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ONEONONE

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

Message from the Chair


Emily Franchina

My interim rector leads a discussion called "Aging in Place" at our church in Cold Spring Harbor. There is a group that meets on a monthly basis to discuss issues and concerns that confront our elderly parishioners and their families. As always, he encouraged us all to read a particular book on the topic and join the discussion group. Fred knows that I work with an aging population, so as I departed he mentioned that "it was a quick read." The book, by Atul Gawande, is *Being Mortal: Medicine and What Matters in the End*, published in October 2014. Dr. Gawande is from Boston, Massachusetts and is a surgeon with a practice at Brigham and Women's Hospital in Boston.

I wasn't sure that I wanted to spend my time on this story of aging and death, since I experience those issues so regularly in my practice; however, the book is a must read for everyone. We are all aging, as the author so clearly describes in the opening chapters of the book, but how we age and what our life and death will be is, in part, how we as a society treat our population.

"We've been wrong about what our job is in Medicine. We think our job is to ensure health and survival. But really, it is larger than that. It is to enable well-being. And well-being is about the reasons one wishes to be alive." *Being Mortal*, Epilogue. Dr. Gawande talks to us about what it means to live well near the conclusion of our lives and not just exist.

As a country, we are obsessed with youth and beauty. Surgical weight loss, face lifts, beauty products, all focus our attention toward the unattainable, but medicine cannot cure all. Dr. Gawande describes families struggling with issues of aging and death. "The battle of being mortal is the battle to maintain the integrity of one's life."

The question of what is a worthwhile life is a question that is answered differently for all of us.

Inside

NYSBA

(l-r) Seth Rosner, Robert Ostertag and Emily Franchina

Please join me in congratulating a member of our Section—the founding member—in his receipt of the General Practice Section Award. Robert Ostertag was admitted to practice in 1957 and practices in Poughkeepsie, New York. In the late 1970s, he and Seth Rosner discussed the viability and the necessity of a section devoted to general practice attorneys. After some research during which they realized no state bar had a general practice section or committee, Seth created the Conference of State Bar General Practice Sections, and appointed Bob as its first chairman. Bob asked the then-President Elect, Tony Palermo, to create a NYSBA General Practice Section, and was appointed to a task force to investigate the idea along with Seth Rosner. The result, of course, was that Bob was appointed first Chair of the newly created General Practice Section, and Seth Rosner, the second. With close to 2,000 members, our Section continues to provide support and information to attorneys in small and solo general practices as well as large firm attorneys who value the diversity of our membership. A past president of the NYSBA and vocal participant in House of Delegates meetings, Bob continues to make an impact in our Association.

A tangible memento of this award was presented at our Annual meeting on January 26, 2016 at the New York Hilton Midtown. Following the presentation, David Rosen, a former court Attorney/Referee at NYS Supreme Court in Queens, presented a CPLR update. Sarah Jo Hamilton, our Chair on Professional Discipline, and Martin Minkowitz, our program chair, introduced a program entitled "New Era in Attorney Ethics and Discipline: Ethics and Procedures of Attorney Discipline under the New Uniform Rules." Moderated by Michael S. Ross from the Law Offices of Michael S. Ross in Manhattan, we were honored to welcome the panelists:

- The Hon. A. Gail Prudenti, currently of the School of Law at Hofstra University, and former Chief Administrative Judge of the Courts of New York State.
- The Hon. Karen K. Peters, Presiding Justice of the Appellate Division, Third Department.
- The Hon. Richard T. Andrias, Associate Justice of the Appellate Division, First Department.
- Glenn Lau-Kee, Esq., the immediate past president of the NYSBA, of Kee & Lau-Kee, PLLC of Manhattan.
- Gregory J. Huether, Esq., the chief attorney of the Fourth Department of the Grievance Committee.
- Sean M. Morton, Esq., Chief Court Attorney of the Appellate Division, Third Department.

As always, we welcomed Timothy J. O'Sullivan from the New York State Lawyers' Fund for Client Protection in Albany to update our Section on the work of the fund. We closed our program with hot tips from the experts, a rapid fire presentation that has consistently provided useful guidance for the GP attorney.

Our Spring meeting will be held in Poughkeepsie. Mark your calendars, May 6 and 7, for what will be an informative and fun weekend at the Poughkeepsie Grand Hotel. The program will be held at the Franklin D. Roosevelt Presidential Library and Museum.

Our General Practice membership has always been a wonderful source for information, networking and collegiality! I look forward to seeing you.

Respectfully submitted,
Emily F. 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. As always, our journal provides the most recent New York State Bar Association Ethics Committee's opinions. This issue, we are pleased to offer you the following articles, which we hope will be found very helpful and informative:

- ***The Common-Law Public Documents Exception to the Hearsay Rule, Although Helpful, Is Burdensome***: Terrence L. Tarver highlights the personal injury ramifications of the public documents exception of the business records exception to hearsay evidence.
- ***New York's Proposed Aid-in-Dying Bill: What You Should Know***: Anthony J. Enea provides a synopsis of the proposed New York Aid-in-Dying Bill and euthanasia, while highlighting the potential requirements.
- ***Third-Party Settlement Under the Workers' Compensation Law and Attorney Fees***: *One on One*'s Co-Editor Martin Minkowitz shares his expertise in an article discussing third-party settlement and attorney fees in workers' compensation cases.
- ***ERISA: An Overview***: Lilah Loughran exposes the readership to a comprehensive guide to private retirement, health and other welfare benefit plans, which all legal practitioners should be aware of for their own practice and for clients.
- ***Commercial Litigation in NY State Courts, Fourth Edition***: *One on One*'s Co-Editor Richard Klass provides a focused review of the latest update by Robert L. Haig.
- ***Piercing the LLC Veil Under New York Law***: Stuart B. Newman and Tyler Silvey provide a summary of advice lawyers can provide to corporate clients with regard to avoid personal liability for corporate debts and obligations.

Martin Minkowitz

- ***How to Stay Motivated: Take a Minute to Remember:*** *One on One*'s Co-Editor Matthew N. Bobrow provides a tribute to Judge Judith Kaye. He gives a brief history of her life but highlights the most inspirational moments.
- ***How to Plan for a Special Needs Spouse or Child During a Divorce:*** Gary E. Vegliante and Alina Vengerov, Eldercare and Matrimonial law experts, share their insights into to the best legal instruments and tools available, and provide details as to the feasibility of each.
- ***Expand Federal Civil Rights Jurisdiction:*** Sanford Rubenstein, in a letter to the editor, advocates for increased federal scrutiny of state police practices.

Article Submission

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), Richard Klass at richklass@courtstreetlaw.com (718-643-6063), or Matthew Bobrow at matthew.bobrow@law.nyls.edu (908-610-5536) to discuss ideas for articles.

Please see Sanford Rubenstein's ***Letter to the Editor***. We have reinstated the "Letter to the Editor" as a way for our readership to express their personal views in our journal. Please address these submissions to matthew.bobrow@law.nyls.edu.

Sincerely,
Martin Minkowitz
Richard Klass
Matthew Bobrow
Co-Editors

Letter to the Editor

Expand Federal Civil Rights Jurisdiction

By Sanford Rubenstein

For over twenty years, I have represented victims and the families of victims who have been either badly injured or killed as the result of allegations of excessive force used by police in New York City and the New York Metropolitan area. The list of victims whose families I have represented for wrongful death is too long to list. It includes fourteen families who have lost fathers, sons, husbands and brothers.

In addition, I was a member of the legal team that represented Abner Louima, a victim who was sodomized in the bathroom of a New York City police precinct by a New York City police officer in Brooklyn, New York. For many years, I have also been an activist on the front lines of the movement for social justice and have been recognized by Civil Rights Organizations for those efforts. My perspective therefore provides valuable insight in the current debate as to how to restore faith and confidence of the public in our police. A comment made to me by a very successful African American businessman sums up the perception that has been expressed in public by so many, " I fear more violence by the police against my teenage son than from the common criminal."

Congress needs to hold hearings to investigate the feasibility of expanding Federal Civil Rights Statutes to give the U. S. Department of Justice jurisdiction to prosecute reckless acts by police causing wrongful death or serious injury to victims.

History is replete with examples of the U. S. Congress passing federal legislation to address serious problems that our country faces, including taking action to safeguard Americans' civil rights.

Today, given what has been happening all across our nation, a new federal remedy is needed to assure the safety of all Americans in communities across our country. The use of excessive force by police that leads to wrongful death is a pressing national problem, which must be addressed by Congress.

Not only do these wrongful deaths of innocent victims cause horrible grief and suffering for the families of those killed, but they also result in the public's loss of confidence in the police, which makes citizens less willing to cooperate with the local police in their day-to-day investigations of criminal activity. We need the police, and most police clearly are law abiding and well intended, but those police who violate the law must be held accountable to set an example for others.

A 2015 *Wall Street Journal* article reported that despite the increased number of police officers tried in court for on-duty killings, "no single officer has been convicted of murder or manslaughter this year." In addition, the *Washington Post* noted in 2015 alone, several hundred people have been shot dead by police.

In recent years, the U. S. Department of Justice has opened twenty "pattern or practice" investigations looking at whether police departments have repeatedly violated residents' civil rights, and it is presently enforcing 13 consent agreements with municipalities throughout the country that give the federal government oversight of their local police departments.

There have been at least 975 fatal police shootings in the U.S. in 2015 according to a *Washington Post* database. Police have been charged with a crime in just eight of those shootings.

If they choose to, United States attorneys currently have the authority to investigate and prosecute intentional civil rights violations by police officers. One example of this authority being used was the case of the police torture of Abner Louima in the bathroom of a Brooklyn police precinct house, where the federal government took over the criminal investigation of the police officers who were involved and prosecuted those responsible.

Given the state of affairs in our Country today, Congress needs to hold hearings to investigate the feasibility of giving the U. S. Department of Justice jurisdiction, not only in Civil Rights cases where there is intentional wrongdoing by police, but also cases in which police conduct is reckless, causing the wrongful death of innocent victims.

I have discussed this proposal face-to-face with Hillary Clinton and met with her staff regarding this. I also had the opportunity to meet with Congressman John Conyers, Jr., of Michigan, the ranking minority member on the House Judiciary Committee and his staff regarding this. Now let's move forward and get it done. This really is a bipartisan issue; I look forward in the future to meeting with Republican leaders as well.

It is most important that the public trust in our system of justice. Having federal prosecutors at the helm working with the FBI in matters of reckless killings by police of innocent victims will, in my view, be extremely helpful in restoring the faith and confidence we need to have in those who police our society. To limit the ability of the involvement of federal prosecutors to cases of intentional acts leaves us exactly where we are now—with a public that is searching for solutions.

Sanford Rubenstein, Esq. is the senior partner at the law firm of Rubenstein & Rynecki.

The views expressed in this "Letter to the Editor" are of the author and not necessarily those of the Editors or Section Officers of the General Practice Section or the New York State Bar Association.

The Common-Law Public Documents Exception to the Hearsay Rule, Although Helpful, Is Burdensome

By Terrence L. Tarver

At the time of trial, a personal injury practitioner may rely on various evidentiary methods to have copies of documents admitted in evidence to prove his or her *prima facie* case without having to subpoena a records custodian to court to testify. A frequent method utilized is the business records exception to the hearsay rule found in CPLR 4518. This article, however, will focus on an exception to the hearsay rule that is not as prevalent, which is the common-law public documents exception.

In some cases, a personal injury practitioner may seek to admit in evidence a governmental agency report or memorandum, and in order to accomplish this, the common-law public documents exception to the hearsay rule can be helpful, although, as will be demonstrated below, it can be quite burdensome to comply with all the prerequisites.

The Public Documents Hearsay Exception in Practice

The common-law public documents exception to the hearsay rule states that "when a public officer is required or authorized, by statute or nature of the duty of the office, to keep records or to make reports of acts or transactions occurring in the course of the official duty, the records or reports are admissible in evidence."[1]

Vincent C. Alexander explains the justification behind this exception in his practice commentaries to McKinney's CPLR 4520, noting that "[t]he common law exception for public records is justified by the presumed reliability inherent in the recording of events by public employees acting in the regular course of public duty. Public employees make records pursuant to the sanction of public duty and have no motive to falsify."[2]

An example of the use of the common-law public documents exception to get a report admitted in evidence in a personal injury case includes *Kozlowski v. City of Amsterdam*.[3] *Kozlowski* was a wrongful death action whereby Plaintiff's decedent committed suicide in jail using his socks. Plaintiff made allegations of negligent supervision, and at trial, sought to enter a copy of a report of the Medical Review Commission of the State Commission of Corrections, which concluded defendant violated 9 NYCRR 7504.1 as it failed to maintain constant supervision of the decedent under the circumstances. Although the trial court denied admission of the report, the Third Department reversed, holding said report was admissible pursuant to the common-law public documents exception to the hearsay rule.[4]

The Second Department case of *Martin v. Ford Motor Co.* is further illustrative.[5] In *Martin*, Plaintiff sued Defendant contending that when he shifted gears of his 1990 Lincoln, the throttle control malfunctioned and stuck in an open position, thereby causing the vehicle to accelerate forward.[6] The Second Department held that a copy of a 1989 report prepared by the National Highway Traffic & Safety Administration pertaining to studies of sudden acceleration was admissible under the aforesaid exception.[7]

While the scope of this article is limited only to the common-law public documents exception to the hearsay rule, it should be noted that said exception does have a statutory companion, which is found in CPLR 4520.[8] However, the common-law public documents exception is not only broader in scope than CPLR 4520, but also has not been superseded by it.[9]

Authenticating Public Documents: A Two-Step Process

While a public document that meets the common-law public documents exception to the hearsay rule is admissible without testimony of the official who made it, its authenticity, nonetheless, must still be proven.[10] Even though authentication of certain public records may be accomplished by certification as provided in CPLR 4518(c), it still is a two-step process.[11] This two-step process involves CPLR 4540(a) and (b) or CPLR 4540 (a) and (c), depending upon jurisdiction.[12]

Utilizing CPLR 4540(b)—Certificate of Officer of the State

"If the document is attested as correct by the official or deputy having legal custody of it, then it becomes *prima facie* evidence of such record."[13] A proper attestation, however, includes three things: a comparison of the copy with the original, a statement of the accuracy of the copy, and compliance with one of the three allowable methods of certification pursuant to CPLR 4540(b).[14]

Addressing the necessary language of an attestation, the New York City Criminal Court in *People v. Watson* explained that it "is similar in import to the language of comparison found in common-law exemplifications and sworn copies."[15] Further, it held that there was not any particular language under CPLR 4518(c) or CPLR 4540 that an attestation was required to have, save for the language regarding a comparison and accuracy.

As for those allowable methods under CPLR 4540(b), entitled, "Certificate of officer of the state," they are as follows:

1) Where the copy is attested by an officer of the state, it shall be accompanied by a certificate signed by, or with a facsimile of the signature of, the clerk of court having legal custody of the record, and, [sic] except where the copy is used in the same court or before one of its officers, with the seal of the court affixed; or

2) [S]igned by, or with a facsimile of the signature of, the officer having legal custody of the original, or his deputy or clerk, with his official seal affixed; or

3) [S]igned by, or with a facsimile of the signature of, the presiding officer, secretary or clerk of the public body or board and except where it is certified by the clerk or secretary of either house of the legislature, with the seal of the body or board affixed; and

4) If the certificate is made by a county clerk, the county seal shall be affixed.[16]

Utilizing CPLR 4540(c)—Certificate of Officer of Another Jurisdiction

When CPLR 4540(b) cannot be utilized, such as when the records sought to be authenticated are in another jurisdiction, a practitioner must turn to the even more oppressive requirements of CPLR 4540(c). Simply stated, CPLR 4540(c) essentially requires a certification of the certification.

Under this provision, the signature and seal of the attesting official will not be sufficient; instead, the attesting official's certification must be accompanied by a certificate from another authorized person, and the certificate must have and/or state the following:

1. The official seal affixed;

2. That the signature of the attestor of the certification is believed to be genuine; and

3. That the attestor of the certification has legal custody of the records in question.[17]

The other authorized person certifying the attesting official's certification can be either of the following:

1. A judge of a court of record of the district or political subdivision in which the record is kept with the seal of the court affixed; or

2. Any public officer having a seal of office and having official duties in that district or political subdivision with respect to the subject matter of the record with such officer's seal affixed.[18]

Even After All Efforts, the Documents Still May Not Be Prima Facie Evidence

Amazingly, if the documents sought to be admitted in evidence are only admitted pursuant to the common-law public documents exception to the hearsay rule, then "they will not be prima facie [sic] evidence of the facts contained in them, but merely some evidence which the trier of facts is free to disbelieve even though the adverse party offers no evidence on the point."[19] Consider that for a moment. A jury, upon whim or whatever suits its fancy, is entirely within its right to completely disregard the evidence introduced, and opposing counsel does not even have to offer evidence on the topic. Thus, all of the practitioner's hard work and due diligence may be for naught.

Given all this, a practitioner is encouraged to avail him or herself to other methods of authentication, if at all possible, such as through a Notice to Admit under CPLR 3123 or even a stipulation. Moreover, using other exceptions to the hearsay rule to have his or her documents admitted in evidence, such as via the ancient documents exception, may be much easier and more beneficial.[20]

Obviously, not all documents are old enough for a practitioner to take advantage of the ancient documents exception. Therefore, the frequently utilized business records exception to the hearsay rule in CPLR 4518 can be another fantastic option. The business records exception cites to sections 2306 and 2307 of the CPLR. CPLR 2306 covers medical records of a department or bureau of a municipal corporation or of the state, and CPLR 2307 pertains to items of a library, department, or bureau of a municipal corporation or of a state. More importantly, if the documents are admissible pursuant to CPLR 4518, then they "are prima facie [sic] evidence of the facts contained" in them.[21]

Conclusion

Although the common-law public documents exception to the hearsay rule can be yet another arrow in the quiver of a personal injury attorney, the song and dance required by same using CPLR 4540 just to have a document admitted in evidence is onerous, especially in light of the fact that the jury is free to disbelieve the information contained within it. Accordingly, a personal injury practitioner should attempt to avoid it, using it only as a last resort, and if it is believed that the exception will be called upon, then it is best to permit oneself ample time prior to the commencement of trial to execute the mandated prerequisites.

Endnotes

1. *Miriam Osborn Mem. Home Assn. v. Assessor of City of Rye*, 9 Misc.3d 1019, 1027 (Sup. Ct., Westchester Co. 2005), citing *Prince, Richardson on Evidence* § 8-1101, at 688 [Farrell 11th ed]; *People v. Hudson*, 237 A.D.2d 943 (4th Dept. 1997). *See also Richards v. Robin*, 178 A.D. 535, 539 (1st Dept. 1917) (citations omitted).
2. Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C4520:2 (citations omitted). Mr. Alexander further explains, "[a]s with the hearsay exception for business records (CPLR 4518), the reliability of public records is assured by the routine and repetitive circumstances under which such records are made. An additional justification is public convenience: If government employees are continually required to testify in court with respect to matters they have witnessed or in which they have participated in the line of duty, the efficiency of public administration will suffer." *Id*. (citations omitted).
3. 111 A.D.2d 476 (3d Dept. 1985).
4. *Id.* at 478.
5. 36 A.D.3d 867 (2d Dept. 2007).
6. *Martin v. Ford Motor Co.*, 2004 WL 5916909 (Sup. Ct., Queens Co. 2004).
7. *Martin*, 36 A.D.3d at 867. S*ee also Martin, supra*, n. 6.
8. The scope of this article also does not include any analysis of the admissibility of reports from public agencies pursuant to the Federal Rules of Evidence, particularly Rule 803(8)(C), including any State Courts that may have cited said Rule. For guidance regarding same, a starting place includes the rule, *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988), *Cramer v. Kuhns*, 213 A.D.2d 131 (3d Dept. 1995), *Haggerty v. Moran Towing and Transportation Co., Inc.*, 162 A.D.2d 189 (1st Dept. 1990).
9. *Consolidated Midland Corp. v. Columbia Pharmaceutical Corp.*, 42 A.D.2d 601 (2d Dept. 1973); *Neuschotz v. Newsday Inc.*, 12 Misc.3d 1198(A) (Sup. Ct., Kings Co. 2006). S*ee also Flury v. Edwards,* 14 N.Y.2d 334 (1964) whereby the Common-Law Hearsay Exception for prior testimony was not superseded by §348 of the Civil Practice Act, which is the statutory predecessor to CPLR 4517, meaning such should be equally applicable for this Common-Law Exception; CPLR 4543 ("[n]othing in this article prevents the proof of a fact…by any method authorized…by the rules of evidence at Common-Law").
10. *Brown v. SMR Gateway 1, LLC*, 22 Misc.3d 1139(A) (Sup. Ct., Kings Co. 2009), citing *People v. Garneau*, 120 A.D.2d 112, 166 (4th Dept. 1976); *Sangiacomo v. State*, 13 Misc.3d 1246(A) (Ct. Cl. 2006).
11. *Brown*, 22 Misc.3d at 3, *Miriam*, 9 Misc.3d at 1029, *People v. Baker*, 183 Misc.2d 650, 653 (Cty. Ct., Oneida Co. 2000).
12. Miriam, 9 Misc.3d at 1029; Brown, 22 Misc.3d at 3. This assumes the document is not an original and is a copy. The scope of this article is limited to subsections (a), (b), and (c) of CPLR 4540, not subsection (d), entitled, "Printed tariff or classification subject to public service commission, commissioner of transportation or interstate commerce commission." It is also limited to the use of CPLR 4540 for authentication and is not meant to address possible authentication via other methods, such as pursuant to CPLR 4543, or even other methods to get the documents in evidence.
13. *Brown*, 22 Misc.3d at 3, citing CPLR 4540(a).
14. *Id. See also Miriam, supra,* n. 1; *Baker, supra*, n. 11.
15. 167 Misc.2d 441, 448 (N.Y. Crim. Ct. 1995) (citing Richardson on Evidence (10th ed), §§ 649-650).
16. CPLR 4540(b).
17. CPLR 4540(c).
18. *Id*.
19. *Consolidated Midland Corp.*, 42 A.D.2d at 601 (citations omitted), *Martin*, 36 A.D.3d at 867.
20. The Second Department in *Essig v. 5670 58th Street Holding Corp.*, 50 A.D.3d 948, 949 (2d Dept. 2008), held that the ancient documents rule permits documents to be self-authenticating and are proof of the facts stated therein as long as they are "more than thirty years old, are free from any indication of fraud or invalidity, and were discovered [in its natural place of custody]."
21. CPLR 4518.

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New York's Proposed Aid-in-Dying Bill: What You Should Know

By Anthony J. Enea

Every year thousands of Americans grapple with excruciatingly painful terminal illnesses. For many of these individuals, the thought of their lives being unnecessarily prolonged is abhorrent. While the issue of euthanasia and/or physician assisted suicide has been front and center in the American psyche since the days of Dr. Kevorkian and Karen Ann Quinlan, the controversial nature of this issue is still as strong today as it was forty to fifty years ago.

While euthanasia is illegal in most states and has been found morally unethical by many organized religions, there are now four (4) states (Washington, Oregon, Vermont and Montana) where physician assisted dying (PAD) is permitted. Additionally, it is also permitted in Bernalillo County, New Mexico.

The major distinction between euthanasia and PAD is who administers the lethal dose. With euthanasia, the physician or other third party administers the lethal dose, whereas with PAD, the lethal dose is self-administered by the patient and the patient determines whether and when to administer it.

New York State Assemblywoman, Amy Paulin, D-Scarsdale, has sponsored the Aid-in-Dying bill in the Assembly, while Senator John Bonacic, R-Mt. Hope (Orange County), has sponsored the bill in the Senate. The proposed legislation was first introduced in February 2015, and a new push for its enactment has occurred this February.

Under the proposed legislation, the Public Health Law of New York would be amended to include a new Article 28-F "Aid in Dying" provision. The proposed legislation would permit a terminally ill adult (age 21 years or older and expected to live six months or less because of terminal illness or condition) who has the capacity (ability) to understand and appreciate the nature and consequences of health care decisions (including risks and benefits), and who is able to reach and communicate an informed decision to a physician licensed to practice in New York State, to decide to end his or her life.

The proposed legislation allows the attending physician (one who has primary responsibility for the care and treatment of a patient's terminal illness) to prescribe a lethal dose of medication to the terminally ill patient that he or she can self administer. The medication has to be capable of ending life and can include any other ancillary medication(s) intended to minimize the discomfort to the patient.

The request for this medication must be made in a writing which is signed and dated by the patient and witnessed by at least two (2) individuals who, in the presence of the patient, attest that to the best of their knowledge and belief, the patient has capacity, is acting voluntarily, and is not being coerced to sign the request. One of the witnesses cannot be a relative of the patient (by blood or by marriage). Additionally, the witnesses can neither be individuals who would be entitled to inherit upon the death of the patient, the attending physician, nor the owner or operator of a health care facility where the patient is residing or receiving treatment.

One of the issues that will surely arise when a decision is made by a terminally ill patient to end his or her life is whether the patient has the requisite capacity to make the decision. The proposed legislation provides that if, it in the opinion of the attending physician, the patient is suffering from a psychiatric or psychological disorder or depression causing impaired judgment, the attending physician shall refer the patient for counseling.

The proposed legislation further provides that no medication to end a patient's life shall be prescribed, dispensed or ordered until the person performing the counseling determines that the patient is not suffering from a psychiatric or psychological disorder or depression causing impaired judgment, and that the patient has the requisite capacity.

Although the proposed legislation has bi-partisan support, it is not without controversy and opposition in the NYS Assembly and Senate. Only time will tell whether the legislation is enacted. However, irrespective of where one's opinion falls on this issue, it is safe to say that whenever any legislation is proposed that allows one to end his or her own life, it should be approached carefully and with a great deal of caution and deliberation.

Anthony Enea, Esq. is a member of Enea, Scanlan & Sirignano, LLP with offices in White Plains and Somers, New York. He is a past chair of the Elder Law Section of NYSBA and Past President and Founding Member of the New York Chapter of NAELA. His telephone number is (914) 948-1500.

Third Party Settlement Under the Workers' Compensation Law and Attorney Fees

By Martin Minkowitz

An action for damages for injuries sustained by a worker can only be brought against someone other than the employer or co-employees. A claim for Worker's Compensation is the exclusive remedy if these injuries arise out of and are incurred in the course of employment. That is usually referred to as the exclusive remedy doctrine.[1] The exclusive remedy doctrine does not prevent a worker from suing someone else who caused the injury. That is considered a "Third Party Action" from a Workers' Compensation Law perspective. Workers' Compensation Law, Section 29, enumerates the rights to and remedies for bringing such an action against third party tortfeasors. The theory is that, as between the employer and the third party tortfeasor, the loss should fall on the one who caused the injury.

Based on this reasoning the employer should, and does, have a lien against any recovery from such an action for any money it paid or will have to pay under the Workers' Compensation Law (WCL), for the disability suffered by the employee.[2] The employer, or the insurance carrier that is paying the benefits, not only has a lien for money paid in benefits but also a credit against future obligations to pay. The employer or its carrier can offset the recovery in the third party action if it is in excess of the lien against what the employee will receive in benefits.[3]

The WCL permits the settlement of a WCL claim with the consent of the Workers' Compensation Board.[4] Counsel fees may be obtained with the approval or consent of the Workers' Compensation Board in successful claims for Workers' Compensation benefits. Indeed, once the Board in a compensation case awards them, counsel fees become a lien in the "compensation" award.[5] That sets the stage for the Appellate Division decision in *Pickering v. Car Win Construction Inc.*[6]

Pickering had a third party action for injuries he sustained and for which he was also receiving significant Workers' Compensation benefits. He was ready to settle the third party action and requested that the lawyer who handled his Workers' Compensation case seek permission from the Workers' Compensation carrier to settle the third party action. The carrier's consent to the settlement of the third party action was required because the carrier had a lien and an offset right. Absent that consent, the claimant would lose all future rights to Workers' Compensation because a settlement of the Third Party Action could prejudice the rights of the one paying compensation benefits.

The carrier agreed to let Pickering settle his third party action, and agreed to waive its lien of more than a half million dollars, provided that Pickering waive his right to any future benefits and discharge the employer and its carrier from any further liability to pay Workers' Compensation. Pickering and his counsel agreed, and the Board approved the settlement. Pickering and his counsel then requested counsel fees of more than $50,000 for the services in obtaining the negotiated waiver of the lien. They claimed that the law permits counsel fees as a lien against the compensation award, and that the carrier's waiver of its significant lien against the third party settlement is the same as a payment of compensation to claimant Pickering.

The Board disagreed and denied the award of counsel fees. On appeal the Appellate Division, Third Department affirmed the Board's decision. The court concluded that since compensation is defined by the WCL as "the money allowance payable to an employee," the waiver of the lien by the carrier was not "compensation" within WCL's definition of compensation. Accordingly, the court reasoned that this was not an award of compensation against which a counsel fee lien could apply.

The court recognized the obvious, that the waiver of the lien was a benefit to the claimant, but concluded that this benefit related to the third party proceeds and not to "compensation awarded" under the WCL.

Endnotes

1. § 11 WCL.
2. § 29 WCL.
3. § 29 WCL.
4. § 32 WCL.
5. § 24 WCL.
6. ___AD 3D___(11/19/15).

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ERISA: An Overview

By Lilah Loughran

The Employee Retirement Income Security Act of 1974 ("ERISA")[1] is a federal law that sets standards for private retirement, health and other welfare benefit plans. The U.S. Department of Labor ("DOL") is responsible for the interpretation and enforcement of ERISA. Among other things, ERISA provides that those individuals who manage plans (and other fiduciaries) must meet certain standards of conduct. The law also contains detailed provisions for reporting to the government and disclosure to participants. There also are provisions aimed at assuring that plan funds are protected and that participants who qualify receive their benefits.

The two most common ERISA-covered retirement plans are: (1) defined contribution (e.g., 401(k), 403(b), profit sharing, etc.) and (2) defined benefit or "pension" plans. However, Individual Retirement Accounts ("IRAs") are governed by the Internal Revenue Code of 1986, as amended (the "IRC"). IRAs are retail brokerage accounts that allow individuals to save for retirement with tax-free growth or on a tax-deferred basis. IRAs are governed by the IRC, which has many analogous provisions to ERISA, including the definition of fiduciary and the prohibited transaction rules.

Being a Fiduciary

ERISA does not require any employer to establish a plan. It only requires that those who establish plans must meet certain minimum standards, such as acting in a fiduciary capacity. A person is considered a fiduciary regarding a plan if he/she is exercising any discretionary authority or discretionary control with respect to the management of such plan or exercises any authority or control with respect to the management or disposition of its assets. Additionally, if a person is rendering investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, then such person is also a fiduciary.

There is a difference between offering investment advice and investment education. A person is considered a fiduciary by providing investment advice but is not considered a fiduciary by providing investment education. Both terms are defined by the DOL. Investment advice is defined as a recommendation that relates to the value of securities or other property or the advisability of investing in securities or other property, is rendered on a regular basis, pursuant to a mutual understanding that it will serve as a primary basis for investment decisions and is individualized based on the needs of the plan and/or participant. By contrast, investment education includes plan information, general financial and investment information, asset allocation models and interactive investment materials.

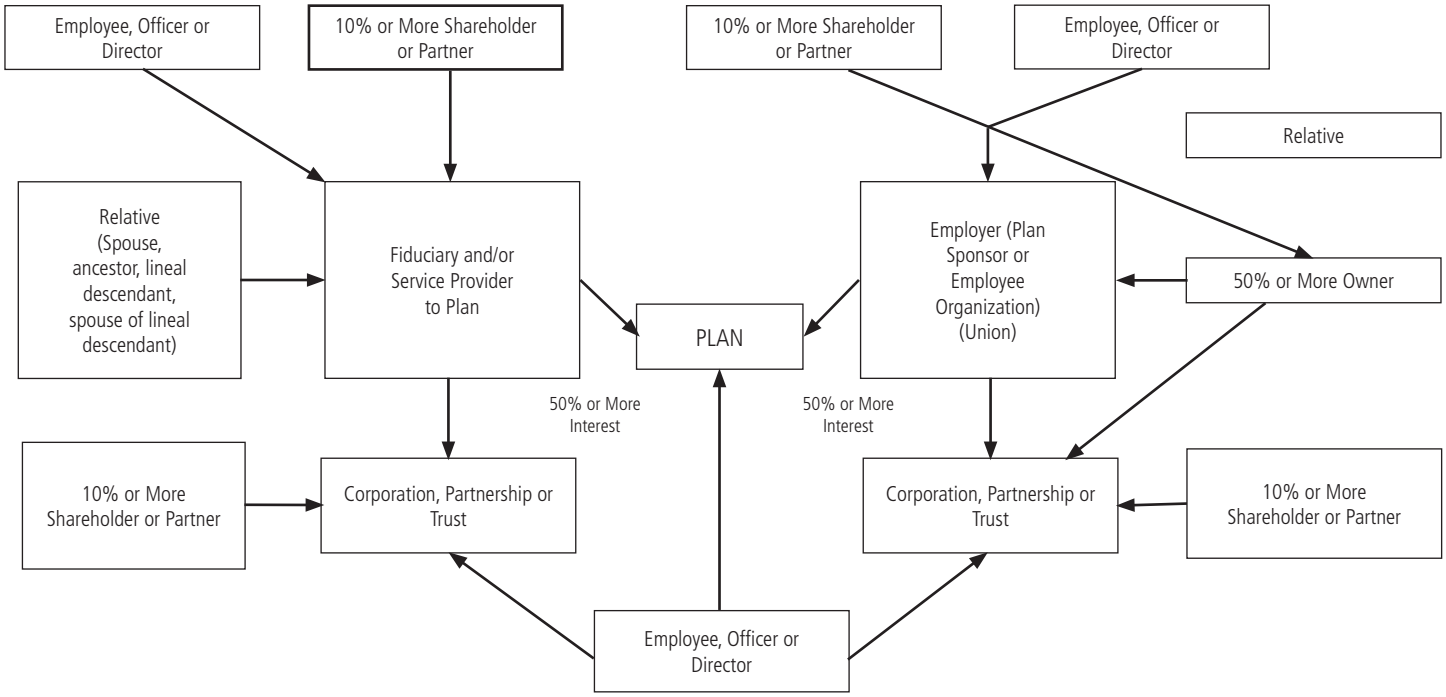
Fiduciary "Duties"

ERISA requires a fiduciary to act under several "duties":

- **Duty of Care**—Fiduciaries must act with the care, skill, prudence and diligence under the circumstances that a prudent person, acting in a similar capacity and familiar with such matters, would use. The analysis focuses on the procedures used in making an investment decision (not the result). There is a flexible standard that corresponds to the complexity of the investment decisions involved and fiduciaries must give "appropriate consideration" to relevant facts. This includes risk of loss and opportunities for gain and the diversification of the ERISA plan's assets, suitability of the investment in light of the ERISA plan's size, anticipated liabilities, cash flow needs and investment objectives.
- **Duty of Loyalty**—A fiduciary must discharge its duties on behalf of a plan solely in the interests of plan participants and beneficiaries, and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. A fiduciary is generally prohibited from causing a plan to engage in a transaction with a party in interest, and may not take any action, when its judgment may give rise to a conflict of interest.
- **Diversification**—A fiduciary must diversify plan investments so as to minimize the risk of large losses unless, under the circumstances, it is clearly prudent not to do so. Evaluations of diversification generally take into account the underlying investments held by a pooled investment vehicle in which a plan invests. To the extent a fiduciary manages a fund or account subject to ERISA (rather than the assets of an entire plan), the requirement to diversify investments extends only to the fund or account that the fiduciary manages, and not to the assets of the entire plan.
- **Compliance With Plan Documents**—A fiduciary must act in accordance with the documents governing the Plan to the extent that the documents are consistent with ERISA. If a fiduciary believes the documents governing the Plan are not consistent with ERISA, the fiduciary should undertake to amend the documents as necessary.

Prohibited Transactions

ERISA prohibits most transactions between an ERISA plan and a "party in interest" unless an exemption applies. Without an exemption, virtually every financial transaction and service, including direct and indirect sales or exchanges, loans or extensions of credit, transfers of plan property and the provision of investment management, custodial and brokerage services, is prohibited under ERISA. The ERISA rules generally do not determine whether any particular transaction is appropriate for an ERISA plan. This will be governed by the investment guidelines for the applicable mandate. The definition of "party in interest" is very broad:



ERISA's self-dealing prohibited transaction rules generally prohibit a fiduciary from dealing with the assets of a plan for the fiduciary's own benefit, representing a party whose interests are adverse to a plan in a transaction and receiving consideration for the fiduciary's own account in connection with a transaction involving a plan. The DOL interprets these prohibitions broadly and these rules often prevent certain transactions that might otherwise be beneficial for an asset manager's clients.

ERISA exemptions

As noted above, ERISA generally prohibits a plan from entering into direct or indirect transactions with a party in interest to the plan absent an exemption. There are certain exemptions that are most commonly used in order to participate in these types of transactions, such as:

- Prohibited Transaction Class Exemption ("PTE") 84-14, which is more commonly known as the "QPAM Exemption";
- An exemption under Section 408(b)(17) of ERISA, which is more commonly known as the "Service Provider Exemption";
- PTE 91-38, which is more commonly known as the "Bank Collective Trust Exemption," or
- An exemption under Section 408(b)(2) of ERISA, which is more commonly known as the "Necessary Services Exemption."

Proposed DOL Fiduciary Rule

In 2010, the DOL proposed a change to the definition of "investment advice" that would have expanded the scope of those who become fiduciaries to 401(k) plans and IRA providers. After significant objections were raised by numerous groups, including Members of Congress from both parties, the DOL withdrew its initial proposal and stated it would conduct further economic analysis. In February 2015, President Obama announced that the DOL should move forward with its proposed rulemaking. On April 14, 2015, the DOL announced a re-proposal of the rule. In May 2015, the DOL granted a 15-day extension to the original 75-day comment period, resulting in a total of 90 days for public comment, which ended July 21, 2015.

Under the DOL's New Proposal on ERISA Fiduciary Status for Investment Advisers, a person will be providing "investment advice" if that person provides (i) an investment recommendation, investment manager recommendation, an appraisal of investments or a recommendation of persons to provide investment advice and (ii) renders such advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is

individualized, or that such advice is specifically directed to the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA. A recommendation is defined broadly to include any communication that would be reasonably viewed as a suggestion to engage in or refrain from taking a particular course of action. Notably, the "mutual agreement," "primary basis," and "regular basis" prongs of the current investment advice definition have been removed. The impact of this re-proposal would transform many current non-fiduciary discussions in the brokerage industry into "investment advice," thereby causing the fees and compensation resulting from any transactions in connection with those discussions to be prohibited.

Accordingly, the DOL also proposed a new exemption called the best interest contract exemption ("BICE"), which would provide relief to the prohibited transaction rules for the receipt of compensation by investment advice fiduciaries and their affiliated financial institutions for services provided in connection with the purchase, sale, or holding of certain investments by participants and beneficiaries, IRAs, and certain plans with fewer than 100 participants (retirement investors).

BICE is designed to address the issue that the receipt by a fiduciary adviser (or financial institution) of certain types of compensation from a plan (such as a commission) or from third parties (such as 12b-1 fees, revenue sharing, sales loads, etc.) would typically violate the ERISA prohibited transaction restrictions against self-dealing because the amount or when such compensation is received by the fiduciary adviser would be affected by the advice the fiduciary adviser provides. In order to rely on the BICE, there is a best interest standard of care that must be provided to IRAs and small plans as well as contractual, disclosure and operational requirements, a permitted asset list, and specific rules on compensation.

The financial services industry is challenging the DOL's proposal and asserting that such drastic reform would not be in the best interest of retirement investors. Self-regulatory agencies, such as Financial Industry Regulatory Authority, Inc. ("FINRA") and the SEC, have vocalized their view that the proposed rule dismisses suitability as a proper standard of care for broker dealers. The proposal does not contemplate potential SEC rules and the FINRA arbitration system for regulating broker dealers and investment advisors. In order to work together with the DOL and the SEC on an implementable standard, the DOL should have included in its proposal some type of substituted compliance mechanism, in which compliance with an SEC fiduciary standard would satisfy the DOL rules. However, the proposal's current view will deny investors a choice in products, services, and financial professionals.

Endnote

1. 29 USC 1001, *et seq.*

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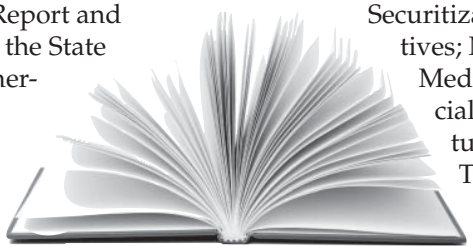
Book Review

Commercial Litigation in New York State Courts, Fourth Edition

Reviewed by Richard A. Klass

Without a doubt, New York's role as a major venue of commercial litigation has increased over the past 20 years since the creation of the first commercial court of its kind in the country. As stated in the Report and Recommendations to the Chief Judge of the State of New York of the Task Force on Commercial Litigation in the 21st Century, "the number and complexity of cases in the Commercial Division have grown dramatically." Against the backdrop of an ever-growing number of commercial cases with their various permutations and combinations, the commercial law practitioner can take comfort that there is a great resource to which one can turn for guidance—*Commercial Litigation in New York State Courts.*



The treatise, *Commercial Litigation in New York State Courts,* edited by Robert L. Haig, Editor-in-Chief, was first introduced in 2005, and has now published its Fourth Edition. The First Edition was published around the same time that the New York State court system established the Commercial Division in several counties throughout the State. The treatise (comprised of eight volumes with 127 chapters) covers a panoply of matters affecting commercial law. Numerous chapters address issues that arise in every commercial case, such as forms of pleading, parties, discovery demands and responses, motion practice and trial. Many of the chapters are catered to particular areas of law which may confront the commercial law practitioner, and widely range from contract disputes to white collar crime cases to commercial real estate litigation. Aside from discussing the topics in each chapter, the treatise provides the reader with easy-to-use forms, sample language, checklists and handy tips. This reviewer has referred to these volumes for many years and considers the treatise an excellent resource.

The Fourth Edition has added 22 chapters to address new subjects arising today, including: Internal Investigations; Preliminary and Compliance Conferences and Orders; Negotiations; Mediation and other Nonbinding ADR; Arbitration; International Arbitration; Pro Bono; Reinsurance; Workers' Compensation; Trade Associations; Securitization and Structured Finance; Derivatives; Medical Malpractice; Licensing; Social Media; Tax; Land Use Regulation; Commercial Leasing; Project Finance and Infrastructure; Entertainment; Sports; and Energy. The 182 principal authors of these new chapters bring with them many years of experience in their respective areas of practice.

To get a better sense of the value of this treatise, one chapter entitled "Social Media" deals with the rapidly growing area of the "social media" internet phenomenon. The outline of the chapter includes social media's Impact on Legal Ethics; Use in Case Preparation; Contractual, Property and Regulatory Issues; and Social Media and the Courts. The chapter provides a tremendously helpful glossary of terms, list of relevant websites, and broad list of issues surrounding social media. The practice aids at the end of the chapter include checklists, data authorization forms and discovery demands. Given the increase of litigation in this particular area, the chapter is of great benefit to the practitioner.

*Commercial Litigation in New York State Courts, Fourth Edition, i*s a joint venture between Thomson Reuters and the New York County Lawyers' Association.

In the Message from the Editor-in-Chief about the Fourth Edition, Mr. Haig states, "I believe that this treatise will enhance those benefits [to New York, by those who work hard and do the right thing]." I believe that he is 100% right.

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Piercing the LLC Veil Under New York Law

By Stuart B. Newman and Tyler Silvey

I. Introduction

The doctrine of piercing the corporate veil is well established across the country's courts and familiar to all attorneys practicing corporate law.[1] A business lawyer can provide advice to corporate clients with a high degree of certainty with regard to what factors a court will analyze and what best practices to employ in order to avoid personal liability for corporate debts and obligations.

Does the same degree of certainty hold true, however, when advising clients who chose to conduct their businesses in the form of a limited liability company, rather than as a corporation? The question is increasingly more relevant as the LLC business format continues to displace corporations as the business entity of choice.

Although it is less than forty years since the first state (Wyoming in 1977) adopted LLC legislation, and less than twenty years (1997) since LLCs were endorsed by legislative action in all fifty states, formation of new LLCs in the United States now outnumbers corporations being formed by nearly two to one, and even more than three to one in Delaware.[2]

In our own state of New York, although LLCs are popular, more new corporations continue to be formed than LLCs—one of only four states where this is still true. (Could this be the consequence of New York's dreaded Publication Requirement? Let's leave that question for another day and perhaps another article!)

The LLC's rapid rise to business stardom, coupled with flexible statutes that govern it, created a scenario in which the courts chose to fall back on various familiar corporate doctrines—like piercing the corporate veil—in parsing through similar problems arising from the governance of LLC entities. This does not work seamlessly across the board, however. Applying the doctrine of piercing the corporate veil in the LLC context, for example, has resulted in criticism.[3] This is because the piercing analysis remains awkwardly transposed onto the LLC context without much nuance or justification, creating uncertainty for both business owners and their lawyers, and hindering the development of an LLC-specific analysis.

To illustrate this, consider the fact that lawyers have always advised their corporate clients to keep the corporation's minute book current, hold periodic shareholder and director meetings and draft minutes for all meetings. A significant reason for doing so is to blunt any argument that corporate existence is a mere sham and should be pierced, with shareholders personally liable for business obligations. Yet, few lawyers advise their LLC clients to follow the same practices, or even draft explicit governance provisions—customary in shareholder agreements—for operating agreements.

New York LLCs and their lawyers could benefit from both clarification at the legislative level and a more LLC-conscious analysis by the courts. As one academic recently wrote, "Courts should put forth cogent reasons for their decisions, rather than blindly applying corporate law principles in what are seemingly analogous situations between LLCs and corporations."[4] For the time being, however, business lawyers should stress the use of safeguards, such as close attention to accounting practices that preserve the integrity of LLC financial statements, and to the drafting of LLC Articles of Organization and Operating Agreements, to minimize the probability of piercing in the LLC context. (See Section IV "Recommendations.")

"The LLC's rapid rise to business stardom, coupled with flexible statutes that govern it, created a scenario in which the courts chose to fall back on various familiar corporate doctrines—like piercing the corporate veil—in parsing through similar problems arising from the governance of LLC entities."

II. Survey

Every state is affected, to varying degrees, by the issues connected to applying corporate veil-piercing principles to conflicts involving limited liability companies. Where states differ is how predictable the courts are in their analyses and whether—and to what extent—LLC veil-piercing legislation exists: there are states that have demonstrated an unpredictable willingness to pierce where other states would not (e.g., Massachusetts), states that have consistently refused to pierce a LLC's veil (e.g., Maryland), and states that have taken first steps towards clarification at the legislative level (Wyoming, California, Colorado, Minnesota, and North Dakota). Although the overall picture remains inconsistent, the good news is that at least the issue is getting addressed.

A recent Massachusetts appellate court pierced the veil of a single-member LLC for essentially one reason: failure to maintain business records.[5] The decision is particularly noteworthy because, paradoxically, although the court recited Massachusetts' basic test—"The right to look beyond the corporate form should be 'exercised only for the defeat of fraud or wrong, or the remedying of injustice'"—and then reviewed the twelve classic factors

commonly examined in corporate veil piercing analyses,[6] it pierced the veil based on one factor without evidence of fraud, wrongdoing, or injustice. The court reasoned that the LLC's complete failure to maintain records hindered the court's ability to address any other factors.[7]

Maryland is at the other end of the spectrum and continues to be one of the states that is most resistant to piercing the LLC veil. The Maryland Court of Special Appeals recently reversed a trial court's decision to pierce a single-member LLC because the appellate court found that defendant did not fraudulently avoid any contractual obligations and that the plaintiff knew he was contracting specifically with the LLC.[8] The appellate court refused to pierce despite the fact that the LLC was inadequately capitalized, failed to live up to several basic contractual obligations, and the sole member lied about key facts pertaining to a transaction.[9] In doing so, the Court reiterated that Maryland is "more restrictive" than other jurisdictions and that the standard has been "so narrowly construed" that no Court of Appeals in Maryland "has ultimately found an equitable interest more important than the state's interest in limited shareholder liability."[10]

Several states have taken steps at the legislative level to clarify piercing the veil in the LLC context. Wyoming—the first state to enact LLC legislation in the 1970s—changed its "Liability of members and managers [of LLCs]" statute by adding: "The failure of a limited liability company to observe any particular formalities relating to the exercise of its powers or management of its activities is not a ground for imposing liability on the members or managers for the debts, obligations or other liabilities of the company."[11] California has similar legislation.[12] On the other hand, states such as Colorado,[13] Minnesota,[14] and North Dakota[15] have enacted definitive legislation that instructs courts to use the corporate veil piercing case law in the LLC context. These additions are not sea changes, but demonstrate that the tides may be turning in the direction of more guidance at the legislative level.

III. State of the Law in New York

New York's shortcomings with regard to piercing the veil of limited liability companies reflect the issues that can be seen across the country: New York's LLC statute does not provide any guidance relating to piercing the veil, while state courts consistently apply the test created for corporations without acknowledging the inherent differences in both entity and context, and at least one recent federal case created more questions than it answered.[16]

New York's LLC statutes do not reference or provide any direction with respect to piercing the corporate veil.[17] Section 609 addresses potential liability of members, managers, and agents, but piercing the veil is not mentioned.[18] Granted, piercing the veil is not referenced under New York's Business Corporation statutes either, but statutory clarification isn't necessary in that context.

Three recent cases paint an accurate picture of New York's LLC veil-piercing doctrine.[19] Two Appellate Division cases serve to show both ends of the spectrum: pierce-worthy malfeasance in the LLC context, and not. The facts of those cases make for relatively easy decisions, but where the facts become difficult the lack of a meaningful piercing analysis becomes more apparent.

New York state courts consistently apply the corporation-oriented analysis without acknowledging the inherent differences between the entities and their respective contexts.[20] Typically, the following test is applied: "[A] party seeking to pierce the corporate veil must establish that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) [] such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury."[21] The factors that a court will consider in determining whether to pierce the corporate veil include: "failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use."[22] Courts aim to pierce the corporate veil "when necessary to prevent fraud or to achieve equity."[23]

In *Colonial Surety Company v. Lakeview Advisors, LLC*, the appellate court upheld a trial court's decision to pierce a single-member LLC.[24] In that case, the defendant admitted to dominating the LLC and further evidence existed that proved that: defendant established the LLC after a prior judgment had been entered against him in order to shield his assets; defendant used LLC funds to pay personal expenses, make payments to his wife "in lieu of his salary," and contributed to his IRA account; and defendant replaced his personal checking account with that of the LLC.[25] As a result of the overwhelming evidence in favor of piercing the LLC's protections, the court concluded that "inequitable consequences would result if we were to permit [defendant] to shield his assets" from his judgment creditor.[26]

In contrast, in *Bonacasa Realty Company, LLC v. Salvatore*, the appellate court refused to pierce the LLC's veil because the principal of the LLC did not exercise his dominion and control to commit a wrong or injustice against the plaintiff.[27] In that case, the defendant-chiropractor executed a five-year lease on behalf of an LLC, and seven months prior to the expiration of the lease term, the LLC vacated the premises and breached the lease agreement.[28] The court explained, "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil"; the plaintiff did not raise any triable issues of fact as to whether the use of the LLC "was intended for the commission of a fraud or wrong upon plaintiff."[29] As a result, the court refused to pierce the veil.

A 2014 case involving a closely held construction company provides a good example of analysis by the

courts in New York, and also underscores the importance of best practices when it comes to the current veil-piercing environment.[30] In *Vivir of L.I. Inc. v. Ehrenkranz,* a New York Supreme Court judge refused to pierce the veil of a small construction company to enforce a $2.2 million judgment in favor of a couple who had entered an agreement with the LLC to purchase land and construct a home.[31] Plaintiffs' argument to pierce was strong: the couple alleged that defendant dissipated all assets of the company in order to become judgment proof; the LLC was never adequately capitalized; defendant commingled funds for both business and personal purposes; defendant specifically took out a large sum of money to repay himself for a loan for which there was no evidence; and defendant made no effort to maintain sufficient documentation of the agreement between the parties.[32]

At trial, the testimony featured a battle of opposing experts—two accountants—and the court ruled against plaintiffs because "the testimony weigh[ed] so evenly that it is required to find that the [plaintiffs] have failed to meet their burden of demonstrating that they are entitled to the somewhat extraordinary relief requested in the context of piercing the corporate veil."[33] The court stated that despite the dominion and control exerted over the entity by defendant, and despite the intermingling of assets as well as underpaid incomes taxes for several years, the timeline and evidence demonstrated that any malfeasance was not done in furtherance of harm or wrong to the couple.[34] Thus, "[t]he real distinction between the case law the Court has reviewed which allows veil piercing and the case at bar lies in the 'purpose' element of the doctrine."[35]

The facts of *Vivir of L.I., Inc.* made for a difficult decision one way or the other, and the court chose to focus on the second, "purpose" prong. The result is not troublesome, but what is problematic in the analysis—particularly for LLCs—is that the four cases that the court used to portray the spectrum of piercing scenarios are not as clear as the court makes them out to be, and involve two single-member corporations, one closely held professional corporation, and an LLC. Of the four cases relied upon by the court, two present pierce-worthy facts and the other two demonstrate the other side of the spectrum. The four cases represent two extremes, and are cited in *Vivir of L.I., Inc.* without much meaningful insight, further delaying the entity-specific analyses that could be developing. The traditional "corporate formalities" cannot be expected of every type of business entity because of the inherent differences in each entity's purpose and setting, yet that fact is ignored in New York's state courts.

IV. Recommendations

New York should take note of the states that have enacted LLC statutes that address veil-piercing. This area of the law could be one in which New York steps to the forefront and goes beyond those other states by outlining a more LLC-conscious analysis. One author recently suggested that states "replace the current haphazard application of corporate veil-piercing doctrine to LLCs by adopting a meaningful standard…embodying an optimal level of complexity to foster socially beneficial—or just—results and further supports a legislatively enacted standard that could include, for example, a cap on damages."[36]

In the meantime, practitioners in New York would do well to institute several of the following practices to ensure that members of LLCs avoid personal liability:

First and foremost, a practitioner should advise a client against being a single-member LLC if at all possible. Aside from tax disadvantages, single-member LLCs inherently invite the piercing analysis and create risks (e.g., intermingling of funds) that could be avoided by having more than a single member. Also, an LLC could avoid similar issues by being manager-managed, rather than member-managed. This management structure could create brighter lines between the entity and its members, and may protect against the risks inherent in a close organization. In New York, the LLC's Articles of Organization should state expressly that the company is manager-managed, not member-managed.

A written operating agreement is also crucial. Although not required under New York's LLC statute—and many New York LLCs opt not to have one—a written operating agreement provides certainty and structure, and a practitioner can draft express language that may help protect the LLC and its members from potential lawsuits. For example, an operating agreement can (and should) expressly disclaim the need for annual meetings as a requirement so that a lack of meetings isn't used as fodder in a piercing analysis. Operating agreements should also expressly limit the personal liability of the manager. The LLC itself should be expressly named as a party to the operating agreement, solidifying the fact that it is an entity separate and distinct from its members.

The practitioner should also counsel LLC clients regarding other basic practices, like adequate capitalization, and, of course, keeping separate books and records. The client should be advised to consult with an accountant to help in those respects—we saw the court in *Vivir of L.I., Inc.* place huge importance on bookkeeping and it essentially shielded the defendant from liability. Lastly, the client should be cautioned to use the full LLC name on all correspondence, not just a "DBA," to underscore that third parties are dealing with a separate legal entity.

Above all, good drafting, common sense and good intentions can reduce the probability of losing or impairing the limitation on personal liability, which is certainly one of the primary reasons for organizing a limited liability company.

Endnotes

1. Some academics disagree with respect to how well established the analysis really is. *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 Cornell L. Rev. 1036, 1036 (1991) ("Piercing the corporate veil is the most litigated issue in corporate law and yet it remains the least understood."); *see also* Stephen M. Bainbridge, *Abolishing LLC Veil Piercing*, 2005 U. Ill. L. Rev. 77, 77-78 (2005) (arguing that veil piercing should be abolished because it is "rare, unprincipled, and arbitrary.").
2. Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations and LPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 Fordham J. Corp. & Fin. L. 460 (2009).
3. *See*, *e.g.*, Gregory Bell, *Veil Piercing and LLCs: Supporting the Case for a Meaningful, Legislated Standard*, 52 S. Tex. L. Rev. 615, 619 (2011) ("[A]n LLC is not a rehashed corporation; it is a fundamentally different creation. It has its own parlance, statute, forms, requirements, and procedures. It is only natural that it needs its own independent body of law.").
4. Joshua P. Fershee, *LLCs and Corporations: A Fork in the Road in Delaware?* 1 Harv. Bus. L. R. Online 82, 86-87 (2011), *available at* http://ssrn.com/abstract=1858945.
5. *Kosanovich v. 80 Worcester St. Assocs., LLC*, 2014 Mass. App. Div. LEXIS 34, at *1, *8 (Mass. App. Div. May 1, 2014). In that case, plaintiff purchased a condominium from defendant's single-member LLC and both the trial and appellate courts pierced the LLC and held defendant liable for breaching various covenants in the purchase agreement. *Id*. at *3, *7.
6. *Id*. at *4–*5. The relevant factors to be considered when a court is faced with the issue of setting aside corporate formalities are: "(1) common ownership; (2) pervasive control; (3) confused intermingling of business assets; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporation's funds by dominant shareholder; (10) nonfunctioning of officers and directors; (11) use of corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud." *Id*. at *5 n.2 (citing *AG v. M.C.K., Inc.*, 432 Mass. 546, 555 n.19 (2000)).
7. *Id*. at *7. Defendant did admit that his recordkeeping was "a bit informal." *Id*. at *6.
8. *Serio v. Baystate Props., LLC*, 60 A.3d 475, 489 (Md. Ct. Spec. App. Jan. 25, 2013).
9. *Id.* at 488–89.
10. *Id*. at 484 (internal quotations omitted). The Court also discussed the Maryland piercing standard, which dictates that piercing should be done when "necessary to prevent fraud or enforce a paramount equity"; the court refused to pierce based on "paramount equity" as the trial court had done, and recognized that no Maryland courts have pierced using that phrase. *Id*. at 484–87.
11. Wyo. Stat. Ann. § 17-29-304(b) (2010).
12. Cal. Corp. Code § 17703.04 (Deering 2013): "A member of a limited liability company shall be subject to liability under the common law governing alter ego liability…except that the failure to hold meetings of members or managers or the failure to observe formalities pertaining to the calling or conduct of meetings shall not be considered a factor tending to establish that a member or the members have alter ego or personal liability."
13. Colo. Rev. Stat. § 7-80-107 (2009): "(1) In any case in which a party seeks to hold the members of a limited liability company personally responsible for the alleged improper actions of the limited liability company, the court shall apply the case law which interprets the conditions and circumstances under which the corporate veil of a corporation may be pierced under Colorado law. (2) For purposes of this section, the failure of a limited liability company to observe the formalities or requirements relating to the management of its business and affairs is not in itself a ground for imposing personal liability on the members for liabilities of the limited liability company."
14. Minn. Stat. § 322B.303 (2009): "The case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under Minnesota law also applies to limited liability companies."
15. N.D. Cent. Code § 10-32-29 (2011): "The case law that states the conditions and circumstances under which the corporate veil of a corporation may be pierced under North Dakota law also applies to limited liability companies."
16. This Section focuses on the decisions at the state court level, but in *Soroof Trading Development Co. Ltd. v. GE Fuel Cell Systems LLC*, the Southern District of New York uncharacteristically stretched to pierce the veil of an LLC. 842 F. Supp. 2d 502, 522 (S.D.N.Y. 2012) (noting that there was an "overall element of unfairness" to plaintiff).
17. *See* N.Y. Ltd. Liab. Co. Law §§ 101–1403.
18. *See* N.Y. Ltd. Liab. Co. Law § 609.
19. *See infra* notes 24, 27, 30 and accompanying text.
20. *See Colonial Sur. Co. v. Lakeview Advisors, LLC*, 93 A.D.3d 1253, 1255, 941 N.Y.S.2d 371, 373 (4th Dep't 2012) ("It is well settled that the doctrine of piercing the corporate veil…applies to limited liability companies.").
21. *Superior Transcribing Serv. LLC v. Paul*, 72 A.D.3d 675, 676, 898 N.Y.S. 2d 234, 235 (2d Dep't 2010) (internal quotations and citation omitted).
22. *Id.* at 676.
23. *See Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140, 603 N.Y.S.2d 807, 810 (1993).
24. *Colonial Sur. Co.*, 93 A.D.3d at 1253.
25. *Id*. at 1255.
26. *Id*.
27. 109 A.D.3d 946, 947, N.Y.S.2d 84, 86 (2d Dep't 2013).
28. *Id.* at 946.
29. *Id*. at 947.
30. *Vivir of L.I., Inc. v. Ehrenkranz*, 2014 N.Y. Misc. LEXIS 3222, 997 N.Y.S.2d 670 (N.Y. Sup. Ct. Suffolk Cnty. 2014).
31. *Id.*
32. *See id.* at *1–*2.
33. *Id*. at *40.
34. *Id*. at *41.
35. *Id*. at *42.
36. Bell, *supra* note 3, at 617.

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In Memoriam: Judge Judith Kaye

How to Stay Motivated: Take a Minute to Remember

By now most of the legal community has heard of the passing of Judith Kaye. Judge Kaye saw the Judiciary as "the guardian for the nation's fundamental ideals." This belief seems to have led her to lead an incredibly inspirational life. Her unmatched accomplishments include becoming the first woman to serve on the Court of Appeals, and first woman to be named Chief Judge of the State of New York, a position she held longer than any of her 21 male predecessors. Her other accomplishments cannot be overstated. Taking a minute to remember the character and ideology of such an inspirational lawyer will serve to reinvigorate our own motivations and help solidify Judith Kaye's extraordinary legacy.

Judith Kaye's parents were Jewish immigrants from Poland who lived on a farm in Albany County and operated a women's apparel store. She skipped two grades and graduated from Barnard College in 1958, at the age of 20. As further examples of her incredible fortitude and self-motivation, she had to work during the day and so attended law school at night at New York University Law School, as one of ten women in a law school class of almost 300. In 1975, Judith Kaye became Olwine, Connelly, Chase, O'Donnell & Weyher's first female partner.

While Judge Kaye was always a pioneer in her own career, she always found capacity to help better protect children and their families. As another single example of her many accomplishments, her work helped New York courts become national leaders in jurisprudence and in procedure for certain addiction, family violence, mental illness, and domestic violence cases. In fact, national "modernization efforts" by other states only began after New York led the way. One of the most creative and functionally important examples of this was the creation of the Center for Court Innovation, which is a non-profit think tank independent of the court system that serves as the judiciary's research arm. In the *NYU Law Review* in 2009, Chief Judge Lippman is quoted, "Judith Kaye essentially started a revolution that has redefined the traditional role of the judiciary in addressing the difficult social problems reflected in our record-breaking court dockets…"

Judith Kaye's many hard-fought accomplishments not discussed herein, such as gay rights, foster care, and death penalty reform can be found in any of the dozens of articles written after her unfortunate death. As authors, we try to extend Judge Kaye's voice to the public so that her aspirations can be better fulfilled. We try in vain to convey in words the magnitude of her willpower so that each reader may be able to reach further than he or she would have otherwise.

In her words, "Remember Field of Dreams? 'Build it and they will come.' That is what we have to do. In New York. It is in our hands, all of us working together, to build the partnerships, the interventions, the off-ramps from disaster, so that the dreams of our children and the dreams of our nation can be fulfilled."

—M. B.

How to Plan for a Special Needs Spouse or Child During a Divorce

By Gary E. Vegliante and Alina Vengerov

A number of studies have shown that the probability of a divorce is substantially higher in a family where a spouse or a child has special needs. That being said, many factors must be taken into consideration when going through a divorce, particularly what sort of effect spousal support and/or child support may have on the disabled spouse's or disabled child's eligibility for government benefits.

In a family where a spouse or a child has a disability and the parties choose to enter into a settlement agreement, the agreement must be structured in such a way that takes into account the current or potential need for government benefits. Otherwise, the disabled spouse or disabled child may find himself in a worse financial position than previously realized.

In awarding or denying government benefits based on need to a disabled person, the government takes into account the person's income and resources. When a spouse in a divorce action contracts to receive spousal support, the government counts that support as unearned income, potentially rendering the spouse ineligible for benefits like home care or nursing home Medicaid benefits, or Supplemental Security Income. Similarly, if the spouse is set to receive a large lump sum under a settlement pursuant to the equitable distribution guidelines, such an award could put the spouse over the resource limit for Medicaid or SSI, again rendering the spouse ineligible for those benefits. Such ineligibility could certainly be devastating for a spouse who is unable to be self-supporting without that government assistance.

Supplemental Security Income, or SSI, is a program that provides stipends for low-income individuals who are either over the age of 65, or are blind or disabled. Commonly confused with Social Security, SSI is paid from U.S. Treasury, not the Social Security trust fund. Because SSI is a means-tested program, there are financial guidelines which must be met in order for an applicant to be eligible to receive SSI. In order for an individual to be eligible for SSI benefits, they must have no more than $2,000.00 in resources in their name, or $3,000.00 for a couple.

Medicaid, also a means-tested program, provides healthcare coverage for people who meet the income and resource eligibility guidelines. If an individual is eligible for SSI benefits, they automatically qualify for Medicaid as well. Otherwise, in order to be eligible for Medicaid, an applicant/recipient may have up to $14,850.00 in assets, not including IRAs or other retirement assets, and up to $825.00 in monthly income, including IRA, pension, and Social Security distributions. Both Medicaid and SSI eligibility guidelines are modified annually.

When it comes to a disabled child who is caught in the middle of his parents' divorce, any child support payments received on behalf of the child under the age of 18 will actually reduce his SSI benefits by as much as one-third. When the child reaches the age of majority, the government then counts the child support as unearned income and reduces the child's SSI check dollar for dollar for the amount of child support. If the child support is greater than the maximum allowable SSI payment, the child loses his eligibility for SSI and, may even lose eligibility for Medicaid. Medicaid provides an adult disabled child with adult services and as such, is imperative for an adult child who ages out of the public school system. Losing eligibility for Medicaid after the child ages out of the public school system is disastrous because without it, the adult child will have no way of receiving necessary services.

What are some ways to work around this problem? As far as child support goes, the parties' agreement can stipulate that child support will take the form of direct payment for things like child care, therapy, private school tuition, additional personal care, cable TV, and the like. Another alternative is for the settlement agreement to provide for the set-up of a Qualified Supplemental Needs Trust. Establishing a Qualified Supplemental Needs Trust requires that the person who will benefit from the trust meets the definition of "disabled" pursuant to 42 U.S.C. Sec. 1382(a)(3). In order to draft a Qualified Supplemental Needs Trust, an attorney must have knowledge of trust law, tax law, Medicaid and Guardianship Law.

What is a Supplemental Needs Trust? Essentially, a Supplemental Needs Trust is a trust that is created in order to provide supplemental products/services to a disabled individual receiving a "means-tested" public benefit, such as Medicaid and SSI. For a Supplemental Needs Trust to be effective, assets that are held in the trust must not be available to the beneficiary directly, meaning that the beneficiary cannot personally withdraw or pay out the funds of the trust. Instead, those funds must be paid out by the trustee. The trust must state that it was created to enhance, **not supplant,** public benefits (NYS E.P.T.L. 7-1.12). Finally, as stated earlier, the beneficiary of the trust must be "disabled."

How may the funds of a Supplemental Needs Trust be used? Because Supplemental Needs Trusts must supplement, and not supplant, government benefits, the trust funds may not be used to pay for anything which might be paid for by or included in the governmental benefits

that the disabled individual is receiving. If the beneficiary is receiving Medicaid, then the Supplemental Needs Trust cannot pay for any medical services which might be covered by Medicaid. Consequently, most other purchases which would go towards the benefit of the beneficiary, such as home repairs or renovations that benefit the beneficiary, utilities and other bills, clothing, groceries, and oftentimes even vacations, may be paid for by the funds held in a Supplemental Needs Trust.

There are three general types of Supplemental Needs Trusts: First Party (or Self-Settled) Trusts, Third Party Trusts, and Pooled Income Trusts. The determination of which trust must be used relies heavily on where the funds that are being placed into the trust come from. A First Party Supplemental Needs Trust must be created by the disabled individual, through a parent, grandparent, the Court, or a legal guardian. A First Party Trust must be used when the funds being deposited into the trust are legally titled to the disabled individual. With regards to a divorce action, if a spouse wants to place funds from a large lump sum settlement into a Supplemental Needs Trust, he or she would need to create a First Party Supplemental Needs Trust, because those funds would be legally titled to her. One downside to First Party Supplemental Needs Trusts is that if there are any funds left in the trust when the beneficiary passes away, those funds must be left to Medicaid in order to help pay back funds expended on the beneficiary's care.

A Third Party Supplemental Needs Trust is appropriate when the funds being used to create the trust are not legally owned by the beneficiary prior to funding the trust. A common example is when a parent passes away and wants to leave a large inheritance to a disabled child, without diminishing his or her government benefits. In that instance the parent may create a Third Party Supplemental Needs Trust in his or her last will and testament, in order to leave money to their disabled child without threatening a loss of crucial benefits. This option could also be utilized in situations where a divorcing couple has a disabled child, as referenced earlier. The parents could create the trust for the benefit of the disabled child, and fund the trust with child support payments made monthly, quarterly or yearly. The biggest benefit of a Third Party Supplemental Needs Trust, as compared to a First Party Trust, is that with a Third Party Trust, there is no payback to Medicaid. This means that the beneficiary may name a successor beneficiary to receive the funds after the first beneficiary passes away.

Lastly, a Pooled Income Trust is a more specified trust, which is utilized only for capturing the excess income of home care (or "Community") Medicaid recipients. Under the Medicaid rules, a recipient of Community Medicaid benefits is only allowed to receive $845/month, with any excess income being paid back to Medicaid to contribute to the recipient's cost of care. As an alternative, a Community Medicaid recipient may create a Pooled Income Trust and automatically debit any excess income over the $845 threshold into the Pooled Income Trust. The funds of the trust can then be used to pay for anything which benefits the Medicaid recipient, and is not paid for by Medicaid. All Pooled Income Trusts are managed by a third party charitable organization. Once the Medicaid recipient passes away, any money left in the trust stays with the charity which manages the trust. For this reason, it is highly encouraged that Pooled Income Trust beneficiaries use those trust funds as much as possible and do not allow a large balance to accrue. While this may sound like a serious detriment to Pooled Income Trusts, one must consider that: (a) without the Pooled Income Trust, those funds would have been lost to Medicaid to begin with; and (b) being able to utilize those excess funds can sometimes be the difference between a Medicaid recipient living a satisfying life at home, and having to move into a nursing home due to not having sufficient funds to remain in the community. As we all know, $845 a month is not a lot to live on in New York.

Supplemental Needs Trusts are becoming more and more prevalent, and rightfully so. In the correct circumstances, a Supplemental Needs Trust can be an incredibly affective tool for safeguarding assets. Whether it is Medicaid planning, asset protection, child support payments, divorcing a disabled spouse or even personal injury settlements, a Supplemental Needs Trust could be the difference between just getting by and living a more enriched, fulfilled life, and that is a goal that everyone should strive for.

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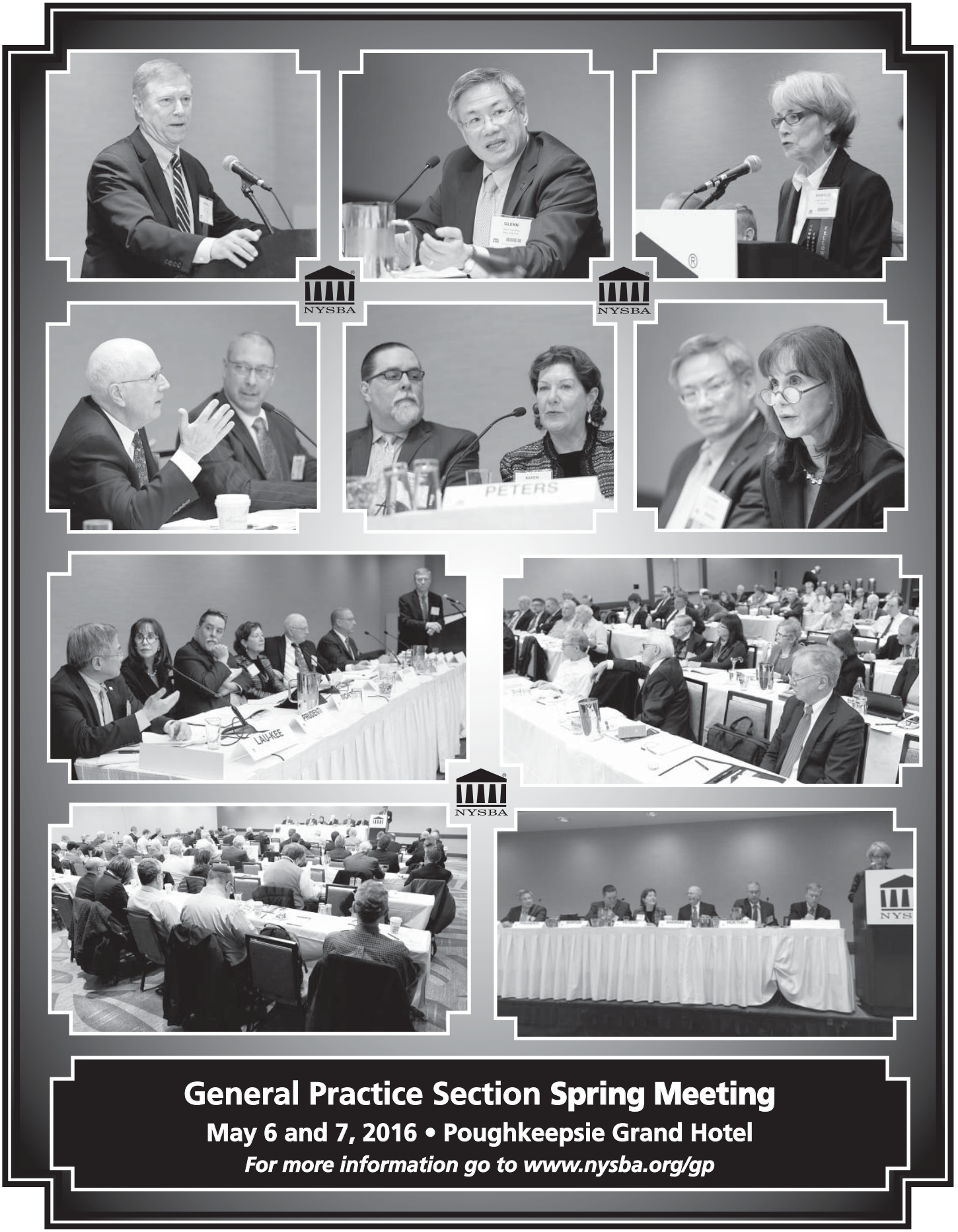

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New York State Bar Association Committee on Professional Ethics Ethics Opinions 1053-1065

Opinion 1053 (4/10/15)

Topic: Attorney-Client Privilege; Sign Language Interpreters; Communication; Competence

Digest: The scope and application of the attorney-client privilege is a question of law beyond the jurisdiction of this Committee, but we note that courts have repeatedly held that the privilege is not waived by a lawyer's use of an agent to facilitate communication with a client. If use of a sign-language interpreter does not waive the privilege, and use of such an interpreter is necessary for effective communication between the lawyer and client, it is ethically required.

Rules: 1.1, 1.4, 1.6

Facts

1. The inquirer works for an organization dedicated, in part, to assuring that persons with disabilities receive the rights afforded to them by federal and state law. In assisting deaf persons to navigate the legal system, the inquirer has encountered lawyers who contend that they cannot represent these individuals because they believe the use of sign language interpreters would violate the attorney-client privilege. The inquirer asks whether a lawyer's use of a sign language interpreter jeopardizes the confidentiality of a communication between lawyer and client.

Question

2. Is a lawyer's use of a sign language interpreter ethically permitted when it is necessary to communicate effectively with a client?

Opinion

3. Rule 1.6(a) of the New York Rules of Professional Conduct (the "Rules") provides, with specific exceptions, that a lawyer "shall not knowingly reveal confidential information—or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person." As Comment [3] to this Rule explains, "The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes."

4. The scope and application of the attorney-client privilege is a question of law, and it is beyond the authority of this Committee to resolve questions of law. Nonetheless, the Committee notes that courts have repeatedly held that the attorney-client privilege is not waived by a lawyer's use of an agent to facilitate communication with a client. *See United States v. Ackert*, 169 F.3d 136, 139 (2d Cir. 1999) ("the inclusion of a third party in attorney-client communications does not destroy the privilege if the purpose of the third party's participation is to improve the comprehension of the communications between attorney and client"); *People v. Osorio*, 75 N.Y.2d 80 (1989) (communications made to counsel through an agent of either attorney or client to facilitate communication generally held privileged); *Stroh v. General Motors Corp.*, 213 A.D.2d 267 (1st Dept. 1995) (presence of daughter of elderly client during conversations with attorney does not vitiate privilege); *see generally* American Law Institute, Restatement of the Law Governing Lawyers § 70; *see also* N.Y. Judiciary Law, art. 12 (providing for the hiring of court interpreters and the appointment of interpreters for deaf parties or witnesses). Nor does the use of a sign language interpreter necessarily violate Rule 1.6's general requirement that a lawyer safeguard a client's confidential information. *See* Rule 5.3 Comment [2] ("[nonlawyer] assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services.")

5. In order to maintain the privilege, the lawyer or law firm should ensure that the interpreter understands the requirement to maintain confidentiality. *See* Rule 5.3 (A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate) and Comment [2] thereto ("A law firm must ensure that such assistants [both employees and independent contractors that act for the lawyer in rendition of professional services] are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client…"). Rule 5.3 notes that the lawyer may take into account factors such as the experience of the person whose work is being supervised. For example, the lawyer may need to take fewer precautions with a professional interpreter who is subject to a code of conduct than with a family member or friend of the client, who

may not understand the requirements for retaining the privilege.

6. If use of a sign-language interpreter would not violate the attorney-client privilege, then when such use is necessary for effective communication between the lawyer and client, it is ethically required. Rule 1.4 governs a lawyer's duty to communicate meaningfully with a client. It includes, *inter alia*, the responsibility to apprise a client of material developments in the client's matter, to consult with the client about the means by which a client's objectives are to be accomplished, and to comply promptly with a client's reasonable requests for information. Rule 1.4 (a)(1)(iii), (2), and (4). As noted in Comment [1] to Rule 1.4, "reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation." Thus, when a lawyer has a client with whom the only means of effective communication is through a sign language interpreter, the lawyer can satisfy the requirements of Rule 1.4 only by engaging this type of interpreter. N.Y. City 1995-12 (foreign language and sign interpreters). *Accord*, Utah Opinion 96-06 (foreign language interpreters); California Opinion 1984-77 (same).

7. Finally, if a lawyer needs a sign language interpreter to communicate effectively with a client, then, unless the lawyer utilizes such an interpreter, the lawyer would be unable to provide "competent representation" to the client, as required by Rule 1.1. As noted by Comment [5] to Rule 1.1, competent handling of a particular matter includes, *inter alia*, "inquiry into and analysis of the factual…elements of a problem." With many hearing-impaired clients, a lawyer could not effectively engage in the required inquiry if he failed to avail himself of a sign language interpreter. N.Y. City 1995-12. Accord, Utah Opinion 96-06; California Opinion 1984-77.

Conclusion

8. The scope and application of the attorney-client privilege is a question of law beyond the jurisdiction of this Committee, but we note that courts have repeatedly held that the privilege is not waived by a lawyer's use of an agent to facilitate communication with a client. If use of a sign-language interpreter does not waive the privilege, and use of such an interpreter is necessary for effective communication between the lawyer and client, it is ethically required.

(5-15)

* * *

Opinion 1054 (4/10/15)

Topic: Choice of law, virtual law office

Digest: If a New York lawyer has been admitted to practice (generally, or for purposes of a proceeding) before the Virginia courts, when the lawyer represents a client in a proceeding in a court in Virginia, the Rules of Professional Conduct to be applied will ordinarily be Virginia's rules. If the lawyer does not represent a client in a proceeding in a court, the rules to be applied will be those of the "admitting jurisdiction" in which the inquirer principally practices, unless the conduct "clearly" has its "predominant effect" in another jurisdiction in which the lawyer is licensed to practice. If the lawyer is permitted to practice in Virginia without being formally admitted there, the lawyer will be deemed to be "licensed to practice" in Virginia for purposes of Rule 8.5(b)(2). However, if the lawyer solicits retention by residents of New York, the lawyer's conduct in connection with such solicitation would have its principal effect in New York, and the disciplinary authorities will apply New York's ethics rules.

Rules: Rules 1.1, 1.4, 1.6(c), 1.15, 5.1, 5.3, 5.5, 7.1(h), 7.3(i), 8.5(b)(1) & (2)

Facts

1. The inquirer is an attorney licensed to practice in both the State of New York and the Commonwealth of Pennsylvania. He now intends to open a solo law office in Virginia, for the sole purpose of representing veterans and their dependents in the United States Court of Appeals for the Fourth Circuit, the United States District Courts in Virginia, and the Administrative Board of Veterans Appeals.

2. The inquirer seeks to practice in Virginia by using a physical office two days per month, using the street address of the office as his mailing address, having access to a private mailbox at that address five days a week; answering phone calls personally when in the office; forwarding calls to the inquirer's cell phone or to a personal voicemail account attached to the cell phone when he is not in the physical office; and using a recorded message when he is not available to answer a phone call.

3. The inquirer formerly worked for the federal government, working on rulemakings pertaining to veterans' benefits and representing the government on appellate briefs.

4. The inquirer states that he has obtained an advisory opinion from the Virginia State Bar Association's ethics committee, advising that he is permitted to practice from an office address in Virginia, as long as the inquirer (a) limits his practice to federal court and (b) indicates on his letterhead, business cards and website that he is licensed to practice law only in New York and Pennsylvania. The inquirer also states that such opinion would permit the inquirer to operate using a "virtual office."

Question

5. May a lawyer admitted only in New York and Pennsylvania practice in the federal courts in Virginia and before the Administrative Board of Veterans Affairs from a "virtual office" in Virginia?

Opinion

6. Under Rule 8.5(a) of the New York Rules of Professional Conduct (the "Rules"), a lawyer admitted in New York is subject to the disciplinary authority of New York no matter where the lawyer's conduct occurs. However, the rules of conduct that the disciplinary authority will apply will depend on the choice of law rules set forth in Rule 8.5(b). Rule 8.5(b) provides:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) For any other conduct:
>
> (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
>
> (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

7. We assume for purposes of this opinion that the inquirer has been (or will be) admitted to practice, either generally or for purposes of a particular proceeding, before the federal courts in Virginia. *See* Rule 5.5 (a lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction).

8. Clearly, if the inquirer has been admitted to practice before the Virginia courts (either generally or for purposes of a particular proceeding), when the inquirer represents a client in a proceeding in a court in Virginia, then Rule 8.5(b)(1) provides that Virginia's ethics rules will be applied, unless the court rules provide otherwise. For purposes of Rule 8.5(b)(1), the Administrative Board of Veterans Affairs is not a "court." As we noted in N.Y. State 968 (2013):

> As [the inquirer is] asking in part about conduct in connection with a proceeding before an administrative tribunal, the question arises whether such an administrative tribunal is a "court" within the meaning of Rule 8.5(b)(1). The Rules contain a definition of "tribunal," which includes both a "court" and an "administrative agency or other body acting in an adjudicative capacity." Rule 1.0(w). In adopting Rule 8.5, the New York Appellate Divisions declined to adopt a version of Rule 8.5 proposed by the New York State Bar Association that substituted the word "tribunal" for the word "court" in the prior version of this rule…. [W]e do not believe we are free to read "court" in Rule 8.5(b)(1) to include administrative tribunals.…

For the same reason, in 2010, the New York State Bar Association amended Comment [4] to Rule 8.5 to replace the word "tribunal" with the word "court." See also N.Y. State 1027 (2014) (canons of statutory construction support the conclusion that the term "court" in Rule 8.5(b)(1) excludes the other types of tribunal listed in Rule 1.0(w)).

9. When the inquirer does not represent a client in a proceeding in a "court," Rule 8.5(b)(2) provides that the ethics rules to be applied will be those of the "admitting jurisdiction" in which the inquirer "principally practices," unless the conduct "clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice." Rule 8.5(b)(2) thus recognizes that New York does not have an interest in applying its own rules when the lawyer's conduct has its principal effect in another

jurisdiction that has disciplinary authority over the conduct.

10. Here, the inquirer is not formally admitted to the bar in Virginia, the jurisdiction in which he intends to principally practice. However, in N.Y. State 815 (2007), we determined that, if a New York lawyer is permitted to engage in conduct in another jurisdiction without being formally admitted in that jurisdiction, then the lawyer should be deemed to be "licensed to practice" in the other jurisdiction, even though such conduct would constitute the practice of law if the lawyer were practicing in New York.[1] According to the inquirer, the Virginia State Bar Association has opined that he may practice from an office address in Virginia, as long as he limits his practice to federal court, and indicates on his letterhead, business cards and website that he is licensed to practice law only in New York and Pennsylvania. Consequently, the inquirer is deemed "licensed to practice" in Virginia, and the New York disciplinary authorities would ordinarily apply the Virginia Rules of Professional Conduct to his conduct. However, an exception will arise if the inquirer solicits business in New York or Pennsylvania. In that case, the lawyer's conduct regarding the solicitation would clearly have its "predominant effect" in the admitting jurisdiction to which the solicitations are directed, and the disciplinary authorities would apply the rules of that jurisdiction to the solicitations. *Cf.,* New York Rule 7.3(i) (the provisions of Rule 7.3 on solicitation apply to a lawyer not admitted in New York who solicits retention by residents of New York). Whether any ensuing business would also be subject to the rules of such admitting jurisdiction depends upon where such business has its "predominant effect." That is a factual question on which we do not opine.

11. Assuming the inquirer is soliciting business in New York, another question arises: must he have a local office in New York? This question is governed by law and not by the Rules. In N.Y. State 1025 (2014), we noted that Judiciary Law §470 has been interpreted by New York courts to require that attorneys have an office in New York if they practice, but do not live, in New York. *See Lichtenstein*, 251 A.D.2d 64; *Haas*, 237 A.D.2d 729; *Matter of Larsen*, 182 A.D.2d 149 (2d Dept 1992). We also determined that Rule 7.1(h), which requires that every lawyer advertisement include the "principal law office address and telephone number of the lawyer or law firm whose services are being offered," does not provide an independent basis for requiring a physical office in New York.

12. In N.Y. State 1025, we noted the case of *Schoenefeld v. New York*, 748 F.3d 464 (2d Cir. 2014). There, the Northern District of New York found unconstitutional the interpretation of § 470 requiring a physical office. On appeal, the Second Circuit referred a certified question to the New York Court of Appeals, asking about the minimum requirements necessary to satisfy the requirement for a local office for the transaction of law business. Although the Court of Appeals had not responded when we published N.Y. State 1025, on March 31, 2015, it issued its response, confirming that the statute requires a physical office for the conduct of business. The Second Circuit must now decide whether enforcement of §470 as so interpreted would be constitutional.

13. Assuming the inquirer is soliciting business from New York residents, the inquirer must comply with various duties imposed by the Rules. *See* N.Y. State 1025 (2014) (listing duties under various Rules, and noting that there is no "virtual law office exception" to any of the Rules).

Conclusion

14. If a New York lawyer has been admitted to practice (generally, or for purposes of a proceeding) before the Virginia courts, when the lawyer represents a client in a proceeding in a court in Virginia, the rules to be applied ordinarily will be the rules of Virginia, unless the court rules provide otherwise. If the lawyer does not represent a client in a proceeding in a court, the rules to be applied will be those of the "admitting jurisdiction" in which the inquirer principally practices, unless the conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice. If the lawyer is permitted to practice in Virginia without being formally admitted there, the lawyer should be deemed to be "licensed to practice" in Virginia for purposes of Rule 8.5(b)(2). However, if the lawyer solicits business in New York, the lawyer's conduct in connection with such solicitation would have its principal effect in New York and the disciplinary authorities would apply the rules of New York.

Endnote

1. N.Y. State 815 was decided under former DR 1-105(B)(2)(b), but the language of that provision is the same as the language of Rule 8.5(b)(2)(ii), so our conclusion would remain the same today. *See* N.Y. State 1042 (2014); N.Y. State 1041 (2014) (both applying this principle of N.Y. State 815 under Rule 8.5(b)(2)).

(6-15)

* * *

Opinion 1055 (5/27/15)

Topic: Municipal employee, business transaction with client, personal conflict of interest

Digest: The Rules do not prohibit a city's lawyer from purchasing from that city or the city's Urban Renewal Agency (acting as agent for the city) real property owned by the city, if (1) the proposed purchase transaction complies with any applicable statute or regulation governing conflicts of interest of government employees, (2) the lawyer is not responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice, and (3) the lawyer is not in a position to use confidential information of the city in connection with the transaction. If the lawyer is (1) responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice and/or (2) in a position to use confidential information of the city in connection with the transaction, the lawyer may nevertheless ethically purchase the property and/or use such information with the informed consent of the city-client if the lawyer is reasonably certain that the city is legally authorized to waive a conflict of interest (or consent to the use of confidential information, as applicable) and the city gives informed consent through a process sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.

Rules: 1.6(a) & (b), 1.7(a)(2), 1.8(a), 8.4(b), 1.11

Facts

1. The inquirer is an Assistant Corporation Counsel for a city in New York State (the "City"). As part of the inquirer's job duties the inquirer appears on the City's tax foreclosure matters. Typically, the inquirer files a motion in Supreme Court under Article 11 of the New York Real Property Tax Law, and, once an order is granted, the inquirer enters the order and records a City tax deed. After the City becomes the legal owner of certain properties as a result of the non-payment of taxes, the City markets the property either through the City's Urban Renewal Agency ("URA") or through a public auction. The URA is a public benefit corporation created by the New York State Legislature under Section 553 of the New York General Municipal Law. It provides access to individuals, community organizations and other developers interested in redeveloping properties that have been tax-foreclosed or abandoned or are distressed properties acquired by the City.

2. The inquirer is interested in purchasing a piece of property being sold by the URA. We assume that the URA has its own counsel and is not looking to the inquirer to exercise professional judgment with respect to sale transactions. The inquiry does not state whether the URA has complete discretion with respect to the sale or whether the City has any role regarding the sale or the negotiation of sale terms, and, if so, whether it would be within the inquirer's job duties to advise the City.

Question

3. May an Assistant Corporation Counsel whose job duties include appearing on the City's tax foreclosure matters purchase a piece of property that was acquired by the City in a tax foreclosure proceeding and that is being sold on behalf of the City by the City's Urban Renewal Agency?

Opinion

4. At the outset, we note that we do not rule on matters of law. For example, the General Municipal Law contains provisions on conflicts of interest of municipal officers and employees, and authorizes a city to have a code of ethics as well as a board of ethics to render advisory opinions to officers and employees regarding their obligations under the law and any code of ethics adopted by the city. *See* General Municipal Law, Art. 18. We take no position here on whether the proposed transaction would violate the law. In the event the transaction is illegal and reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer, it would violate Rule 8.4(b) of the New York Rules of Professional Conduct (the "Rules"). *See* N.Y. State 845 (2010). In discussing the applicable provisions of the Rules, the remainder of this opinion assumes that the proposed purchase transaction does not violate any applicable law.

If the Real Property Is Being Sold by or on Behalf of the City

5. The answer to the question posed may differ, depending on whether the Urban Renewal Agency is acting as agent for the City or as owner of the property. We will assume, first, that the URA is acting as agent for the City and that the inquirer would be purchasing the property from the City.

Conflicts of Interest

6. Business transactions between a lawyer and client are governed by Rule 1.8(a), which provides:

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

(1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

7. Rule 1.7(a)(2) more generally governs a lawyer's personal conflicts of interests. It provides:

(a) Except as provided in paragraph (b) [which contains a number conditions under which an exception may be available, including the informed consent of the client], a lawyer shall not represent a client if a reasonable lawyer would conclude that—(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

8. We believe that when Rule 1.8 applies, Rule 1.7(a)(2) is not applicable. This is consistent with the principle of statutory construction that rules governing specific matters supersede more generally applicable rules. *See D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) ("General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment."). Rule 1.7 contains the general rules on conflicts of interest, while Rule 1.8, as its title—"Current Clients: Specific Conflict of Interest Rules"—indicates, contains rules governing specific conflicts of interest. In any event, the requirements for client consent to conflicts under Section 1.8(a) are at least as stringent as those under Rule 1.7(b).

9. Purchasing real property from the City constitutes a business transaction with the client. Moreover, the City and the lawyer have differing interests in the transaction, in that the City is interested in receiving the highest price for the transaction, while the lawyer-purchaser is interested in paying the lowest price. Consequently, a key issue in determining whether Rule 1.8 applies is whether the City expects the inquirer to exercise professional judgment for the protection of the client—and we believe the answer to that question depends upon whether the lawyer is responsible for legal advice regarding property sales or supervises other lawyers who are responsible for that advice. If the inquirer is responsible for such advice, or supervises other lawyers who are responsible for that advice, it puts into question whether the client's consent is fully informed. If the inquirer supervises such other lawyers, it also raises the question whether the inquirer would be doing indirectly through subordinates what a lawyer cannot do directly. *See* Rule 8.4(a).

10. If other lawyers in the City's law department or the URA are responsible for giving legal advice to the City regarding property sales, and if the inquirer does not supervise those lawyers regarding property sales, then Rule 1.8(a) by its terms should not apply.[1]

11. But if the inquirer is responsible for giving legal advice to the City regarding property sales, or supervises other lawyers responsible for giving legal advice to the City regarding property sales, then Rule 1.8(a) prohibits the lawyer from entering into a purchase transaction unless (1) the terms are fair and reasonable to the client, (2) the client is advised to seek the advice of independent legal counsel and (3) the client gives informed consent in writing. Comment [1] to Rule 1.11 warns that statutes and regulations governing government ethics may circumscribe the extent to which a government agency may give consent under Rule 1.11. The inquirer should determine whether the same legal impediment applies to consents under Rule 1.8(a).

12. The requirements of informed consent are set forth in Rule 1.0(j). Until 1992, a long line of ethics opinions had held that the "government" could not consent to a conflict of interest. However, in N.Y. State 629 (1992), we determined that the question of whether the government can consent to a conflict is one of law and that the lawyer may accept consent by a government entity if he or she is reasonably certain that the entity is legally authorized to waive a conflict of interest and the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.

13. If Rule 1.8(a) does not apply, Rule 1.7(a)(2) is implicated. The question under Rule 1.7(a)(2) is whether

the lawyer's purchase of property from the City creates a significant risk of adversely affecting the lawyer's professional judgment on behalf of the City in matters within the realm of the lawyer's job as Assistant Corporation Counsel. This is a question of fact that is beyond the jurisdiction of our Committee. The inquirer must make that determination. If the property purchase would result in such a significant risk, then the lawyer must consider the applicability of Rule 1.7(b)(1)-(3), all of which describe circumstances under which a conflict is non-consentable (i.e. cannot be waived by the client). If the conflict is consentable, then the lawyer must obtain the client's informed consent to the conflict pursuant to Rule 1.7(b)(4).

Our Prior Opinions

14. Two prior opinions of the Committee—both decided under the former Code of Professional Responsibility—are consistent with the analysis above. In N.Y. State 470 (1977), we held it to be improper for a city attorney to purchase a city-owned building when (i) the lawyer's official duties include giving legal advice to the chairman of that city's urban renewal agency and the common council, and (ii) the common council must approve the sale. N.Y. State 470 cites DR 5-104(A)—the predecessor to Rule 1.8(a)—although the gravamen of that opinion, as well as of two additional opinions that it cites, was that the nature of the inquiring attorney's public duties was such that the attorney appeared to have some influence upon the work of the urban renewal agency. Consequently, we opined that the attorney could not be involved in a transaction that would require any action of the agency.

15. Similarly, in N.Y. State 558 (1988), the inquirer was employed by the Department of Social Services, which proposed to sell some property that the agency had acquired, in a public sale by sealed bids that would be reviewed by the Commissioner of Social Services. We opined that, because the statute gave discretion in the bid process to the Social Services Department, which might be looking to the lawyer for the exercise of professional judgment, the lawyer could not participate in the bid process. We also stated that the city could not consent to the conflict, because, as noted in paragraph 12 above, at that time a long line of ethics opinions had held that a government entity could not consent to a conflict of interest. Finally, in N.Y. State 558, we found that the lawyer's interest in purchasing the property would conflict with those of the municipality because the lawyer had access to the municipality's appraisal of the property and therefore had information that would undermine the fairness of the bidding process.

If the Real Property Is Being Sold on Behalf of the Urban Renewal Agency

16. If the City has transferred the lien to the URA, then the purchase transaction would not be with the client— the City— and neither Rule 1.8(a) or Rule 1.7(a)(2) would apply.

Use of Confidential Client Information

17. Rule 1.6(a) prohibits a lawyer from knowingly using confidential information of the client to the disadvantage of a client or for the advantage of the lawyer, except as specifically authorized in section 1.6. The inquirer here represents the City in tax foreclosure matters. The inquiry notes that the inquirer files a motion in Supreme Court under Article 11 of the New York Real Property Tax Law, and, after an order is granted, enters the order and records a City tax deed. The inquiry does not state whether, as a result of that role, the inquirer gains any information about the property that would give the inquirer an advantage in an eventual purchase transaction. If that were the case, then the lawyer could use such information only with the informed consent of the client under Rule 1.6(a)(1), and it would be irrelevant whether the seller of the property were the City or the URA.

Conclusion

18. The Rules would not prohibit a city's lawyer from purchasing from that city or the City's Urban Renewal Agency (acting as agent for the city), real property owned by the city, as long as (1) the proposed purchase transaction complies with any applicable statute or regulation governing conflicts of interest of government employees, (2) the lawyer is not responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice, and (3) the lawyer is not in a position to use confidential information of the city in connection with the transaction. If the lawyer is responsible for advising the city or the Urban Renewal Agency on legal matters arising in property sales or for supervising other lawyers who are responsible for that advice and/or in a position to use confidential information of the city in connection with the transaction, the lawyer may nevertheless ethically purchase the property and/or use such information with the informed consent of the city-client if the lawyer is reasonably certain that the city is legally authorized to waive a conflict of interest (or consent to the use of confidential information, as applicable) and the City gives informed consent through a process sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust.

Endnote

1. Rule 1.8(a) applies where the client expects the lawyer to exercise professional judgment in the transaction for the protection of the client. Comment [1] to Rule 1.8 states: "If a lawyer elects…to enter into a business transaction with a current client, the requirements of [Rule 1.8(a)] must be met if the client and lawyer have differing interests in the transaction and the client expects the lawyer to exercise professional judgment therein for the benefit of the client. This will ordinarily be the case even when the transaction is not related to the subject matter of the representation.…" We believe that a number of factors will determine whether the client expects the lawyer to exercise professional judgment on the client's behalf. These include (i) whether the client has other counsel in the matter, for example, because it is a corporation or other entity with a legal department, (ii) whether the lawyer is responsible for client matters in the subject area, and (iii) whether the client is an individual or an entity and the client's level of sophistication in legal matters. We believe it is more likely that an individual client or one that is not sophisticated in legal matters is more likely to rely on a lawyer that does not represent the client in that matter than would be the case with an institutional client.

(1-15)

* * *

Opinion 1056 (6/2/15)

Topic: County clerk; law practice; conflict of interest

Digest: Subject to any overriding law or regulation governing the office, a county clerk may engage in the private practice of law provided the clerk does not participate in any way in any matter before the clerk's office in which the clerk is personally and substantially involved in private practice, and avoids use of the public office to obtain special treatment for a private client, to influence a tribunal in favor of a client, or to receive consideration from anyone in the guise of legal fees to influence official conduct.

Rules: 1.11(d) & (f)

Facts

1. The inquirer is an elected county clerk who intends to continue practicing law while serving in that position. His law practice consists exclusively of representing parties to transactions involving real property. He confines his practice to counties adjacent to the county where he serves as clerk; he does not represent parties in transactions in the county where he serves as clerk.

2. Section 525 of the New York County Law defines the duties of a county clerk as follows:

   1. The county clerk shall perform the duties prescribed by law as register, and be the clerk of the supreme court and clerk of the county court within his county. He shall perform such additional and related duties as may be prescribed by law and directed by the board of supervisors. 2. He shall provide at the expense of the county, all books, files and other necessary equipment for the filing, recording and depositing of documents, maps, papers in actions, and special proceedings of both civil and criminal nature, judgment and lien dockets and books for the indexing of same as directed or authorized by law.

3. Section 806 of the New York General Municipal Law provides that a county may adopt a code of ethics:

   > setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them. Such code shall provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing body, holding of investments in conflict with official duties, private employment in conflict with official duties, future employment and such other standards relating to the conduct of officers and employees as may be deemed advisable. Such codes may regulate or prescribe conduct which is not expressly prohibited by this article but may not authorize conduct otherwise prohibited. Such codes may provide for the prohibition of conduct or disclosure of information and the classification of employees or officers.

4. Section 808 of the New York State General Municipal Law also permits a county to establish boards of ethics to promulgate standards and to issue advisory opinions to elected officials on the consistency of proposed actions with the county's ethical norms.

Question

5. Do the New York Rules of Professional Conduct (the "Rules") circumscribe the inquirer's legal practice while serving as county clerk?

Opinion

6. Rule 1.11(d) states:

   > Except as law may otherwise expressly provide, a lawyer currently serving as a public officer or employee shall not:
   >
   > (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, autho-

rized to act in the lawyer's stead in the matter; or

(2) negotiate for private employment with any person who is involved as a party or as a lawyer in a matter in which the lawyer is participating personally and substantially.

7. The opening phrase of Rule 1.11(d) makes clear that any law or regulation governing the conduct of a current government official has priority over the Rules. The provisions of the General Municipal Law that authorize counties to regulate the conduct of officials are one example of the type of law or regulation that would override any inconsistent provisions of the Rules. Provisions regulating the extent of outside employment by a county official may also appear in the Public Officers Law, the County Law and the Municipal Home Rule Law. This list is not intended to be exhaustive of potentially applicable rules; others may bear on the clerk's ability to engage in law practice. *See, e.g.*, Rules Governing Conduct of Nonjudicial Court Employees, 22 N.Y.C.R.R. §§ 50.1-50.6. Our jurisdiction is limited to opinions on the Rules, and thus we do not address the applicability of these or any other provisions of law to this inquiry.

8. Another provision of Rule 1.11 applies specifically to current government employees. Rule 1.11(f) states:

   A lawyer who holds public office shall not:

   (1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

   (2) use the public position to influence, or attempt to influence, a tribunal to act in favor of the lawyer or of a client; or

   (3) accept anything of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing the lawyer's actions as a public official.

9. In N.Y. State 966 (2013), we discussed Rule 1.11(f)(2) in a situation in which the town clerk of Town A wished to represent a client in the court of Town B at a time when the client also had a matter pending in the Town A court. There we said:

   > The applicability of Rule 1.11(f)(2) does not mean that in all cases, the inquirer would be precluded from representing the client's matter before Town Court B. *If the inquiring clerk's duties as court clerk would not include any duties in connection with the client's matter before Town Court A (and if the inquirer did not seek in any way other than performance of assigned duties to influence Town Court A),* then the Rule would not prohibit representation of the private client in the matter before Town Court B.

   [emphasis supplied] Of significance, we then added:

   > Moreover, the representation may be permissible even if the inquirer had very limited duties in connection with the client's matter before Town Court A. If the inquiring clerk's duties are solely ministerial, such as assigning docket number to cases, then we believe the clerk would generally not be in a position to influence the tribunal in Town Court A to act in favor of the client represented by the clerk in Town Court B.

10. This reasoning is equally applicable here. The inquirer is clerk of County A and engages in practice solely in transactional matters in Counties B, C, D, and E. The inquirer's work on behalf of clients in those latter counties would not include any matter in County A. Although not precisely posed by the inquiry, by analogy to N.Y. State 966, if the inquirer is counsel in a matter, say, in County C, to a client who also has a matter pending in County A, the inquirer must not seek in any way other than performance of ministerial duties to influence the client's matter in County A.

11. The prohibitions in Rule 1.11(f)(1) and 1.11(f)(3) are straightforward. For instance, a lawyer's use of a county clerk's position, on behalf of a client, to obtain special treatment for a private client before the county board of supervisors would run afoul of Rule 1.11(f)(1) unless the official could make a good faith judgment that the client's interests accord with the public interest. Likewise, under Rule 1.11(f)(3), the maintenance of a private business, whether in law or otherwise, as a vehicle to receive anything of value to influence an official judgment would be inconsistent with Rule 1.11(f)(3).

Conclusion

12. Subject to any overriding law or regulation governing the office, a county clerk may engage in the private practice of law provided the clerk does not participate in any way in any matter before the clerk's office in which the clerk is personally and substantially involved in private practice, and avoids use of the public office to obtain special treatment for a private client, to influence a tribu-

nal in favor of a client, or to receive consideration from anyone in the guise of legal fees to influence official conduct.

(3-15)

* * *

Opinion 1057 (6/5/15)

Topic: Withdrawal from representation; confidential information; disclosure to court

Digest: The nature and extent of information about a client that a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6. The lawyer should also consider (1) whether withdrawal is mandatory or permissive; (2) whether withdrawal may be accomplished without significant disclosure to the court; (3) whether disclosure is ordered by the court; (4) the circumstances under which the information is to be disclosed (*e.g.,* in open court or *in camera*); and (5) whether the client consents to the disclosure. The lawyer may test on appeal the validity of a court's order to disclose. Client documents filed with another court in other proceedings will be deemed confidential unless their existence is generally known in the community or in the legal profession.

Rules: 1.2(a) & (d), 1.4(a)(5), 1.6, 1.16(b)(1), (c) & (e), 3.1, 3.3

Facts

1. The inquiring lawyer represents a client in pending litigation in state court. The lawyer's client insists that he file what the lawyer considers frivolous petitions, based on allegations made in other litigation filed by the client in federal court against members of the judiciary and another lawyer. The inquirer believes these allegations are not relevant to the matter on which he is providing representation. The inquirer is preparing a request to be relieved as counsel, and asks whether he may use the documents filed by his client in federal court, although the documents may reveal his client to be "incompetent or unstable" and thereby prejudice his client.

Question

2. When a lawyer is moving to withdraw from representing a client, may the lawyer support the motion to withdraw with documents that the client has filed in a different court, even if using those documents may prejudice the client?

Opinion

3. In this opinion, we address the information a lawyer may reveal to the court when requesting withdrawal under Rule 1.16 of the New York Rules of Professional Conduct (the "Rules"). We assume for purposes of this opinion that the lawyer has grounds for withdrawal. If the allegations the client is urging the lawyer to make are indeed frivolous, then filing them would violate Rule 3.1(a), which prohibits a lawyer from asserting an "issue" absent a basis for doing so that is not frivolous, and Rule 3.4(d)(1), which provides that a lawyer appearing before a tribunal shall not "state or allude to any matter that the lawyer does not reasonably believe is relevant.…" Rule 1.2(a) requires a lawyer to abide by the client's decisions concerning the objectives of the representation, and to consult with the client as to the means by which they are to be pursued. However, in discussing a client's suggestion that the lawyer engage in conduct that violates the Rules, Comment [2] to Rule 1.16 states: "The lawyer is not obliged to decline [representation] or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation."

4. Rule 1.6(a) prohibits a lawyer from knowingly revealing confidential information unless the client gives informed consent or the disclosure is permitted by Rule 1.6(b), including when permitted or required under the Rules or to comply with other law or a court order.

5. The nature and extent of information about a client that a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6. The lawyer should also consider the following:

   (1) whether withdrawal is mandatory or permissive;

   (2) whether withdrawal may be accomplished without significant disclosure to the court;

   (3) whether disclosure is ordered by the court;

   (4) under what circumstances the information is to be disclosed (e.g., in open court or in camera); and

   (5) whether the client consents to the disclosure.

Whether the Information Is Protected as "Confidential"

6. Rule 1.6(a) defines and protects certain information as "confidential":

(a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:

(1) the client gives informed consent, as defined in Rule 1.0(j);

(2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

(3) the disclosure is permitted by paragraph (b).

"Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

7. The information at issue here was gained during the representation of the client. It is not clear that the information is protected by the attorney-client privilege, which generally protects only information that the client discloses in seeking legal advice (or that the lawyer discloses in giving legal advice). However, the inquirer believes that its disclosure would be embarrassing or detrimental to the client; consequently, the information falls within part (b) of the definition. The issue here is whether the documents filed in federal court by the client in other proceedings fall within the exception in the second sentence of the definition.

8. The definition of "confidential information" does not include "information that is generally known in the local community or in the…profession to which the information relates." Comment [4A] to Rule 1.6 states: "Information is not 'generally known' simply because it is in the public domain or available in a public file." See Rule 1.0(k) (the term "known" denotes actual knowledge, but a person's knowledge may be inferred from circumstances). In N.Y. State 991 (2013) we explained that sentence: "In our view, information is generally known only if it is known to a sizeable percentage of people in 'the local community or in the trade, field or profession to which the information relates.'" *But see Jamaica Pub. Serv. v. AIU Ins.*, 92 N.Y.2d 631 (1998) (Court of Appeals, interpreting DR 5-108(A)(2) [the predecessor to current Rule 1.9(c)(1)], holds that information is "generally known" when it is readily available in such public materials as trade periodicals and filings with State and Federal regulators).

9. Here, we believe that, unless the allegations in the client's other lawsuits were reported in the public media, or unless the client himself has widely publicized the allegations, the documents in the client's other cases do not fall within the exception and therefore constitute confidential information of the client.

Whether Withdrawal Is Mandatory

10. In certain circumstances, withdrawal from a representation is mandatory. See Rule 1.16(b). In others, withdrawal is permissive—the lawyer may but is not required to withdraw from the representation. See Rule 1.16(c). In either case, as required by Rule 1.16(e), the lawyer must take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client.

11. Where withdrawal is not mandatory, there is less of a justification for revealing client confidences. See N.Y. State 681 (1996) (having a basis for permissive withdrawal may not allow the lawyer to withdraw if confidentiality obligations prevent the lawyer from obtaining required court approval).

Whether Withdrawal May Be Accomplished Without Significant Disclosure

12. Comment [3] to Rule 1.16 discusses the extent of disclosure which ordinarily should be required of counsel seeking to withdraw:

Court approval or notice to the court is often required by applicable law, and when so required by applicable law is also required by paragraph (d), before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. *The lawyer's statement that professional considerations require termination of the*

representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rule 1.6 and Rule 3.3. (Emphasis supplied)

13. Hence, the Rules anticipate that the court usually will not demand the disclosure of confidential information if the lawyer advises the court that "professional considerations" require withdrawal. But that may not always be the case. Particularly when withdrawal is sought on the eve of trial or there has been a history of dilatory tactics, the court may demand more information about the reason counsel believes that "professional considerations require termination of the representation."

14. Where withdrawal may be accomplished simply on the basis of counsel's statement that professional considerations require it, no more should be disclosed. Accordingly, even where the information would not be deemed "confidential" as defined by Rule 1.6, it should not be disclosed if withdrawal can be accomplished without disclosure.

15. Where withdrawal may not be accomplished simply on the basis of counsel's statement that professional considerations require it, but disclosing more would not be permitted under Rule 1.6(b), the lawyer could not disclose that the client has requested that he file papers that the lawyer believes are frivolous, let alone copies of the client's prior frivolous filings.

Whether Disclosure Is Ordered by the Court

16. In some circumstances, the court may press the lawyer for further explanation that "professional considerations" require the withdrawal. If the court orders the lawyer to disclose information the lawyer believes is confidential, Rule 1.6(b) permits the lawyer to comply to the extent the lawyer reasonably believes necessary without violating his ethical obligation to protect a client's confidential information. Rule 1.6 states in relevant part:

    (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary: * * * (6) when permitted or required under these Rules or to comply with other law or court order.

17. But even where Rule 1.6 authorizes disclosure of client confidential information as a result of a court order, Comment [14] to Rule 1.6 suggests that disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. Moreover, if the court does not order disclosure (for example, if it merely states that permission to withdraw will not be granted without more information about the reasons for the motion to withdraw) then the exception in Rule 1.6(b)(6) does not apply.

18. Where a court orders that confidential information be disclosed, the lawyer should seek to protect the information by asking for an *in camera* examination by the court. In many cases, this will limit the adverse effects of disclosure on the client.

19. Alternatively, the lawyer may ethically decide not to comply immediately with the court's order. Instead, the lawyer may test the validity of the order by appealing. An appeal is not mandatory, but if the lawyer believes the information to be disclosed is protected by the attorney-client privilege, the lawyer should appeal the court order. See, e.g., N.Y. State 681 (1996) (lawyer may disclose "secrets" [such as information embarrassing or detrimental to the client] if ordered by a court to do so, but if information is protected by the privilege, lawyer may have an ethical obligation to appeal court's ruling); N.Y. State 528 (1981) (where lawyer's claim of privilege is rejected by a court ruling or order, lawyer may postpone disclosure until validity of adverse ruling is determined on appeal).

Whether the Client Consents to the Disclosure

20. The final consideration is whether the client gives informed consent to any disclosure. The lawyer cannot meet this element until after the lawyer has adequately explained the material risks of disclosure. If the lawyer does so and the client nevertheless consents to disclosure, then the lawyer may disclose the information in the course of moving to withdraw.

Conclusion

21. The nature and extent of information about a client which a lawyer may ethically reveal on a motion to withdraw as counsel depend on whether the information is protected as confidential information under Rule 1.6. The lawyer should also consider (1) whether withdrawal is mandatory or permissive; (2) whether withdrawal may be accomplished without significant disclosure to the court; (3) whether disclosure is ordered by the court; (4) the circumstances under which the information is to be disclosed (e.g., in open court or in camera); and (5) whether the client consents to the disclosure. The lawyer may test on appeal the validity of a court's order to disclose. Client documents filed with another court in other proceedings will be deemed confidential unless their existence is generally known in the community or in the legal profession.

[7-15]

* * *

Opinion 1058 (6/10/15)

Topic: Choice of law; immigration practice

Digest: If a lawyer is admitted solely in New York but is authorized by Federal law to practice immigration law in another state, and if the lawyer practices only immigration law and practices only in another state, then the lawyer is not required to maintain an attorney trust account in a New York banking institution unless the other state's Rules of Professional Conduct require the lawyer to do so.

Rules: 1.0(w), 1.15(b); 7.3(i), 8.5(a) & (b)

Facts

1. The inquirer was recently admitted to practice in New York but plans to reside and practice solely in Illinois and will engage in a practice limited to immigration law. She inquires about her obligations under Rule 1.15(b) of the New York Rules of Professional Conduct (the "Rules") regarding client trust accounts.

Question

2. If a lawyer is admitted in New York but practices solely in Illinois and limits her practice to immigration law, is the lawyer bound by the requirements in New York Rule 1.15(b) to maintain client funds in a banking institution within New York State?

Opinion

Attorney Trust Accounts

3. Rule 1.15(a) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer who "is in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own." Rule 1.15(b)(1) provides that, where the lawyer is in possession of funds or property of another person, the lawyer must maintain the funds in a banking institution as defined in the Rule and 22 N.Y.C.R.R. Part 1300.

4. We assume for purposes of this opinion that the lawyer has or will receive funds belonging to the client incident to her practice of law.

Federal Regulations Governing Immigration Practice

5. Federal immigration regulations provide that a person entitled to representation may be represented by a member in good standing of the bar of the highest court of any state, who is not under suspension or otherwise restricted in his or her practice of law, as long as the lawyer is registered to practice with the Executive Office for Immigration Review. *See* 8 C.F.R. §§ 1001.1(f), 1292.1(a)(1); *see also* Anna Marie Gallagher, "A primer on immigration court practice," 08–12 Immigration Briefings 1 (2008) (hereinafter "Gallagher") (noting six categories of persons who are permitted to represent parties in the immigration courts); N.Y. State 863 (2011) (discussing lawyer licensed only in Texas who works at law firm in New York State that "exclusively" practices immigration law). The cited federal regulations apparently apply to appearances before the U.S. Citizenship and Immigration Service, the Board of Immigration Appeals, and an Immigration Court or Judge, including any related application, proceeding, practice, and preparation. The full scope of federal law permitting lawyers to practice immigration law is a question of law beyond this Committee's jurisdiction. *See* N.Y. State 863 (2011).

The New York Choice of Law Rule: Rule 8.5(b)

6. Under Rule 8.5(a), a lawyer admitted in New York is subject to the disciplinary authority of this state no matter where the lawyer's conduct occurs—but that does not necessarily mean that the New York Rules will apply. Rather, the rules of conduct that a New York disciplinary authority will apply will depend on the choice of law rules set forth in Rule 8.5(b). Rule 8.5(b) provides:

> (b) In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows:
>
> (1) For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and
>
> (2) For any other conduct:
>
> (i) If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and
>
> (ii) If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in

another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

Proceedings Before a Court

7. If the inquirer receives client funds in connection with a proceeding in a court before which the inquirer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied will be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise. *See* Rule 8.5, Comment [2] (observing that a lawyer "may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice"). *See also* Gallagher, *supra,* at 1 ("There are over 50 immigration courts nationwide where immigration hearings are held").

8. We do not opine on the specific ethical obligations governing immigration lawyers, but we note that the rules governing practice before the United States Citizenship and Immigration Services ("USCIS") state several grounds for imposing discipline on any practitioner who appears before the Board of Immigration Appeals and the Immigration Courts. *See* 8 CFR Part 1003, Subpart G, entitled "Professional Conduct for Practitioners—Rules and Procedures." However, such rules do not contain any requirements for establishing and maintaining escrow accounts. Consequently, we believe that the escrow rules of the State of Illinois (*i.e*. the jurisdiction in which the Court sits) would apply.

9. For purposes of applying New York's Rule 8.5(b), the Board of Immigration Appeals is not a "court." As we noted in N.Y. State 968 (2013):

> As [the inquirer is] asking in part about conduct in connection with a proceeding before an administrative tribunal, the question arises whether such an administrative tribunal is a "court" within the meaning of Rule 8.5(b)(1). The Rules contain a definition of "tribunal," which includes both a "court" and an "administrative agency or other body acting in an adjudicative capacity." Rule 1.0(w). In adopting Rule 8.5, the New York Appellate Divisions declined to adopt a version of Rule 8.5 proposed by the New York State Bar Association that substituted the word "tribunal" for the word "court" in the prior version of this rule.… [W]e do not believe we are free to read "court" in Rule 8.5(b)(1) to include administrative tribunals…

For the same reason, in 2010, the New York State Bar Association amended Comment [4] to Rule 8.5 to replace the word "tribunal" with the word "court." See also N.Y. State 1027 (2014) (canons of statutory construction support the conclusion that the term "court" in Rule 8.5(b)(1) excludes the other types of tribunal listed in Rule 1.0(w)).

Matters Not Involving Court Proceedings

10. When the inquirer does not represent a client in a proceeding in a court, Rule 8.5(b)(2) provides that the rules to be applied will be those of the "admitting jurisdiction" in which the inquirer "principally practices," unless the conduct clearly has its "predominant effect" in another jurisdiction in which the lawyer is "licensed to practice." This rule recognizes that New York does not have an interest in applying its own rules where the lawyer's conduct clearly has its predominant effect in another jurisdiction that has disciplinary authority over the conduct.

11. Here, the inquirer is not admitted to the bar in Illinois, the jurisdiction in which the inquirer principally practices. However, in N.Y. State 815 (2007), we determined that, if a New York lawyer is permitted to engage in conduct in another jurisdiction without being formally admitted in that jurisdiction, the lawyer should be deemed to be "licensed to practice" in the other jurisdiction for purposes of DR 1-105(B)(2)(b), the predecessor to Rule 8.5(b)(2)(ii). See also N.Y. State 1054 (2015), N.Y. State 1042 (2014), N.Y. State 1041 (2014) (all applying this principle). If Federal law authorizes the inquirer to practice immigration law from an office address in Illinois, even if not in connection with a "court" proceeding, we believe the New York disciplinary authorities would apply the Illinois Rules of Professional Conduct, unless the inquirer solicits business in New York, in which case the lawyer's conduct in making the solicitation would usually have its predominant effect in New York, which is an admitting jurisdiction, and the disciplinary authorities would apply the New York Rules of Professional Conduct. *Cf.,* Rule 7.3(i) (the provisions of Rule 7.3 on solicitation apply to a lawyer not admitted in New York who solicits retention by residents of New York).

The Illinois Rules of Professional Conduct

12. Our conclusion that New York would apply the escrow provisions of the Illinois Rules of Professional Conduct is consistent with Rule 8.5 of the Illinois Rules of Professional Conduct, which provides as follows:

(a) *Disciplinary Authority*. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) *Choice of Law.* In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

13. Thus, under the Illinois rules, the inquirer is subject to discipline in Illinois because the lawyer provides legal services in Illinois, and the Illinois disciplinary authority will apply the Illinois Rules of Professional Conduct if the conduct occurred in Illinois—whether or not in connection with a proceeding before a tribunal in Illinois—unless the predominant effect of the conduct is in a different jurisdiction. Unless the Illinois Rules of Professional Conduct require a lawyer to maintain client funds in a banking institution in a state where she is formally licensed to practice (here, New York), the inquirer need not maintain an attorney trust account in a New York banking institution. (Whether the Illinois Rules of Professional Conduct so require is a question of law beyond our jurisdiction.)

14. There could, however, be disciplinary proceedings in both jurisdictions, because both the New York and Illinois versions of Rule 8.5(a) provide that a lawyer may be subject to the disciplinary authority of more than one jurisdiction for the same conduct. Thus, if the inquirer were to violate the Illinois Rules of Professional Conduct, she could be disciplined by New York, by Illinois or by both states.

Conclusion

15. If a lawyer is admitted solely in New York but is authorized by Federal law to practice immigration law in another state, and if the lawyer practices only immigration law and practices only in another state, then the lawyer is not required to maintain an attorney trust account in a New York banking institution unless the other state's Rules of Professional Conduct require her to do so.

(9-15)

* * *

Opinion 1059 (6/12/15)

Topic: Disclosure of confidential information, consent by minor clients

Digest: Lawyers for minor clients in immigration proceedings may disclose the names and certain procedural information regarding the clients' cases to granting organizations where (1) the information is not privileged and the disclosure would not be embarrassing or detrimental to the clients or (2) the clients or their legal representatives (*e.g.*, parents or guardians) give voluntary, informed consent to the disclosure.

Rules: 1.0(j), 1.6, 1.14

Facts

1. The inquirers are legal assistance organizations that receive government grants to represent unaccompanied children in immigration removal proceedings. "Unaccompanied children" for this purpose are persons under sixteen years old who were apprehended by the Department of Homeland Security and were not in the care or custody of a legal guardian or parent at the time of arrest. The governmental granting organizations require that grantees provide data on their clients' cases in an online database created and managed by the Vera Institute of Justice, a private, not-for-profit corporation that carries out research and other projects designed to improve the functioning of the criminal justice system.

2. The data to be entered include the name of the children accepted as clients, the number of hours spent on each client's case, where the attorney represented the child, and various procedural details regarding the conduct of those cases (such as the number of charges that were admitted and that

were contested, the relief requested, the types of motions filed, and whether expert testimony was adduced). The term "charges" refers to alleged violations of immigration statutes, such as entering the country without inspection or without possessing a visa at the time of entry. Grantees are also required to input in a narrative field the "results of interviews designed to capture an Unaccompanied Child's understanding of Immigration Proceedings before and after receiving program services."[1]

3. Under the terms of the contract between each governmental granting organization and Vera, Vera is responsible for ensuring that the case-specific data is "redacted and/or anonymized" in order not to disclose any information protected by the attorney-client privilege or by the ethical duty of confidentiality.

Questions

4. May attorneys representing children in removal proceedings disclose to the governmental granting organization specified information about each client and matter without violating the duty of client confidentiality?

5. If disclosure requires client consent, may grantee organizations obtain informed consent to disclosure of this information from an immigrant child who is under sixteen years of age?

Opinion

Disclosing Confidential Information

6. Rule 1.6 of the New York Rules of Professional Conduct (the "Rules") bars a lawyer from knowingly revealing "confidential information" or using such information for the advantage of the lawyer or a third person, unless the client gives informed consent. There are exceptions, none of which are applicable here.[2]

7. "Confidential information" is defined as information gained during or relating to the representation of a client (a) that is "protected by the attorney-client privilege," (b) that is "likely to be embarrassing or detrimental to the client if disclosed," or (c) that the client has requested be kept confidential.[3]

8. This Committee and others have concluded that the disclosure of non-anonymized information about client representations for similar purposes is barred, absent client consent, if the information consists of confidential information. For example, in N.Y. State 485 (1978), we opined that the attorneys in the Juvenile Rights Division of the Legal Aid Society, which represented persons in juvenile delinquency and other Family Court proceedings, could not participate in Vera studies that called for in-depth interviews with defense attorneys that would reveal the clients' confidences or secrets, absent client consent, "even for so worthy a purpose as the Vera study." We cited, among other authorities, ABA Inf. 1287 (1974), which held that a Legal Services Office providing legal representation to poor persons could not reveal the names, addresses and phone numbers of its clients so that they could be interviewed for a research study by an outside non-profit group. The ABA committee noted that the names, addresses and telephone numbers of clients were protected from disclosure "since it might be an embarrassment to the client for any number of reasons to have it revealed that he was a client of the Legal Services Office."

9. Here, with the exception of the last item of data sought (the results of interviews designed to capture the client's understanding of immigration proceedings), the data being sought disclose procedural steps in the course of administrative or court proceedings, and such information is clearly not protected by the attorney-client privilege. Whether disclosure of the information to Vera would be embarrassing or detrimental to the clients depends on the context and the precise nature of the information involved. It is not, however, readily apparent that disclosure to a research organization of the fact that a child is involved in removal proceedings or that a court or administrative body has taken certain procedural steps would be embarrassing or detrimental to the child in the typical case. Those facts will already be known to the parts of U.S. Citizenship and Immigration Services most concerned with the clients' cases, so the disclosure here will merely bring it to the attention of Vera, which is required by contract to redact and/or anonymize the data before disclosing it to the granting agencies. Nevertheless, not every case is typical, so the inquirers must weigh in each case whether disclosure would be embarrassing or detrimental to the child.

10. The final item is quite different. Depending on the level of detail required for the answers, reports of interviews designed to capture the client's understanding of immigration proceedings may reveal information that is embarrassing or detrimental to the child (*e.g.*, the child's ignorance or lack of sophistication) and possibly information protected by the attorney-client privilege (*e.g.*, the tactical considerations that counsel discussed with the client). That information would be "confidential information" within the meaning of Rule 1.6(a), so disclosure is barred, absent informed consent. We turn to whether and how a grant recipient can obtain that consent.

Client Consent to Disclosure

11. A minor can consent to disclosure of confidential information if the minor is capable of understanding the risks of disclosure and of making a reasoned judgment. *See*, *e.g.*, N.Y. City 1997-2; N.Y. State 485; Connecticut Opinion 03-07 (2003); North Carolina Opinion 18 (1998). *See also* Rule 1.14, Cmt. [1] ("[A] client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.").

12. It is not always appropriate to seek consent for disclosure in order to promote interests other than the interests of the client. In this case, the disclosures would primarily promote the research, and presumably monitoring, interests of the governmental granting organizations. But we and other ethics committees have concluded that it is reasonable to seek consent for disclosure of some information to third parties that is necessary for the lawyer to obtain funding or to further research, depending on the nature of the information and the confidentiality protections in place. As the New York City Bar ethics committee has observed, a lawyer may seek consent for disclosure of confidential information to a social services organization if the lawyer "reasonably believes that such disclosures are either in the client's best interests or likely to be a matter of indifference to the client." N.Y. City 1997-2 (information related to the client's expressed intention to harm herself or possible abuse of the child). Similarly, in N.Y. State 69 (1968) we opined that an attorney could, with consent, disclose to the administrator of the county department of social services that paid for the attorney's services information necessary to obtain payment, including the facts of the case and the services proposed for the client, where the administrator made undertakings of confidentiality. Likewise, in N.Y. State 716 (1999) we concluded that it was permissible to obtain client consent to disclose bills and supporting documentation to insurance company auditors responsible for approving the lawyer's bills. *Cf. Restatement Third, The Law Governing Lawyers* § 60, cmt. h (2000) ("A lawyer may cooperate with reasonable efforts to obtain information about clients and law practice for public purposes, such as historical research, when no material risk to a client is entailed, such as financial or reputational harm.").

13. Here, in the typical case, the information sought would appear to be of relatively limited sensitivity and it will be redacted and/or anonymized before transmission to the granting agencies. To the extent the information qualifies as "confidential information" at all, a lawyer could in most cases reasonably conclude that the risks of harm are very small or nonexistent, so the inquirers would be free to seek consent to disclosure.

14. Even if it is permissible to seek consent for disclosure of information that the lawyer concludes is confidential, however, it may not be possible for the child to give consent. First, very young children will be incapable of giving consent. There is no particular age when children can be said to have capacity to give consent. The New York City Bar ethics committee observed in an opinion dealing with "verbal minors ages twelve or older who affirmatively seek a lawyer's assistance" that such clients "generally will be capable of making considered judgments concerning the representation." N.Y. City 1997-2 (citing, *inter alia*, Standard for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings § 2.2 (Am. Academy of Matrimonial Lawyers 1995) for the proposition that there is "a rebuttable presumption that children above the age of twelve are competent"). But the children that are the inquirers' clients may be less capable of making considered judgments than the clients in N.Y. City 1997-2, given that the unaccompanied children who are the inquirers' clients are likely to be unfamiliar with American society, or may be more capable of making considered judgments, given their experiences in their home countries and during their unaccompanied trip to the United States. If the children have been released to the custody of a parent or guardian—the inquiry states that "approximately 45% of the children are not released to a parent," leaving approximately 55% who are—the parent or guardian may be able to consent. *See* Rule 1.14, Cmt. [4] (discussing possibility of looking to parents to make decisions for minor clients, and noting that whether the lawyer should do so may depend on the nature of the matter).

15. Second, the consent must not be accepted until the lawyer has made full disclosure of "information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Rule 1.0(j) (definition of "informed consent"). The extent of the information needed and risks to be addressed will vary both with the nature of the information being disclosed and the sophistication of the child, parent or guardian whose consent is sought. Where the information is relatively innocuous, it may be possible to delegate the task of obtaining consent to nonlegal personnel, but where the information is more sensitive, that may not be possible.

16. Third, the client's consent must be voluntary. As this Committee observed in N.Y. State 490 (1978), lawyers providing services to indigent clients "should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and, such requests should be made only under circumstances where the staff is satisfied that their clients could refuse to consent without any sense of guilt or embarrassment."

Conclusion

17. Whether the inquirers can disclose the information sought by the granting organizations depends, first, on whether the information is protected by the attorney-client privilege or disclosure in a particular case would likely to be embarrassing or detrimental to the clients. If the lawyer concludes that the information is protected but that disclosure would not be adverse to the interests of the child, the lawyer may seek the consent of the child or, in some circumstances, the child's parent or guardian, but the consent must be preceded by full disclosure of any risks and benefits and must be fully voluntary.

Endnotes

1. The precise information requested is as follows:
   - number of children accepted as clients, identified by name, gender, date of birth, and alien number;
   - number of hours spent on each Unaccompanied Child client's case;
   - fora in which the attorney represented each Unaccompanied Child (immigration court, the Board of Immigration Appeals, state court, the U.S. Citizenship and Immigration Services);
   - number of cases in which the Unaccompanied Child did not contest the allegations in the Notice to Appear;
   - number of charges contested and the outcome;
   - whether the Unaccompanied Child requested immigration relief or relief from removal and the disposition of any such applications;
   - number of other court/agency orders sought and the disposition of the orders;
   - type of motions filed and disposition of those motions;
   - disposition of any appeals filed;
   - whether any expert testimony was proffered and/or allowed;
   - whether the attorney sought or obtained the appointment of a child advocate for an Unaccompanied Child,
   - whether special accommodations (such as testimonial aids, closed hearings, or other means to facilitate the adjudication) were sought or utilized;
   - results of interviews designed to capture an Unaccompanied Child's understanding of Immigration proceedings before and after receiving program services.
2. One of the exceptions is if "the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community." The disclosures contemplated here, while they are in the interest of the grantee organizations, which wish to receive payment for the services rendered, are not thereby impliedly authorized to advance the best interests of the client for this purpose. That exception implies a closer connection between the interests of the client and the interests advanced by the disclosure. Another exception is disclosure "to establish or collect a fee," but that does not permit a lawyer to enter into a contract with a third party for payment of fees where the contract requires disclosure, and then rely on this exception to justify the disclosure. *See* N.Y. State 716 (1999) ("the fact that the insurance company has agreed to pay the lawyers fee does not in itself authorize the lawyer to disclose information to the [insurance company] auditor that would otherwise be protected by DR 4-101 [the predecessor to Rule 1.6]").
3. We will assume in the discussion that follows that the clients have not specifically requested that any of the information at issue be kept confidential.

(12-15)

* * *

Opinion 1060 (6/12/15)

Topic: Escrow account; attorney special account; delegation to nonlawyer employee

Digest: Law firm may authorize a non-legal staff member to direct its bank to open law firm escrow sub-accounts, and to transfer funds from a sub-account to the master escrow account, in name of a lawyer admitted in New York State and under that lawyer's direction, provided that the lawyer or law firm exercises close supervision over the nonlawyer, and withdrawals from the master escrow account can only be authorized by a lawyer admitted in New York State. In any event, the supervising lawyer retains professional responsibility for the nonlawyer's conduct.

Rules: 1.15(b), (c), (d) & (e); 5.3.

Facts

1. A law firm wishes to have a staff member of the law firm, who is not a lawyer, direct a bank to open individual sub-accounts under a master lawyer escrow account maintained by that bank for the law firm. The law firm also wishes to authorize the nonlawyer staff member to direct the bank to transfer funds from any sub-account to the master escrow account.

2. The law firm would permit distributions from the master escrow account to be initiated and authorized only by a lawyer in the law firm licensed to practice in New York. Authority of the non-lawyer staff would be limited to transferring funds from a sub-account to the master escrow account, and the nonlawyer could only make such transfers at the direction of a lawyer licensed to practice in New York. Transfers from the sub-accounts may be

made only to the master escrow account. The only authorized method to withdraw funds from the master escrow account or any of the sub-accounts would be at the express direction of a lawyer in the law firm admitted to practice in New York, and upon the signature of a lawyer in the firm admitted to practice in New York. The nonlawyer would have no authority to move funds out of the master escrow account.

Questions

3. May a law firm or lawyer ethically authorize and instruct a nonlawyer staff member of the law firm to direct its bank to open individual sub-accounts under a master lawyer escrow account maintained by the bank for the law firm?

4. May the law firm or lawyer ethically instruct the nonlawyer staff member to direct a bank to transfer funds from a sub-account to a master escrow account, from which the funds would be distributed by a lawyer in the law firm, who would execute the checks?

Opinion

Rule 1.15(e): Requirements for Authorized Signatories on Lawyer Special Accounts

5. Rule 1.15 of the New York Rules of Professional Conduct (the "Rules") governs the obligations of lawyers with respect to the funds of others that the lawyer has received "incident to the lawyer's practice of law." This includes the following obligations:

   - Not to misappropriate such funds. Rule 1.15(a).
   - To maintain such funds in one or more special bank accounts. Rule 1.15(b).
   - To maintain records of all deposits in and withdrawals from the special bank accounts, that identify the date, source and description of each item deposited, and the date, payee and purpose of each withdrawal or disbursement. Rule 1.15(d)(1)(i).
   - To maintain records of the special accounts, including the source of all funds deposited and the persons for whom the funds are or were held. Rule 1.15(d)(1)(ii).
   - To make accurate entries in their records of receipts and disbursements, special accounts and ledger books or similar records. Rule 1.15(d)(2).
   - To ensure that special account withdrawals (i) are made only to a named payee and not to cash, (ii) are made by check or (with the approval of the party entitled to the proceeds) by bank transfer and—most important here—(iii) that all authorized signatories of a special account are lawyers admitted to practice law in New York State. Rule 1.15(e).

6. There are no comments to Rule 1.15 relevant to the questions presented.

Non-Lawyer Employees of Law Firms

7. Rule 5.3(a) provides that "A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate." Rule 5.3(a) further provides that "the degree of supervision required is that which is reasonable under the circumstances," taking into account such factors as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter. However, what is reasonable in the circumstances of holding funds under Rule 1.15 may involve a higher standard of care than that required under other rules. For example, Rule 1.15(a) states that a lawyer in possession of funds belonging to another person incident to his or her law practice is a fiduciary and Comment [1] to Rule 1.15 explains that the lawyer should hold such funds using the care required of a professional fiduciary. Moreover, as noted in paragraph 9, the lawyer may be responsible for the conduct of a nonlawyer employee that would be a violation of the Rules if engaged in by a lawyer. As noted in paragraph 13, we warned in N.Y. State 693 that, since the responsibility for client funds may not be delegated, the lawyer remains responsible to the client for errors. Finally, the courts, in evaluating the lawyer's care of client funds for disciplinary purposes, may use an exacting standard. *See Matter of Galasso*, *infra* (lawyer must use a *high degree of vigilance* to ensure that the funds [the clients] entrusted are returned to them upon request.)

8. Comment [2] to Rule 5.3 states that a law firm must ensure that nonlawyer assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, and that a law firm "should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules."

9. Violations of the Rules by a nonlawyer employee may subject certain firm lawyers to professional discipline. Rule 5.3(b) provides that a "lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the

lawyer that would be a violation of these Rules if engaged in by a lawyer" where the lawyer either (i) has "managerial responsibility in a law firm" or (ii) has supervisory authority over the nonlawyer and knew or should have known of the conduct at issue in time to take reasonable remedial action.

10. These principles were affirmed in *Matter of Galasso*, 19 N.Y.3d 688 (2012), which involved a disciplinary proceeding against a lawyer for failing to properly supervise a bookkeeper, resulting in the misappropriation of the funds of several clients from an escrow account and the firm's IOLA account. Although Galasso and one of his partners were the only authorized signatories on the special account application, the bookkeeper apparently altered the account documentation to permit electronic funds transfers and to include himself as an authorized signatory.

11. The Court of Appeals in *Galasso* found several deficiencies in the firm's policies and procedures regarding client funds. For example, the lawyer's practice had been to review monthly financial reports generated by the bookkeeper rather than to review the account statements themselves (which might have disclosed that the bookkeeper was forging checks). In addition, the lawyer did not have personal contact with the bank and did not exercise sufficient oversight of the firm's books and records. Finally, the lawyer ceded an unacceptable level of control over the firm accounts to the bookkeeper, thereby creating the opportunity for misuse of client funds. Indeed, when a client's accountant pointed out a discrepancy in the escrow account, the lawyer did not resolve the discrepancy himself but rather allowed the bookkeeper to resolve it with the bank. The *Galasso* court stressed that attorneys are not prohibited from delegating tasks to firm employees, but also stressed that any delegation must be accompanied by an appropriate degree of oversight by a lawyer.

Establishing Sub-Accounts in the Special Account

12. No opinions of this Committee directly address the questions presented, but N.Y. State 693 (1997) is instructive. N.Y. State 693 discusses whether a lawyer may allow a paralegal to use a stamp bearing the lawyer's signature to execute checks drawn on a client escrow account. N.Y. State 693 notes that DR 9-102(E) of the Code of Professional Responsibility, the predecessor to Rule 1.15(e), explicitly states that only a lawyer may be a signatory to such a special account. Even so, the opinion notes that the Code "contemplates that lawyers will delegate tasks to nonlawyers," and that, despite restrictive holdings from case authorities that lawyers may not give signatory authority to nonlawyers, a lawyer could ethically authorize a nonlawyer to use the lawyer's signature stamp. Opinion 693 said:

> [W]e believe that it is ethically permissible for a lawyer to authorize a paralegal to make use of the lawyer's signature stamp on checks drawn from a special account at closings *under certain conditions and with proper controls*. As with the rest of a paralegal's duties at a real estate closing… the lawyer must consider in advance how the paralegal will use the signature stamp—including approving the purpose of the anticipated payments to be made by such checks, the nature of the payee and the authorized dollar amount range for each check to be issued—and review afterwards what actually happened to assure that the delegation of authority has been utilized property. [Emphasis added.]

13. N.Y. State 693 warns that the "responsibility for client funds may not be delegated," and that lawyers who authorize nonlawyers to use their signatures thus remain responsible to the client for any errors or misuse of the signature stamp. The opinion concludes that the delegation is permissible despite DR 9-102(E) "so long as the lawyer supervises the delegated work closely" and "exercises complete professional responsibility for the acts" of the nonlawyer.

14. In the inquiry here, the inquirer has assured us that transfers from sub-accounts can be made only to the master escrow account, not outside it, and that withdrawals can only be made by a lawyer licensed to practice in New York. In these circumstances, we believe a lawyer may delegate the two tasks described in the inquiry. Specifically, under procedures approved and closely supervised by the lawyer or law firm, the law firm may authorize a nonlawyer to direct the bank to set up the requested sub-accounts and to transfer funds from a sub-account to the master escrow account. Of course, pursuant to Rule 5.3(b), the supervising lawyer remains professionally responsible for any ethical violations by the nonlawyer.

Conclusion

15. A lawyer or law firm may authorize a non-legal staff member to direct its bank to open law firm escrow sub-accounts and to transfer funds from such an account to the master escrow account in the name and under the direction of a firm lawyer admitted in New York State, provided that the lawyer or law firm exercises close supervision over

the nonlawyer, and withdrawals from the master escrow account can only be authorized by a lawyer admitted in New York State. In any event, the supervising lawyer retains professional responsibility for the nonlawyer's conduct.

(8-15)

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Opinion 1061 (6/15/15)

Topic: Duty of Confidentiality; Informed Consent; Client Payment History; Law Firm Reporting Client's payment history to database with Client's Informed Consent

Digest: Subject to certain conditions, a lawyer may report a client's payment history on a database system that allows lawyers to report on the timeliness of payment of legal bills and gives access to such information to subscribing law firms and their staff members. Such reporting does not violate the Rules of Professional Conduct provided that (i) the lawyer has obtained the client's informed consent, and (ii) the client's consent is not coerced. To obtain the client's uncoerced informed consent, the lawyer should fully explain the material risks of consenting, including the uses to which the information may be put, and the lawyer should take into consideration the sophistication of the client. The lawyer should also inform the client of his/her right to have independent counsel advise on whether the client should consent. A client who has given informed consent to disclose confidential information may later revoke the consent at any time.

Rules: 1.0(j), 1.6(a) & (b), 1.7(b), 1.9(c), 1.16(b) & (c)

Facts

1. The inquirer proposes a subscription-based database system or information clearinghouse (the "System"), akin to a credit reporting system, in which lawyers would report information about the payment status of legal bills of a commercial (i.e. non-consumer, non-household use) client.[1] The System would be accessible through a secure website solely to subscribing law firms ("Subscribers") and their constituent lawyers and staff members. Subscribers would be allowed to file reports on the payment histories of their consenting clients and to review reports filed by other lawyers. The purposes of the System are to allow Subscribers to predict a potential client's timeliness of payment of fees (*i.e.*, assess the credit-worthiness of a prospective client) and to incentivize clients to pay legal bills as agreed. The System would identify not only potential problematic credit risks but also good credit risks. Under the System's business model, the Subscriber would have the client sign a consent, allowing the law firm to report the client's timeliness in payment.

2. The System, as proposed, would enable law firms to report a client's payment history using such categories as non-payments, late payments, disputed payments and prompt payments, but it would not report the amount owed by the client. The reporting Subscriber would be required to notify the client when the Subscriber files an adverse report about an unpaid invoice with the System, and the client would be entitled to notify the System if the client disputes the amount or validity of the unpaid invoice.

3. Subscribers would be obligated to treat the payment histories in the System's database as confidential, but would be authorized to use the information in the System in determining whether to accept an engagement or in establishing the financial terms of the engagement, including whether to request or require an advance retainer and in what amount.

4. Subscribers would be required to notify the System if a client disputes an invoice, or if a dispute with a client has been settled. The inquirer has indicated that a negative payment history will not be reported until after an attorney-client relationship has ended.[2]

5. The inquirer has advised that the System's rules mandate that, before accepting an engagement, the System's subscriber must obtain the client's informed, written consent and a limited waiver of confidentiality. The form of consent to be provided to the client upon engagement informs the client that by executing the consent, the client authorizes the lawyer to file a report with the System that contains (a) the client's name, address, state of incorporation, names of principals, officers and directors; (b) dates services were rendered and dates payment were due; and (c) the length of time the invoice was outstanding (with notations such as: "paid as agreed" or "invoice was 60, 90, 120 or 120+ days past due"). In addition, the form of consent informs the client to "feel free" to consult with other counsel regarding the implications of the consent.

Question

6. May a lawyer participate in a system that reports the payment histories of the law firm's clients to other system subscribers, if the client gives informed consent for the lawyer to make such reports to the system?

Opinion

7. Rule 1.6 of the New York Rules of Professional Conduct (the "Rules") describes a lawyer's duty of confidentiality to a current client. Rule 1.6 provides as follows:

   (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or third person, unless:

   (1) the client gives informed consent, as defined in Rule 1.0(j);

   (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or

   (3) the disclosure is permitted by paragraph (b).

   "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (a) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (1) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.

8. Comment [2] to Rule 1.6, headed "Scope of the Professional Duty of Confidentiality," underscores the importance of a lawyer's duty of confidentiality. It states, in pertinent part:

   > [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, or except as permitted or required by these Rules, the lawyer must not knowingly reveal information gained during and related to the representation, whatever its source.… The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship.…

9. Rule 1.9 addresses a lawyer's duties to former clients, including the duty of confidentiality. Paragraph (c) of this rule states in pertinent part:

   (c) A lawyer who has formerly represented a client in a matter…shall not thereafter:

   (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

   (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

   The confidentiality obligation to a former client is thus the same as that to a current client, and the same exceptions apply.

Payment History as Confidential Information

10. We have previously addressed whether a client's payment status constitutes confidential information. In N.Y. State 684 (1996), interpreting DR 4-101(B), the predecessor to Rule 1.6(a), the Committee concluded that a client's unpaid account status will almost always constitute a "secret"[3] within the meaning of DR 4-101(B) because it is information "gained in the professional relationship" and because its "is likely to be embarrassing or detrimental to the client if disclosed." We therefore found that reporting the client's payment status to a credit bureau would plainly violate the prohibition on using a client secret "to the disadvantage of the client" and for the "advantage of the lawyer."

11. Our conclusion under Rule 1.6 on the facts before us is the same. We see no practical difference between a credit bureau and the System proposed here.

12. The analysis, however, does not end there, since the Rules contain certain exceptions to confidentiality. Rule 1.6, and therefore Rule 1.9, contains two potentially applicable exceptions to the proscription against disclosure or use of confidential information—information necessary to collect a fee, and information a client has given informed consent to disclose. We will address each exception.

Information Necessary to Collect a Fee

13. Under Rule 1.6(b)(5)(ii), the lawyer may disclose confidential information to the extent the disclosure is "reasonably necessary" to "establish or collect a fee." In N.Y. State 684 (1996), we concluded that reporting the client's delinquent status to a credit bureau did not qualify as the type of disclosure that was "reasonably necessary" to "establish or collect the lawyer's fee" within the meaning of the similar exception under the Code, because the fee can be collected without making such a report. We said:

> [T]o the extent it aids the collection process at all, it would appear to do so only by virtue of its *in terrorem* effect on the client, arising from the likely adverse impact on the client's credit rating. Such use of a client's secret by a lawyer would plainly violate DR 4-101(B)'s prohibitions on the use of a client's secret "to the disadvantage of the client" and "for the advantage of the lawyer."

14. See also Rule 1.6, Cmt. [14] (disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose); N.Y. State 980 (2013) (Rule 1.6(b)(5) is no license for counsel to reveal any confidential information beyond what is "reasonably believe[d] necessary" to collect the fee.)

15. The inquirer argues that the System is consistent with the principle described in Comment [11] to Rule 1.6, which explains the exception for disclosures necessary to collect a fee, and states: "A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary." For example, we have long recognized that lawyers are not compelled to provide free legal services to all clients. See N.Y. State 598 (1989) (client's knowing and substantial failure to satisfy his or her financial obligations to a lawyer would justify lawyer's withdrawal from employment in accordance with DR 2-110(C)(1)(f)—the predecessor to Rule 1.16(c)(5)—which allows a lawyer to withdraw from representation where the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees). However, our interpretations of the withdrawal rule make it clear that mere nonpayment or late payment is not enough. The client's failure must be conscious rather than inadvertent, and must not be *de minimis* in either amount or duration. Conversely, a lawyer may withdraw from representing a client who deliberately disregards an obligation to pay a lawyer more than a *de minimis* amount for more than a *de minimis* length of time.

Client Consent to Disclosure or Use

16. The duty of confidentiality owed to a client or former client may be waived if a client or former client gives informed consent to disclose the confidential information, confirmed in writing. See Rule 1.6(a)(i) (disclosure permitted if client gives informed consent); Rule 1.9(c)(1)&(2) (disclosure prohibited except as these Rules would permit with respect to a current client); Rule 1.9, Cmt. [9] ("The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent…").

17. The definition of "informed consent" is pertinent to the inquiry, because Rules 1.6 and 1.9 both refer to it. Rule 1.0(j) defines "informed consent" as:

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

18. Comment [6] to Rule 1.0 provides the following guidance regarding informed consent:

> The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct, and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel.… In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decision of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

See also Rule 1.7, Cmt. [18] (informed consent requires that the client be aware of the material and foreseeable ways that the conflict could adversely affect the interests of the client).

19. This Committee declines to opine whether any particular form of disclosure is adequate to obtain informed consent from any particular population

of clients. At a minimum, however, informed consent in the circumstances before us would require disclosing that (i) the client's payment history would be available to Subscribers, and that (ii) Subscribers might use the client's payment history to determine whether to accept an engagement or to establish the financial terms of the engagement, including whether to request an advance retainer. Full disclosure may also require informing the client that the waiver would authorize the lawyer to report the client's non-payment pending a dispute over the legal bill (although we are told that the report to the system would note that the bill was disputed).[4] In the event of a later challenge, the burden is on the lawyer to demonstrate that consent was informed.

20. In prior opinions involving collection of fees, this Committee has commented on informed consent to the use of a collection agency, and cautioned that the "lawyer must take care to ensure that the client's consent is uncoerced as well as informed." We have some concern that, as in N.Y. State 684, the lawyer's ability to disclose the client's payment history to the System will have an *in terrorem* effect on the client, arising from the likely adverse impact of a history of slow or contested payments on the client's ability to hire other counsel on favorable credit terms. But we think that this *in terrorem* effect simply makes it less likely that the client will consent, rather than indicating that the client's consent is coerced. Coercion may be present, however, if the lawyer refused an engagement unless the client consented to use of the System.

Advance Consent

21. The consent being proposed here is an advance consent. That is, the client is not being asked to consent to a known current disclosure or known use of confidences, but rather is being asked to consent to the lawyer's possible future disclosure or use of those confidences. In N.Y. City 1997-2, the City Bar ethics committee held that "consent to disclosure under particular circumstances for particular purposes may generally be obtained in advance of obtaining client confidences." In determining the effectiveness of the consent, the City Bar said that the client's consent must be given after "full disclosure" and must be "voluntary." N.Y. City 1997-2. Those two factors are also helpful here.

22. Advance consent to disclosure of confidential information is analogous to advance consent to waive a conflict. Comment [22] to Rule 1.7 provides guidance about what information a lawyer must provide to a client to obtain valid consent to a future conflict:

> The effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. At a minimum, the client should be advised generally of the types of possible future adverse representations that the lawyer envisions, as well as the types of clients and matters that may present such conflicts. The more comprehensive the explanation and disclosure of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the understanding necessary to make the consent "informed" and the waiver effective.… The adequacy of the disclosure necessary to obtain valid advance consent to conflicts may also depend on the sophistication and experience of the client.

See generally Restatement Third, The Law Governing Lawyers ("Restatement of the Law Governing Lawyers") §62 Cmt. c ("When the question concerns the lawyer's duty to the client, the client's consent is effective only if it is given on the basis of information and consultation reasonably appropriate under the circumstances.") A lawyer cannot assume that all "commercial" clients are sophisticated. Many small business clients may not be sophisticated consumers of legal services and may not have experience in negotiating retainer agreements or negotiating waivers of rights bestowed upon them by the Rules.

23. Applying those concepts here, once the client consents in advance to the lawyer's providing otherwise confidential payment information to the System, the question arises whether the client may, at some point thereafter, revoke the consent. Comment [21] to Rule 1.7 states that "a client who has given consent to a conflict may revoke the consent at any time." Similarly, the Restatement of the Law Governing Lawyers takes the view that consent to a conflict can be revoked at any time. Restatement, §122, Cmt f. ("A client who has given informed consent to an otherwise conflicted representation may at any time revoke the consent."). See N.Y. State 903 (2012) (client who has given consent to a conflict may revoke the consent). In the case of conflicts, the client's revocation of consent enables the client to terminate the lawyer's representation of the client from that point forward.[5]

24. We believe the same restriction applies to a client's advance consent to a lawyer's disclosure of confidential information. If the client revokes consent, the revocation will prohibit the lawyer from making future reports of the client's payment status to the System, but will not require the lawyer to remove any past reports to the System. See N.Y. City 1997-2 ("If the minor client consents in advance to the lawyer's reporting of confidences or secrets concerning abuse or mistreatment, the client may later change his mind and revoke consent, in which event the lawyer must maintain confidentiality."). The City Bar further opined that whether the lawyer may withdraw from representing the revoking client or a conflicting client upon the client's revocation of consent is governed by the rule on withdrawal from representation (now Rule 1.16). Similarly, whether the inquiring lawyer here would have grounds to withdraw from representing a client who revoked consent to allow the lawyer to report the client's late payments would depend on Rule 1.16(b)-(c).

25. Aside from complying with the requirements of the aforementioned Rules, the lawyer must also comply with applicable law, including laws such as the Fair Credit Reporting Act. (We offer no opinion on whether the FCRA or any other law is applicable in these circumstances.)

Conclusion

26. A lawyer may report a client's payment history to a database system that allows lawyers to report on the timeliness of payment of legal bills and gives access to such information to subscribing law firms and their staff members, provided that lawyer has obtained the client's informed consent, and provided that the client's consent is not coerced. In order to obtain the client's informed consent, the lawyer should fully explain the material risks of consenting, including the uses to which the information may be put. In formulating that explanation the lawyer should take into consideration the sophistication of the client, and should inform the client of his/her right to have independent counsel review the consent. In addition, the client who has given informed consent to disclose confidential information may revoke the consent at any time.

Endnotes

1. The inquirer may have chosen the term "commercial" to avoid the application of consumer protection laws such as the Fair Credit Reporting Act. The distinction made by ethics rules, particularly those involving informed consent, is not the same as that made by consumer protection laws. Rather, as noted below, it is based on the sophistication and experience of the client, and all "commercial" clients will not have the same degree of sophistication in, and experience with, legal matters.

2. The inquirer apparently changed the method of operation of the System after another state's ethics committee opined that, under the ethical rules in its state, a lawyer could not make reports on current clients. Because the inquirer has told us that lawyers would make reports only with respect to former clients, we have not examined whether our Rules would permit such reports with respect to current clients.

3. The Code defined "secret" as information gained in the professional relationship that is not protected by the attorney-client privilege, but that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. Although the Rules do not use the term "secret," the term "confidential information" includes information gained during or relating to the representation that is likely to be embarrassing or detrimental to the client and information that the client has requested to be kept confidential. Thus, the term "confidential information" is similar to and slightly broader than the terms "confidences" and "secrets" under the Code.

4. Under New York's Attorney-Client Dispute Resolution Program, 22 N.Y.C.R.R. Part 137, the lawyer could not sue the client for the unpaid fee without giving the client 30 days' notice of the right to demand fee arbitration. Thus New York disfavors unilateral actions by lawyers to collect legal fees.

5. In the context of conflicts, whether the client's revocation and firing of the lawyer results in the lawyer's disqualification from representing the other client depends on the circumstances, including whether the parties have agreed to permit continued representation adverse to the withdrawing client after a conflict has arisen. See N.Y. 903 (2012) ("When a lawyer jointly represents two co-defendants pursuant to a validly obtained consent to the dual representation and to any future conflicts that might arise between the joint clients, and one of the clients later revokes consent, whether the lawyer may continue to represent the non-revoking client depends upon the circumstances, unless an advance agreement specifies what happens upon revocation of consent."); D.C. Bar Opinion 317 (2002).

(54-14)

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Opinion 1062 (6/29/15)

Topic: Financing a law practice; crowdfunding websites.

Digest: A law firm may engage in certain types of crowdfunding but not others. Any form of fundraising that gives the investor an interest in a law firm or a share of its revenue would be prohibited. However, in some circumstances a law firm may give the funding source some kind of reward. For example, a law firm may send a funder non-confidential memoranda discussing legal issues (provided the law firm complies with any applicable advertising rules), or may agree that the law firm will provide pro bono legal services to certain charitable organizations, provided that the lawyer complies with Rule 1.1 regarding competence and the repre-

sentation does not involve conflicts in violation of Rule 1.7 or Rule 1.9.

Rules: 1.1(b), 1.7, 1.9, 5.4(a) & (d), 7.1.

Facts

1. The inquiring lawyers, who are recent law school graduates, plan to start a small firm. They need to raise capital to fund the start-up expenses of the new firm for the first few months of operations, such as rent, website development, professional liability insurance, and office supplies.

2. The inquiring lawyers have accumulated substantial student loan debt and aim to avoid further borrowing. They ask whether they may ethically raise start-up funds via internet websites through a method known generally as "crowdfunding."

3. "Crowdfunding" is defined generally as funding a project or venture by raising small amounts of money from a large number of people. It is often used in product development to test a market and refine a product. Philanthropic organizations also use crowdfunding to raise funds. We are aware of five basic approaches to crowdfunding: (1) Donation, (2) Reward, (3) Lending, (4) Equity, and (5) Royalty. In each of the models, the user uses the funding website of a crowdfunding "platform," which charges fees based on the amount of money raised. The platforms have varying focuses, models and fee structures. *See generally* Crowds Unite, *What is Crowd Funding?*, *available at* http://crowdsunite.com/what-is-crowdfunding.

4. The first of the five approaches to fundraising—the lending model—is close to the traditional working capital loan.

5. The second approach, the equity model, is often used for new ventures and provides the funding source an ownership interest in the venture.

6. Similarly, the third approach, the royalty model, which often is used for specific product development and rollout, rewards the investor with a percentage of the sales proceeds from that particular product.

7. The donation model is used most often for philanthropic causes where there is no material or financial return to the contributor.

8. The reward model typically provides the funder with a sample of the product or service being supported by the fundraising effort. It is often used by private ventures to pre-sell product or create a large following for the product.

Question

9. What are the ethical limitations on using internet-based crowdfunding to raise working capital for a law firm?

Opinion

10. This Committee expresses no opinion on the business merits of any of the five crowdfunding methods or whether any might succeed in reaching the law firm's fundraising goals. But we comment briefly on each model.

11. The lending model would only increase debt and therefore would not meet the law firm's goal.

12. The donation model may be unattractive to potential donors (since they receive nothing in return and may not wish to support an enterprise designed to make a profit). The donation model might also be unattractive to the law firm, since friends and relatives of the lawyers might be inclined to donate directly to the law firm even if the lawyers were not using crowdfunding, whereas under the donation model their contributions will be diminished by the platform's fees. But we see no ethical issues with the donation model, as long as the lawyers make clear that donors will receive nothing in return and that the law firm is designed to be a profit-making enterprise.

13. Two of the models—the royalty model and the equity model—would clearly violate the Rules of Professional Conduct. The royalty model contemplates the investor receiving a percentage of revenues, and would therefore violate Rule 5.4(a) ("A lawyer shall not share legal fees with a non-lawyer"). Similarly, the equity model violates Rule 5.4(d) (lawyer shall not practice law in a for-profit entity if a non-lawyer owns any interest therein.).

14. The remaining model, the reward model, might fit the law firm's business needs, and the inquiring lawyers have suggested several examples of rewards, including (i) informational pamphlets, (ii) reports on the progress of the firm and (iii) the lawyers' performance of pro bono work for a third-party non-profit legal organization. Whether these rewards would be attractive enough to raise capital requires a judgment that is beyond the jurisdiction of this Committee, but we can comment on the ethical implications of the suggested rewards.

15. ***Informational pamphlets and progress reports.*** Informational pamphlets, whitepapers or reports on the firm's progress may be governed by Rule 7.1 ("Advertising"). Materials may not be considered advertising as defined in Rule 1.0(a) if they are

"topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law.…" Rule 7.1, Cmt. [7]; N.Y. State 967 (2013) (blog written by an attorney is not an "advertisement" if the primary purpose of the blog is not retention of the attorney). However, the lawyers should take care that their writings on legal topics do not give individual legal advice. *See* Rule 7.1(r) (without affecting the right to accept employment, lawyer may write for publication on legal topics "so long as the lawyer does not undertake to give individual advice").

16. ***Pro bono hours.*** The proposal to offer pro bono hours to a third-party non-profit legal organization raises several issues. In N.Y. State 971 (2013), a lawyer proposed to donate legal services to a charitable organization for auction as a fund-raising device. We discussed the requirement of Rule 1.1(b) that a lawyer accept employment only if the lawyer is, or intends to become, competent to handle the matter. Opinion 971 also discussed the prohibition on undertaking a matter that would involve an impermissible conflict of interest under Rule 1.7 or Rule 1.9. We therefore concluded that the firm's offer of pro bono services must be conditioned on the firm's ability to comply with these ethical constraints. We stressed, however, that the fact these limitations apply does not mean that the lawyer cannot participate. *See also* N.Y. State 897 (2011) (lawyer may market legal services on a "deal" of the day" or "group coupon" website provided that the advertising is not misleading or deceptive and makes clear that no lawyer-client relationship will be formed until the lawyer can check for conflicts and assess competence to provide the services). The same principles apply to the reward model that the inquiring lawyers are considering here.

Conclusion

17. A law firm may engage in certain types of crowdfunding but not others. Any form of fundraising that gives the investor an interest in a law firm or a share of its revenue would be prohibited. However, in some circumstances a law firm may give the funding source some kind of reward. For example, a law firm may send a funder non-confidential memoranda discussing legal issues (provided the law firm complies with any applicable advertising rules), or may agree that the law firm will provide pro bono legal services to certain charitable organizations, provided that the lawyer complies with Rule 1.1 regarding competence and the representation does not involve conflicts in violation of Rule 1.7 or Rule 1.9.

(13-15)

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Opinion 1063 (6/29/15)

Topic: Conflicts; fees paid by third-party payors

Digest: When a lawyer accepts payment of legal fees from a third party, the third-party payor is not a client merely by virtue of paying the lawyer's fee. Where the lawyer's fee for representing a son was paid by the client's father and mother, and the lawyer did not give father reason to believe he was a client, the lawyer's representation of mother would not constitute a conflict of interest unless a reasonable lawyer would conclude that the lawyer's interest in continuing to receive fees from the father for representing the son would create a significant risk of adversely affecting the lawyer's professional judgment on behalf of the mother. But even if such a conflict exists, the lawyer could cure the conflict by obtaining the mother's informed consent to the conflict as long as the lawyer satisfies the terms of Rule 1.7(b).

Rules: 1.7(a) & (b), 1.8(f)

Facts

1. The inquirer agreed to represent an 18-year-old client ("Son") in a criminal defense matter. When the inquirer initially met the Son at the Town Court, the Son's divorced parents ("Mother" and "Father") were present. Although only Son signed a retainer agreement, each of the client's parents paid one-half of the retainer. The inquirer continues to represent Son.

2. Recently, inquirer agreed to represent Mother in two matters against Father. One is a custody dispute against Father (not involving Son). The other is a support matter against Father in which Son is among the subjects of the support sought. Opposing counsel has protested that, having taken money from Father, it is a conflict of interest for inquirer to represent Mother adverse to Father.

Question

3. When a lawyer has accepted payment of a legal fee from a client's relative, may the lawyer later accept a representation adverse to the interests of the payor?

Opinion

4. Many lawyers occasionally accept payment of their clients' legal fees from third-party payors. *See* New York Rules of Professional Conduct (the "Rules"), Rule 1.8(f), Cmt. [11] ("Lawyers are frequently asked to represents clients under circum-

stances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees)").

5. It is well-established that when a lawyer accepts payment from a third party to represent a client, the third-party payor is not a client merely by virtue of paying the lawyer's fee. See N.Y. State 716 (1999) (when an insurance company retains a lawyer to represent a policyholder, the client is the policyholder, not the insurance company). *See generally* American Law Institute, Restatement Third, *The Law Governing Lawyers*, §14, cmt. c (2000) (paying a lawyer does not by itself create a client-lawyer relationship with the payor if the circumstances indicate that the lawyer was to represent someone else).

6. If a third-party payor is present at an intake interview, the lawyer may sometimes give the impression that the third party is also a client. Many factors might contribute to such an impression by the third party. A lawyer who accepts payment from third parties may therefore wish to inform such persons that the lawyer does not represent them and has no duties to them. The lawyer should also avoid giving legal advice to the third-party payor, and should make clear that the lawyer will not share confidential information with the third-party payor absent informed consent from the client. S*ee* Rule 1.8(f)(3) (lawyer shall not accept fees from third party unless "the client's confidential information is protected as required by Rule 1.6").

7. The remainder of this opinion assumes that the lawyer has not given Father grounds to believe he is a client.

8. Rule 1.8(f) recognizes that, when the lawyer accepts payment of his or her fee from a third party, the interest in being paid might affect the lawyer's independent professional judgment on behalf of the client. Consequently, it prohibits the lawyer from accepting such compensation unless:

   (1) the client gives informed consent;

   (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and

   (3) the client's confidential information is protected as required by Rule 1.6.

9. If these three conditions are fulfilled, the Rules permit the third party payment. *See* N.Y. State 1000 (2014), in which compliance with Rule 1.8(f) operates to permit payment even by one whose interests are adverse or potentially adverse to those of the client. (Indeed, Opinion 1000 points out that, where legal fees are paid by an indemnitor such as an insurance company, the interests of the indemnitor are often contrary to those of the client.)

10. Unless the inquirer has given the Father reason to believe that he represents the parents as well as the Son, the Father is not a client of the lawyer, by virtue of paying part of the lawyer's fee. Assuming that the lawyer has not indicated to the Father that he is a co-client, and has not otherwise given the Father the impression that he is a client, then the Father is not a client.

11. Conflicts of interest with current clients are governed by Rule 1.7. Rule 1.7(a) prohibits a lawyer from representing a client if a reasonable lawyer would conclude that (i) the representation will involve the lawyer in representing differing interests, or (ii) 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. If there is a conflict of interest under Rule 1.7(a), the client may consent to the conflict if the requirements of Rule 1.7(b) are met.

12. Since we assume the Father is not a client, accepting a retainer from the Mother adverse to the Father does not involve "representing" differing interests. Thus is no conflict of interest under Rule 1.7(a)(1). However, a conflict could exist under Rule 1.7(a)(2) if a reasonable lawyer would conclude that the inquirer's interest in continuing to receive fees from the Father for representing the Son would create a "significant risk" of adversely affecting the inquirer's professional judgment on behalf of the Mother. Even if such a personal interest conflict exists, which depends on questions of fact, the inquirer could still represent the Mother if he reasonably believes within the meaning of Rule 1.7(b)(1) that he could provide competent and diligent representation to the Mother, and if he obtains informed consent from the Mother, confirmed in writing, pursuant to Rule 1.7(b)(4). See Rule 1.7, Cmts. [18]-[20].

Conclusion

13. When a lawyer accepts payment of legal fees from a third party, the third-party payor is not a client merely by virtue of paying the lawyer's fee. Where a lawyer's fee for representing a son was paid by the client's father and mother, and the lawyer did not give the father reason to believe he himself was a client, the lawyer's representation of mother would not constitute a conflict of interest unless a reasonable lawyer would conclude that the law-

yer's interest in continuing to receive fees from the father for representing the son would create a significant risk of adversely affecting the lawyer's professional judgment on behalf of the mother. But even if such a conflict exists, the lawyer could cure the conflict by obtaining the mother's informed consent to the conflict as long as the lawyer satisfies the terms of Rule 1.7(b).

(14-15)

* * *

Opinion 1064 (7/10/15)

Topic: Former Judge; Conflicts

Digest: A lawyer who is a former family court judge is prohibited by Rule 1.12(a) from privately representing a client in a permanent neglect action when the same client appeared before the judge in a previous neglect action and the judge issued an order "upon the merits" to put the subject child in foster care. For the same reason, the former judge is prohibited by Rule 1.12(a) from privately representing a client in a proceeding to modify child support when, as a judge, he or she issued orders upon the merits related to custody and visitation in the same matter and custody and visitation issues will be revisited as part of the application to amend child support. A conflict arising under Rule 1.12(a) cannot be waived even with consent of all parties. However, the Rule 1.12(a) conflict is not imputed to other members of the lawyer's firm if the firm acts promptly and reasonably to implement certain screening measures and no other circumstances in the particular representation create an appearance of impropriety.

Rules: 1.0(l); 1.12(a); 1.12(d)

Facts

1. The inquirer is a retired Family Court Judge and Acting Supreme Court Justice who is now in private practice. A client has asked the inquirer to undertake representation in a permanent neglect action ("permanent neglect action") involving the client's two children. Approximately two years ago, the client made one appearance before the inquirer as a judge in a neglect case ("neglect action") involving one of the client's two children in this same permanent neglect action. The inquirer as judge issued one consent order where the parties before him, including the person who is now his client, stipulated to put the subject child in foster care. The inquirer was the emergency judge that week and the assigned judge was unavailable. Recently, the Department of Social Services ("DSS") filed a petition seeking to terminate the client's parental rights.

2. Separately, the inquirer has been asked to represent an individual (the "Potential Client") in a pending child support proceeding ("support proceeding") in Family Court. The inquirer, as a judge, rendered multiple decisions over a period of two to three years concerning custody and visitation of the Potential Client's children. The inquirer did not issue any orders regarding child support. The non-custodial parent is now attempting to reduce the support award. As a result of the issues raised by the non-custodial parent, the custody/visitation orders issued by the inquirer as judge will now be revisited in the child support determination.

Question

3. a. May a lawyer ethically represent a client in a permanent neglect action when the client previously appeared before the inquirer, who was then sitting as a family court judge in a neglect proceeding, where the inquirer issued a stipulated order to put the subject child in foster care?

   b. May a lawyer ethically represent a client in a child support proceeding (the "support proceeding") when the inquirer, as judge, issued numerous orders related to custody and visitation that will now be revisited as part of the child support determination?

Opinion

4. Former judges are governed by Rule 1.12 of the New York Rules of Professional Conduct (the "Rules"). Rule 1.12(a) provides:

   (a) A lawyer shall not accept private employment in a matter upon the merits of which the lawyer has acted in a judicial capacity.

5. A conflict under Rule 1.12(a) is a non-waivable conflict. A lawyer who has such a conflict must be disqualified from the representation, regardless of consent from the client or the adversary. *See* Rule 1.12, Cmt. [1] ("A former judge or adjudicative officer may not, however, accept private employment in a matter upon the merits of which the judge or adjudicative officer has acted in a judicial capacity and—unlike conflicts for lawyers who have acted in a capacity listed in Rule 1.12(b)—a conflict arising under paragraph (a) cannot be waived.").

6. In order to analyze a former judge's obligations under Rule 1.12, it is necessary to define three terms used in the Rule—"judicial capacity," "matter" and "merits."

"Judicial Capacity"

7. According to Rule 1.12, Cmt. [1], a lawyer acts in a "judicial capacity" within the meaning of paragraph (a) when the lawyer "serves as a judge or other adjudicative officer." However, a judge or adjudicative officer "is not prohibited from acting as a lawyer in a matter where he or she exercised remote or incidental administrative responsibility that did not affect the merits."

8. Comment [1] to Rule 1.12 thus distinguishes between a former judge who has exercised remote or incidental administrative responsibility in a matter that did not affect the merits and a former judge who has acted in a judicial capacity that did affect the merits of a matter. A judge who acted on the merits in the matter is prohibited by New York Rule 1.12(a) from representing a client whether or not the judge participated "personally and substantially" in the matter. This Rule is different from New York's Rule 1.11(a)– applicable to a former government lawyer—and ABA Model Rule 1.12(a)—applicable to a former judge—both of which require personal and substantial participation in the matter.

"Matter"

9. In order to determine whether a Rule 1.12(a) conflict exists in this inquiry, we must consider the definition of "matter," and whether the new representations are part of the same "matter." Under the definition in Rule 1.0(*l*), the term "matter" includes:

> any litigation, judicial or administrative proceeding, case, claim, application, request for a ruling or other determination, contract, controversy, investigation, charge, accusation, arrest, negotiation, arbitration, mediation or any other representation involving a specific party or parties.

10. Some guidance can be obtained from the comments to Rules 1.9 and 1.11 and the prior ethics opinions of this Committee.

11. The term "matter" is discussed in the comments to both Rule 1.9 and Rule 1.11. Comment [2] to Rule 1.9 states in part that "the scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction." 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. [Emphasis added.]

Several of our prior opinions have followed these "facts, parties, and time" tests. *See* N.Y. State 1029 (2014) (discussing the facts, parties and time tests); N.Y. State 904 (same underlying conduct was not, on its own, sufficient to constitute the same "matter"; rather, the extent of a matter depends on a variety of factors, including whether two matters involve the same underlying events, the same or related parties, the same underlying events or related issues, and whether the matters are ongoing at the same time or close in time).

12. In N.Y. State 1047 (2015), the Committee stated: "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 matters that are included within the term. *See* Rule 1.0(*l*)."

13. In N.Y. State 800 (2006) we provided examples of matters that are heard in the Family Court: "The Family Court hears matters involving children and families, including child protective proceedings, adoption, custody and visitation, support, family offense, guardianship, delinquency, paternity, persons in need of supervision (PINS), and foster care approval and review." *See also* N.Y. State 894 (2011) ("Rule 1.0(*l*) defined 'matter' to include a claim or controversy as well as a proceeding.").

14. Applying the facts, parties and time tests to the neglect action and the permanent neglect action, the neglect and the permanent neglect actions appear to be the same matter for purposes of Rule 1.12(a). In terms of "facts," the same underlying events or alleged actions setting forth the grounds for neglect and permanent neglect may be present. Regarding the parties, the client, DSS and the other parent are the same in both the neglect and the permanent neglect proceedings. Regarding time, the petitions are not ongoing at the same time or close in time, but we understand that a permanent neglect petition will typically be commenced after there has been an initial finding of neglect, and that the neglect finding is often referenced in (and a basis for) the permanent neglect petition. These factors taken together suggest that the neglect and permanent neglect actions are the same matter for purposes of Rule 1.12(a).

15. Applying the facts, parties and time tests to the support proceeding and the custody/visitation proceeding, while the parties are the same, at first blush, facts would appear to be different because the judge rendered decisions involving custody and visitation, and not child support. However,

we are told that the custody and visitation issues will be revisited in determining the application for reduced child support due to allegations raised by the non-custodial parent. Finally, while at least three years have passed since the former judge's earliest involvement with the custody/child support proceeding, it seems clear that modifying an order in a prior proceeding constitutes part of the same proceeding.

"Merits"

16. The term "merits" is not defined in the Rules, and neither New York courts nor New York ethics opinions have interpreted the term "merits" in the context of Rule 1.12. However, New York courts have interpreted the term "merits" in the context of the doctrine of *res judicata*, which operates only if there has been a judgment "on the merits." For example, in *Pizzuto v. Soriano,* 2011 WL 1991964, 2011 NY Slip Op. 31287(U) (Sup. Ct. Richmond County 2011), the court said:

> The word "merits," as a legal term, has acquired no precise technical meaning and admits to some latitude of interpretation, but is to be regarded as referring to the strict legal rights of the parties, as contradistinguished from those mere questions of practice which every court regulates for itself and from all matters which depend upon the discretion or favor of the court.

(citing *Mink v. Keim*, 266 AD 184, 186 (1st Dept. 1943); reversed on other grounds, *Mink v. Keim*, 291 NY 300 (1943)). In our opinion, that definition is too narrow for Rule 1.12, which should be read to encompass any decision affecting the legal rights of the parties, whether based on substantive law, procedural rules, or matters depending on the court's discretion. Here, we believe that approving a consent order constitutes a determination of the legal rights of the parties, and thus is acting "on the merits."

Interpretations of "On the Merits" in Ohio

17. Our conclusion is supported by authority from another state. The Ohio Board of Commissioners on Grievances and Discipline ("Board of Commissioners") in its Opinion 2005-5 (2005) held that "a divorce or dissolution and any subsequent post-decree matters (such as a modification of child custody, parenting time, child support or defending or initiating a contempt order to enforce a prior court order) are the same matter for purposes of DR 9-101(A) [the predecessor to Rule 1.12]." The Board of Commissioners concluded that it was "improper under DR 9-101(A) of the Ohio Code of Professional Responsibility for a former magistrate, now privately practicing law, to represent a person in post-decree matters (such as modifying child custody, parenting time, or child support, or defending or initiating a contempt order to enforce a prior court order) when he or she served as magistrate in the person's original divorce or dissolution action." After noting that "the words 'matter' or 'merits' were not defined in the Ohio Code of Professional Responsibility," the Board of Commissioners turned to Ohio caselaw. In *Disciplinary Counsel v. Christ*, 74 Ohio St.3d 308 (1996), a former judge had received a public reprimand for violating DR 9-101(A) when, seven years after granting an uncontested divorce as judge, he privately represented one of the parties to the divorce, filing a Motion to Modify Parental Rights and Responsibilities on the client's behalf. When he was charged with violating DR 9-101(A), the former judge argued that his judicial involvement in the uncontested divorce had been limited to signing the final judgment, an act which the judge considered "perfunctory" rather than "on the merits." However, the Board of Commissioners concluded that the judge had violated DR 9-101(A) because he "did act in his official capacity as a judge, [he] signed the entry, and…seven years later [he] represented one of the litigants in a…Motion to Modify custody in the same case." *Id.* at 309.

18. Although the Ohio Code of Professional Responsibility has been superseded by the Ohio Rules of Professional Conduct, Opinion 2005-5 is instructive because the language under the Ohio DR 9-101(A) is substantively identical to the language in New York Rule 1.12(a): "A lawyer shall not accept private employment in a matter upon the merits of which he (she) has acted in a judicial capacity."

Screening the Former Judge to Avoid Imputed Disqualification

19. If Rule 1.12(a) disqualifies a former judge from representing a private client, the other lawyers in the firm may nevertheless work on the matter if they are properly screened pursuant to Rule 1.12(d). Rule 1.12(d) provides as follows:

> (d) When a lawyer is disqualified from representation under this Rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the firm acts promptly and reasonably to:
>
> (i) notify, as appropriate, lawyers and nonlawyer personnel within the firm that the personally disqualified lawyer is prohibited from participating

in the representation of the current client;

(ii) implement effective screening procedures to prevent the flow of information about the matter between the personally disqualified lawyer and the others in the firm;

(iii) ensure that the disqualified lawyer is apportioned no part of the fee therefrom; and

(iv) give written notice to the parties and any appropriate tribunal to enable it to ascertain compliance with the provisions of this Rule; and

(2) there are no other circumstances in the particular representation that create an appearance of impropriety.

In order for the former judge's firm not to be disqualified, the firm must timely and effectively screen the former judge pursuant to Rule 1.12(d)(1), and must also consider whether the circumstances give rise to any appearance of impropriety pursuant to Rule 1.12(d)(2).

20. Whether the inquirer would violate the Code of Judicial Conduct or any applicable statutes and regulations is beyond the jurisdiction of this Committee. We therefore do not discuss requirements in any of those sources that might apply to the inquiry here.

Conclusion

21. A lawyer who is a former family court judge is prohibited by Rule 1.12(a) from privately representing a client in a permanent neglect action when the same client appeared before the judge in a previous neglect action and the judge issued an order "upon the merits" to put the subject child in foster care. For the same reason, the former judge is prohibited by Rule 1.12(a) from privately representing a client in a proceeding to modify child support when, as a judge, he or she issued orders upon the merits related to custody and visitation in the same matter and custody and visitation issues will be revisited as part of the application to amend child support. A conflict arising under Rule 1.12(a) cannot be waived even with consent of all parties. However, the Rule 1.12(a) conflict is not imputed to other members of the lawyer's firm if the firm acts promptly and reasonably to implement certain screening measures and no other circumstances in the particular representation create an appearance of impropriety.

(21-15)

* * *

Opinion 1065 (7/10/15)

Topic: Imputed Conflicts of Interest; Part-time Prosecutor

Digest: The law firm of a part-time prosecutor for Town may represent a client in an Article 78 proceeding against Village, involving actions of Village zoning board or Village planning board, where (i) the Town and Village are separate legal entities and have separate legal departments, (ii) the Town Attorney and his or her staff, including the part-time prosecutor, have no responsibility for prosecuting Village zoning and planning laws, and (iii) the proceeding would not involve Village law enforcement personnel, even though the Town and Village courts have been merged and the Village provides police protection services to both the Village and Town.

Rules: 1.7(a), 1.10(a), 1.11(f)

Facts

1. The inquirer is an attorney in private practice and a part-time Deputy Town Attorney. As Deputy Town Attorney, his duties include prosecuting violations of the Town Code and Vehicle and Traffic Law (including prosecuting traffic violations written primarily by the Village police force), assisting the Town Council in drafting and interpreting its statutes, and providing legal advice to the Town. The Village has its own Village Prosecutor who is responsible for prosecuting Village zoning laws, building codes and the Village Code, and is supervised by Corporation Counsel. The Town's attorneys, including inquirer, have no responsibilities relating to Village zoning or planning laws. The scope of the Village Prosecutor's work on behalf of the Village is entirely distinct from the scope of the Town Attorney's work on behalf of the Town, and the Town and Village are distinct legal entities. However, the Town and Village have an inter-municipal agreement, which has, in effect, merged the Town and Village courts, and under another such agreement the Village provides police protection services to the Village and Town.

2. The inquirer's firm was asked to represent an individual in an Article 78 proceeding against the Village based upon allegedly improper actions taken by the zoning board or the planning board. The inquirer asks if there is any conflict of interest in his firm's representation of the plaintiff against the Village.

Question

3. May the law firm of a part-time prosecutor for a Town represent a client in an Article 78 proceeding against a Village to challenge actions of the Village zoning board or Village planning board where the town and village are separate legal entities and have separate legal departments and the Town Attorney and his or her staff, including the part-time prosecutor, have no responsibility for prosecuting Village zoning or planning laws, even though the Town and Village courts have been merged and the Village provides police protection services to both the Village and Town?

Opinion

4. This Committee interprets the New York Rules of Professional Conduct (the "Rules"). We assume for purposes of this opinion that the proposed representation would not violate any applicable law governing Town officers and their firms. We express no opinion on that issue and urge the inquirer to verify our assumption.

5. Rule 1.7(a) prohibits concurrent representations where a reasonable attorney 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." In addition, while lawyers are associated in a firm none of them may knowingly represent a client when any one of them practicing alone would be prohibited from doing so. Rule 1.10(a). Thus, if the inquirer would be prohibited under Rule 1.7 from representing the new client in a proceeding against the Village because he is a part-time Town prosecutor, then, without the consent of the Town and the private client, the inquirer's conflict would be imputed to all the lawyers in the firm such that no lawyer at the firm could represent this individual in a proceeding against the Village.

6. The threshold question here is whether the firm's representation of an individual in a lawsuit adverse to the Village conflicts with the inquirer's representation of the Town. The inquirer makes clear that the attorneys for the Town represent the Town, not the Village. The Village is represented by a Village Prosecutor who is separately supervised by the Corporation Counsel. Further, the scope of the inquirer's duties as a part-time Town attorney (prosecuting Town Code and Vehicle and Traffic law violations, drafting and interpreting Town statutes, and general legal advice and representation of the Town) are distinct from the duties of the Village Prosecutor (prosecuting violations of Village zoning laws, building codes and the Village Code).

7. We recognize that there may be instances where the inquirer's actions on behalf of the Town may further the interests of the Village or may rely on resources that are shared with Village prosecutors. For example, the inquirer prosecutes traffic violations written primarily by Village Police, and litigates on behalf of the Town in the merged Town and Village courts. Such shared resources alone are not, in our opinion, sufficient to give the inquirer a conflict of interest.

8. However, this Committee has issued many opinions setting conditions on the private practice of law by part-time prosecutors. For example, a part-time prosecutor is prohibited from representing criminal defendants in matters where (i) the lawyer is required to appear before a judicial or other official of the locality he or she publicly represents, (ii) the government unit where the lawyer is employed or one of its ordinances is involved, (iii) the charges are similar to those the lawyer prosecutes or (iv) the investigating officers or law enforcement personnel involved are those with whom the lawyer associates as a prosecutor. See N.Y. State 874 (2011); N.Y. State 544 (1982) and the opinions cited therein.

9. Here, the matter is not a criminal matter. Moreover, the lawyer would not be required to appear before a Town judge or official. See C.P.L.R. § 7804(b) (an Article 78 proceeding "shall be brought in the supreme court in the county specified in subdivision (b) of section 506," with exceptions not applicable here). The governmental unit involved is the Village, and the ordinances involved are those of the Village, not the Town. Moreover, the subject matter is not similar to matters the lawyer prosecutes.

10. In N.Y. State 800 (2006), this Committee concluded that a part-time prosecutor was barred from accepting Family Court appointed counsel assignments where the matters involved investigating officers or law enforcement personnel with whom the lawyer was currently working or had previously worked as a part-time prosecutor, because of the possible effect on the lawyer's professional judgment and on the lawyer's future working relationships with such law enforcement personnel.

11. Following the reasoning of Opinion 800, it would be impermissible for the inquirer to represent a client in a matter in which he is likely to be adverse to law enforcement personnel with whom he had

worked or is likely to work in connection with his role as a Town prosecutor, and such a conflict would be non-consentable. Ordinarily, however, we would expect that representing a client in a zoning or planning board matter adverse to the Village would not involve adversity to Village law enforcement personnel. Yet even assuming there is no conflict under Rule 1.7(a), the inquirer is prohibited from using any influence he may have as a public official to influence, or attempt to influence, any tribunal to act in favor of the firm's proposed client. Rule 1.11(f).

12. Assuming that the zoning or planning board matter would not involve adversity to Village law enforcement personnel, representation of the private client and the Town would not involve representation of differing interests, and there is no conflict to impute to other lawyers at the inquirer's firm.

Conclusion

13. The law firm of a part-time prosecutor for Town may represent a client in an Article 78 proceeding against Village, concerning actions taken by Village's zoning board or planning board, where (i) the Town and Village are separate legal entities and have separate legal departments, (ii) the Town Attorney and his or her staff, including the part-time prosecutor, have no responsibility for prosecuting Village zoning laws, and (iii) the proceeding would not involve Village law enforcement personnel, even though the Town and Village courts have, in effect, been merged and the Village provides police protection services to both the Village and Town.

(20-15)

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Welcome New General Practice Section Members

Michelle L. Abruzzo
Lauren Amanda Adler
Rahat Ahmad
David Seiyong Ahn
Sophia Alvi
Michael Ray Anderson
Kevin Andrade
Michele Antonelli
Babatunde S. Aremu
Laura Kimiko Ashikaga
Jacklyn N. Aymong
Shahar Azoulay
Brian Charles Baker
Emily Barile
Noah Batist
Nicholas John Bebirian
Matthew T. Bennett
Robert William Berbenich
Richard Berrios
Priyam Bhargava
Andrea Lynn Bible
Katie Bireley
David I. Blumberg
Pinni Bohm
Jason Benjamin Bonk
Andrew R. Booth
Bella Borukhova
John P. Bracken
Lani Brandon
Gregory Brown
Frank Bruno
Charles L. Brutten
Samuel Brylski
Jeffrey T. Buley
Megan Bumb
Jeffrey P. Burack
K. Alexandra Byrd
Patricia Vivian Cameron
Jared Madison Campbell
Joseph R. Cardamone
Jennylynn Carey
Alana P. Carr
Tanya P. Carter
Jonnelle Casey
Thomas P. Casper
Rebecca Cerny
Louanni Galvani Ribeiro Cesario
Rose Chan
Michael Chazoule
William Chen
Jaewoo Cho
Byoung-gon Choi
Jung Hwan Choi
Sung H. Choi
Ke Jia Chong
Tom Yen Ting Chou
Joseph Michael Cirillo
Cameron M. Clark
Jared Lee Clark
Jonathan Drew Cocks
Shawn O. Cohen
Agatha M. Cole
Stephanie Donna Cook
Christina Ann Corcoran
Wade Benjamin Coye
Connor J. Croston
Elizabeth M. Cuccinello
Christopher Barton Dalbey
Uri Dallal
Elizabeth David-Dembrowsky David-Dembrowsky
Dante David De Leo
Timothy Lawrence DeGeorge
Nicholas Paul DeMarco
Stuart Desser
Michael William DeTrano
Elliot Dolby-Shields
Jodi Ann Donato
Patricie Drake
Laura Elizabeth Draper
Meagan Kate Du Jardin
Patrice Edwards
Jason M. Engelstein
Vincent J. Esposito
Tina Marie Fassnacht
Stephanie W. Ferradino
Paul R. Feuer
Richard L. Filiberto
Moshe Fogel
Whitney Fogg
Timothy D. Foley
Anthony K.C. Fong
Harry Fournaris
Nyasha S. Foy
Luwick Francois
Heather Frank
Pamela Frederick
Ralph Fresolone
Jeremy Adam Friedman
Maria Anna Fufido
Hanae Charlotte Fujinami
Rossana Gallego
Chang Gao
Sally M. Gard
Franklin Genao
David Adam Giaro
Kenneth Elswood Gillespie
Jeremy Ginsburg
Renee L. Giorgini
Lara Glass
Nora C. Godkin
Gabriel Michael Goldenberg
Sara A. Goldfarb
Avigail Goldglancz
Jorge Gomez
Patrick Momsen Grady
Denise Marie Graham
Jenny Lian Greisman
Jamie Lynn Griebner
Fredric J. Gruder
Christopher Guerin
Uzma A. Gulamali
Stephen Patrick Hampsey
Althea Harris
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Christian Hibinski
Brian M. Higbie
J. Theodore Hilscher
Sean M. Hobbs
Evan Hofmann
Christine Marie Hogan
Tamara Rochele Holliday
Arshia Hourizadeh
Dustin Howard
Nordia A. Hunt
Allen Hurkin-Torres
Nia M. Itoh
Cheddi Berret Jagan
Jeffrey Mark Jensen
Walter M. Jeram
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Yun Ju Kang
Alison M. Kaplan
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David Lavian
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Hector Andres Ledezma
Anthony C. Lee
Chia Wen Lee
Susana May Yon Lee
Yung Wan Lee

Illana Leiser
Andrew Zachary Lepore
Debra Levin
Amanda Levine
Suzanne J. Levitt
Michael M. Levitz
Matthew W. Lewis
Dela Leybovich
May Tin Mei Li
Rong Lin
Li Liu
Ying-ying Ma
Jennifer J. Maertz
Raina E. Maissel
James R. Major
Stephen J. Maloney
Sarah Mansher
Lauren Marshall
Kacey Martin
Nneka J. Martin
William James Martin
Christina Marie Martinez
Guillermo A. Martinez
Jessica Anne Martinez
Rubaiat Mashraq
Molly Anne Masterton Rothschild
Gerard Xavier McCarthy
Colleen A. McCormack
Christopher D. McDonald
Kevin F. McGarry
Charlene Monique McGregor
Whitney R. McGuire
Rayna McKenzie
Bryon C. McKim
Grace E. Mellen
Justin Meyer
Paul Michalski
Patricia Michitsch
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