such issues in the past. *See* N.Y. State 666 (1994) (addressing whether a lawyer could properly refer a client to a litigation funding firm); N.Y. State 769 (2003) (addressing whether the attorney could represent a client in negotiating and carrying out a litigation funding agreement and charge the client an additional fee for this service). *See also* N.Y. City 2011-2 (2011) (concluding that it is not unethical *per se* for a lawyer to represent a client who enters into a non-recourse litigation financing arrangement with a third party lender, but discussing a number of ethical issues that may arise, including the possible compromise of confidentiality and waiver of attorney-client privilege, and the potential impact on a lawyer's exercise of independent judgment).[1]

7. Rule 1.5 of the New York Rules of Professional Conduct (the "Rules") provides as follows: "A lawyer shall not make an agreement for, charge, or collect an excessive or illegal fee or expense." Rule 1.8(e) prohibits a lawyer from acquiring a proprietary interest in a cause of action the lawyer is conducting, except that the lawyer may "contract with a client for a reasonable contingent fee in a civil matter."

8. Rule 1.5(c) contains detailed requirements with respect to contingent fee agreements. It provides:

> (c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. Promptly after a lawyer has been employed in a contingent fee matter, the lawyer shall provide the client with a writing stating the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or, if not prohibited by statute or court rule, after the contingent fee is calculated. The writing must clearly notify the client of any expenses for which the client will be liable regardless of whether the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a writing stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

9. Contingent fees in claims and actions for personal injury are also governed by court rules. *See, e.g.*, 22 NYCRR § 603.7 (First Dep't), 22 NYCRR § 806.13 (Third Dep't) (where an attorney's fee depends in whole or in part upon the amount of the recovery, and is equal to or less than the amount contained in the rule's schedule of fees, the fee is deemed to be fair and reasonable).

10. The inquirer's retainer agreement entitles the inquirer to payment when "a monetary recovery is obtained for client by settlement or judgment." The interpretation of a fee agreement and the interpretation of the applicable court rules—including whether a monetary recovery through an advance qualifies as "a monetary recovery by settlement or judgment"—are matters of law. This Committee does not answer questions of law. *But cf.*, *Knight v. Aqui*, 966 F. Supp.2d 989 (N.D. Cal. 2013) (attorney whose fee agreement is silent as to how attorneys' fees shall be paid in the event of a structured settlement is permitted to receive fees only on the same pro rata basis that the client receives compensation); American Law Institute, Restatement of the Law Governing Lawyers, § 35, cmt. *e* (when a client will receive a structured settlement providing for regular payments over the client's lifetime, a lawyer with a contingent fee agreement is entitled to receive the stated share of each such payment if and when it is made to the client, unless the client-lawyer contract provides otherwise).

11. Any attempt to collect a legal fee that is not authorized is an ethical issue. Any fee that is not authorized by a retainer agreement would be "excessive." *See* Rule 1.5(a)(prohibiting an "excessive or illegal fee"). Moreover, agreements regarding legal fees are strictly construed against the lawyer. *See, e.g.*, *Matter of Kuneicki*, 35 A.D. 3d 742, (2d Dep't 2006) ("In cases of doubt and ambiguity, an agreement between a client and the attorney must be construed most favorably to the client.").

12. If the retainer agreement as currently drafted would not be interpreted as including, in the phrase "monetary recovery by settlement or judg-

ment," a loan or advance offered by a third party, then the question is whether the retainer agreement could ethically be amended to authorize such payment.

13. If the inquirer's retainer agreement had provided *ab initio* for payment of the lawyer's fees and expenses out of a loan or advance secured by an interest in the client's legal claim, such agreement would not have violated Rule 1.5, as long as the fee was not excessive within the meaning of Rule 1.5(a). Whether such a fee would be considered a contingency fee and entitled to the presumption of reasonableness contained in the court rules is a matter of law about which we do not opine.

14. In many instances, it is possible to amend a fee agreement with the concurrence of the lawyer and client. "However, such an amendment raises ethical concerns, because [a] lawyer is often in a position to take unfair advantage of the client." N.Y. State 910 (2012).

15. As we noted in N.Y. State 910, while some amendments to fee agreements may be subject only to Rule 1.5's prohibition against excessive or illegal fees, other amendments are considered a "business transaction with a client" and are also subject to Rule 1.8. In N.Y. State 910, we set out a number of factors that will determine whether the higher scrutiny of Rule 1.8 is warranted.

16. First, we noted that, since the lawyer is the drafter of the fee contract and should be expected to anticipate most changes in circumstances that may occur during the representation, one consideration is whether there has been a material change in circumstances. A second and related factor is the length of time since the contract was entered into, which will affect the reasonableness of the lawyer's failure to anticipate the changed circumstances in the original contract. For example, in N.Y. State 910 we noted that if the representation was expected to be completed within a year, and the contract therefore did not make provision for the law firm's customary annual increases in billable rates, an amendment a year later would be tested under Rule 1.5, and not Rule 1.8. A third factor is the sophistication of the client, and whether the client is a frequent user of legal services and thus is in a position to determine the reasonableness of the proposed amendment. A fourth factor is whether the amendment benefits the client. For example, we noted in N.Y. State 910 that, if the client is no longer able to pay an agreed-upon hourly rate and the contract is amended to provide for a contingent fee, the amendment has been held to be subject to Rule 1.5 rather than Rule 1.8. ABA 11-458 (2011). New York case law often applies higher scrutiny to modifications of retainer agreements that are beneficial to the attorney. *See, e.g.*, *Baye v. Grindlinger*, 78 A.D.2d 60, 432 N.Y.S.2d 624 (2d Dep't 1989) (as to contracts made between the attorney and the client subsequent to employment which are beneficial to the attorney, it is incumbent on the attorney to show that the terms are fair and reasonable and fully known and understood by the client), *Naiman v. N.Y. Univ. Hosps Ctr.*, 351 F. Supp.2d 257, 264 (S.D.N.Y. 2005) (midstream modifications of retainer agreements must be carefully scrutinized and attorney must show that the terms are fair and reasonable to the client).

17. Applying these factors, we believe a retainer agreement amendment to require that the client pay the lawyer out of the proceeds of any loan taken out by the client should be scrutinized under Rule 1.8(a) as a business transaction between the lawyer and client. First, it is not clear there has been any change of circumstances, other than the fact that the client has determined to pay a litigation funding firm for earlier access to funds. Second, Rule 1.8, Cmt. [16] provides that when a lawyer negotiates a contractual security interest in property other than that recovered through the lawyer's efforts in the litigation, the acquisition of the security interest is a business or financial transaction with a client that is governed by Rule 1.8(a). Similarly, the amendment here would give the lawyer access to the proceeds of the client's advance, which appear to be different from the moneys recovered through the lawyer's efforts. Third, the amendment here would benefit solely the lawyer. Moreover, it might come at a significant cost to the client, both because a client who never develops symptoms meriting an award from the settlement fund might otherwise never have to pay the lawyer, and because, if the client does later develop symptoms and obtains an award from the settlement fund, the client will have to pay interest on the amount taken by the attorney as his fee under the amended agreement.

18. The inquiry here does not specify the terms on which the funding firm would make advances to individuals covered by the settlement. Literature on litigation funding firms indicates that such firms often charge 3-5 percent *monthly* for such advances (and sometimes more).[2] Because many litigation funding firms style their funding as a purchase of an interest in the eventual judgment rather than as a loan, most litigation funding loans are not considered to be "loans" under state law, and the effective interest rate generally is not considered to be "interest" for purposes of state usury laws. Thus, where the retainer agreement provides that the lawyer is entitled to take the contingency fee proportion of any advance arranged from a litigation funding firm, the agreement is essentially requiring the client to pay a high rate of interest in

order to provide the lawyer with a portion of the legal fee at an earlier time than might otherwise be the case. For this reason, at least one state that regulates the provision of litigation funding services prohibits the proceeds of the litigation funding from being used for attorneys' fees or costs of litigation. *See* Okla. S. Supp. 2013, 14A-3-814(A)(8).

19. A key question under Rule 1.8(a) is whether the client "expects the lawyer to exercise professional judgment [in the transaction] for the benefit of the client." That question can turn on a number of factors, including the sophistication of the client and the complexity of the transaction. Here, a critical question for the client in assessing the proposed amendment to the fee agreement is whether the existing fee agreement already permits such a deduction of the fee from the proceeds of the advance, and, if not, whether agreeing to the amendment is in the client's best interest. When the lawyer explains to the client how a court would interpret the existing contract and whether the amendment benefits the client, the client will likely expect the lawyer to be exercising professional judgment for the benefit of the client. In addition, if the fee agreement does not already provide for taking the fee out of the loan proceeds—and the lawyer presumably would be seeking an amendment only if the lawyer concludes that the fee agreement does not already so provide or is not sufficiently clear—the client clearly needs the protections provided by Rule 1.8(a).

20. When Section 1.8(a) is applicable, the amendment must be fair and reasonable to the client and the terms of the transaction must be fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; the client must be advised in a writing of the desirability of seeking (and be given a reasonable opportunity to seek) the advice of independent legal counsel, and the client must give informed consent, in a writing signed by the client, to the essential terms of the transaction, including whether the lawyer is representing the client in the transaction and whether the lawyer is receiving a referral fee or other compensation from the litigation funding firm. In addition, the lawyer has the burden of demonstrating that the terms of the amendment are fair and reasonable.

Conclusion

21. Where a contingent fee agreement provides for the fee to be calculated on the amount of the recovery "by settlement or judgment," whether the lawyer may take a percentage of the amount loaned to the client by a third party is a question of law beyond the jurisdiction of the Committee. A retainer agreement may ethically provide for such a payment *ab initio*. If it does not, the lawyer may ask the client to amend the retainer agreement to provide specifically for such payment. However any such amendment would be subject to scrutiny under Rule 1.8(a) as a business transaction with a client, because (1) there has been no apparent change of circumstances, other than the fact that the client has determined to pay a litigation funding firm for earlier access to funds, (2) the lawyer apparently would be taking funds from property other than that recovered through the lawyer's efforts in the litigation, (3) the amendment would benefit solely the lawyer, (4) the advance would likely come at a significant cost to the client, and (5) it is likely that the client would be looking to the lawyer to exercise professional judgment on behalf of the client in connection with the amendment.

Endnotes

1. See generally ABA, Commission on Ethics 20/20, Informational Report to the House of Delegates on Alternative Litigation Finance, available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf.
2. *See* Jonathan T. Molot, "A Market Approach to Litigation Accuracy," 2009, paper presented at "Third Party Litigation Funding and Claim Transfer—Trends and Implications for the Civil Justice System," RAND Institute for Civil Justice and UCLA Law policy symposium, RAND Corporation, June 2, 2009; *see also Rancman v. Interim Settlement Funding Corp.*, 789 N.E.2d 217 (Ohio 2003)(financing transaction had return exceeding 180 percent per year). *See generally* Steven Garber, Alternative Litigation Funding in the United States: Issues, Knowns and Unknowns (Rand Corp. 2010).

(52-14)

* * *

Opinion 1052 (3/25/15)

Topic: Compensating clients to rate lawyer on Internet website

Digest: A lawyer may give clients a $50 credit on their legal bills if they rate the lawyer on an Internet website such as Avvo that allows clients to evaluate their lawyers, provided the credit against the lawyer's bill is not contingent on the content of the rating, the client is not coerced or compelled to rate the lawyer, and the ratings and reviews are done by the clients and not by the lawyer.

Rules: 7.1(a)-(d), 7.2(a), and 8.4(c)

Facts

1. A lawyer would like more of his clients to rate him on Avvo, a website that allows clients to rate their lawyers with one to five stars. To rate a lawyer, a client would visit the Avvo website, look up the

lawyer by name, and submit a review. A sample review might say, "I could not be more pleased with Ms. X. She is thorough, honest, caring and available. Her prices are reasonable compared to others. She specializes in elder law and knows her specialty," or "Attorney Z did a great job on my case. He was very upfront about what to expect and he got very good results. Highly recommended." (Many reviews are longer.) Clients also rate the lawyer on a scale of 1 to 5 for five categories: "Overall rating," "Trustworthy," "Responsive," "Knowledgeable," and "Kept me informed," and clients either check or do not check a box saying that they would "recommend" the lawyer. (For more information about Avvo ratings and how they are calculated, see *http://www.avvo.com/support/avvo_rating*.)

2. After a client writes a review online, the review is read internally at Avvo before it is posted on the website. Once Avvo has approved a review, it will be posted under the heading "Client Reviews" on the attorney's page on the Avvo website and will become part of the attorney's profile. The inquiring attorney is apparently confident that if clients take the time to rate him, he will receive high ratings and positive reviews, which will help to boost his reputation and encourage other clients to hire him. The inquirer therefore wants to offer clients a $50 credit on their bills for legal fees if they rate him on Avvo. The credit would not be contingent on the content of a review, the scores in the ratings, or whether a client checks the box recommending the lawyer to others.

Question

3. May a lawyer give clients a $50 credit on their legal bills if they rate the lawyer on an Internet website that allows clients to evaluate their lawyers?

Opinion

4. The inquiry raises issues under several provisions of the New York Rules of Professional Conduct (the "Rules"). We take these issues in turn.

A. Rule 7.2(a): Giving a person something of value to recommend the lawyer

5. The first issue is whether giving clients a $50 credit against their legal bills if they rate the lawyer would violate Rule 7.2(a), which provides, in pertinent part, as follows:

> A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client ….

Rule 7.2(a) also has certain exceptions that do not apply here.

6. Rule 7.2(a) does not apply because the inquirer is asking for a rating, not a recommendation. The inquirer says he will give a $50 credit to any client who rates the lawyer, without regard to the content of the rating and without regard to whether the client recommends the lawyer to others. A client thus remains free to give the lawyer a bad rating and remains free not to check the box saying that she would recommend the lawyer to others. Moreover, the inquirer is not making the $50 credit contingent on whether some future person retains the lawyer as a result of the rating. Thus, the credit is not a "reward" for making a recommendation "resulting in employment by a client."

7. If the inquirer made the credit contingent on receiving a positive review or high scores, or if the inquirer made the credit contingent on being retained by a new client as a result of the rating, then the credit would violate Rule 7.2(a). Those are not the facts before us.

B. Rules 7.1(a), (d) and (e) and Rule 8.4(c): Testimonials from clients

8. Rule 7.1(d)(3) allows lawyers to advertise testimonials from current and former clients – but Rule 7.1(e)(4) requires that "in the case of a testimonial or endorsement from a client with respect to a matter still pending, the client gives informed consent confirmed in writing." The term "testimonial" is not defined in the Rules of Professional Conduct, but the term "advertisement" is defined in Rule 1.0(a) as follows:

> "Advertisement" means 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. It does not include communications to existing clients or other lawyers. [Emphasis added.]

9. A client's freely given review or rating is not an "advertisement" within the definition in Rule 1.0(a) because the review is not made "by or on behalf" of the lawyer.

10. If the inquirer were to coerce or compel a client to rate the lawyer with respect to a pending matter, then the rating (*i.e.*, testimonial) would be "on behalf" of the lawyer, and would hence be an

"advertisement" subject to Rule 7.1(e)(4). And if the lawyer, rather than the client, were to write the review or fill in the ratings, then they would be "by…the lawyer," and would be advertisements under Rule 1.0(a) subject to Rule 7.1(a), which prohibits advertisements that are "false, deceptive or misleading." A rating that purports to be made by a client but was actually made by the lawyer would be deceptive and misleading (and perhaps false as well). *See* N.Y. State 661 (1994) ("a dramatization using a fictional client testimonial is unethical because it is inherently false, deceptive and misleading").

11. Moreover, a coerced rating would violate Rule 7.1(e)(4) because the lawyer would lack the client's "consent." Consent must be voluntary—it cannot be compelled. But according to the inquirer, clients can freely choose whether to rate the lawyer. The only inducement is a $50 credit to those who do so. That is not coercion or compulsion; it is an incentive. *Cf.* N.Y. State 873 (2011) (Rules of Professional Conduct do not prohibit an attorney from offering a prize to join the attorney's social network as long as the prize offer is not illegal).

12. Furthermore, Rule 8.4(c) provides that a lawyer or law firm shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Even as to testimonials from former clients—which are not subject to Rule 7.1(e)(4)'s requirement of informed consent—a coerced rating, or one written by the lawyer, would constitute not only an advertisement subject to Rule 7.1(a) but also conduct involving deceit and misrepresentation in violation of Rule 8.4(c), attempting to pass off the lawyer's words and opinions as the former client's. *See* Rule 7.1, Cmt. [6] ("all communications by lawyers, whether subject to the special rules governing lawyer advertising or not, are governed by the general rule that lawyers may not engage in conduct involving dishonesty, fraud, deceit or misrepresentation"); N.Y. State 873 ¶ 15 (2011) ("Whether or not the prize offer is an advertisement, the inquirer must be honest").

13. Since the inquirer has not asked about advertising the Avvo rating, we do not address whether Avvo ratings are "bona fide professional ratings" within the meaning of Rule 7.1(b)(1), or how other advertising provisions might apply if the inquirer were to advertise his Avvo rating. Nor do we address whether Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, requires the inquirer to disclose that he has given certain clients a $50 inducement to rate him on Avvo. Finally, we do not address whether the inquirer's plan complies with the Federal Trade Commission's Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. Part 255. (The FTC Guides are available online at *http://1.usa.gov/1CikwjJ*.) Whether a lawyer's conduct complies with FTC guidelines is a question of law beyond our jurisdiction.

Conclusion

14. A lawyer may give clients a $50 credit on their legal bills if they rate the lawyer on an Internet website such as Avvo that allows clients to evaluate their lawyers, provided the credit against the lawyer's bill is not contingent on the content of the rating, the client is not coerced or compelled to rate the lawyer, and the ratings and reviews are done by the clients and not by the lawyer.

(2-15)

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Agenda

8:30 a.m. – 9:00 a.m.	Registration
9:00 a.m. – 9:10 a.m.	Welcome and Introduction
9:10 a.m. – 9:35 p.m.	Brief Update on Amendments to the Family Health Care Decisions Act *0.5 MCLE Credits in Professional Practice*
9:35 a.m. – 10:25 a.m.	History and Context of Aid in Dying *1.0 MCLE Credit in Professional Practice*
10:25 a.m. – 10:35 a.m.	Refreshment Break
10:35 a.m. – 11:25 a.m.	*Myers et al. v. Schneiderman* *1.0 MCLE Credit in Professional Practice*
11:25 a.m. – 12:15 p.m.	New York State Legislative Proposals and the Patient Self Determination Act *1.0 MCLE Credit in Professional Practice*
12:15 p.m. – 1:15 p.m.	Lunch (on your own)
1:15 p.m. – 2:05 p.m.	Ethics and the Right to Die *1.0 MCLE Credit in Ethics*
2:05 p.m. – 2:15 p.m.	Refreshment Break
2:15 p.m. – 3:55 p.m.	Issues for Counsel: Panel Discussion with Case Studies *2.0 MCLE Credits in Professional Practice*
4:00 p.m.	Adjournment

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