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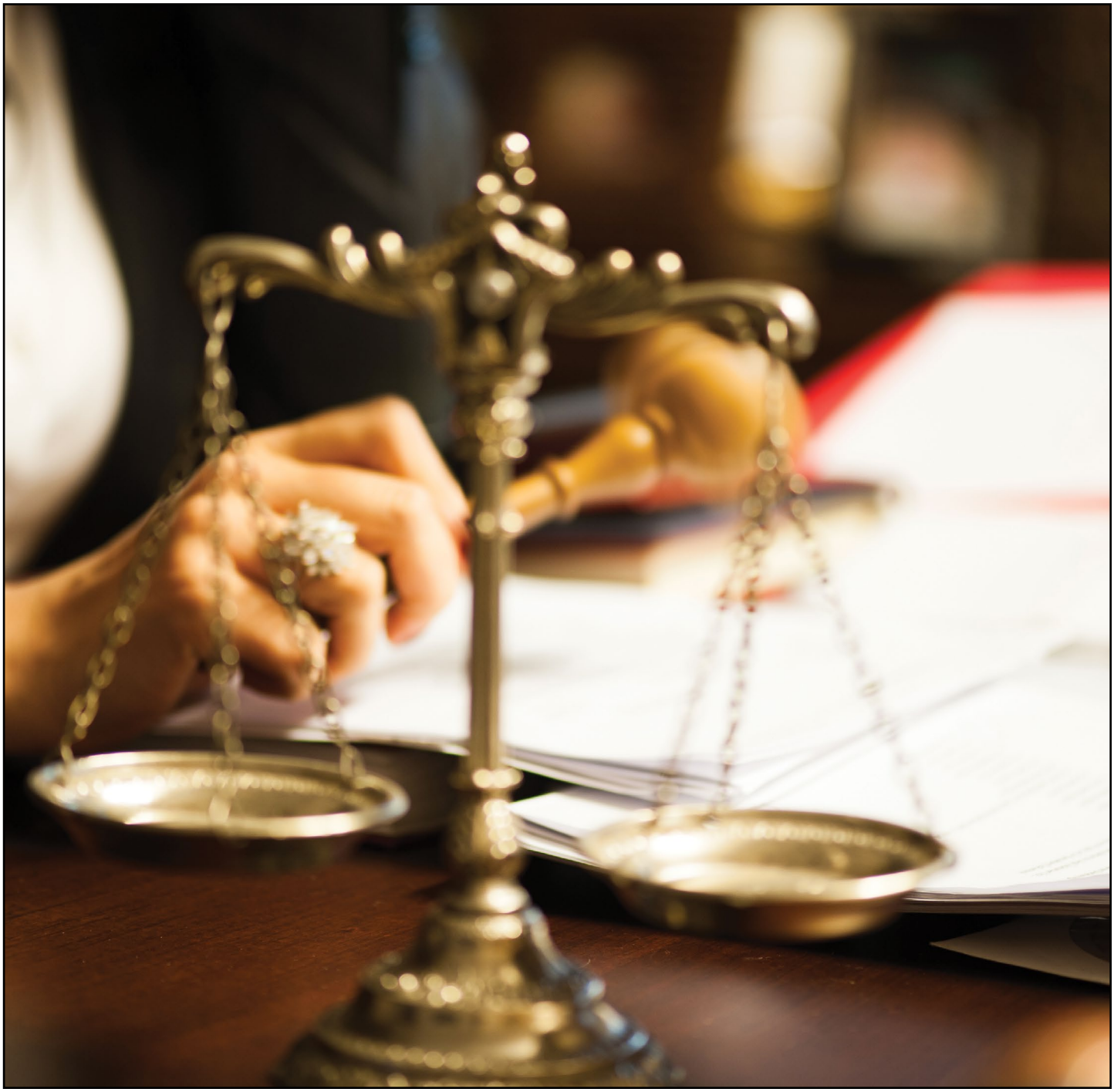
ONEONONE

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



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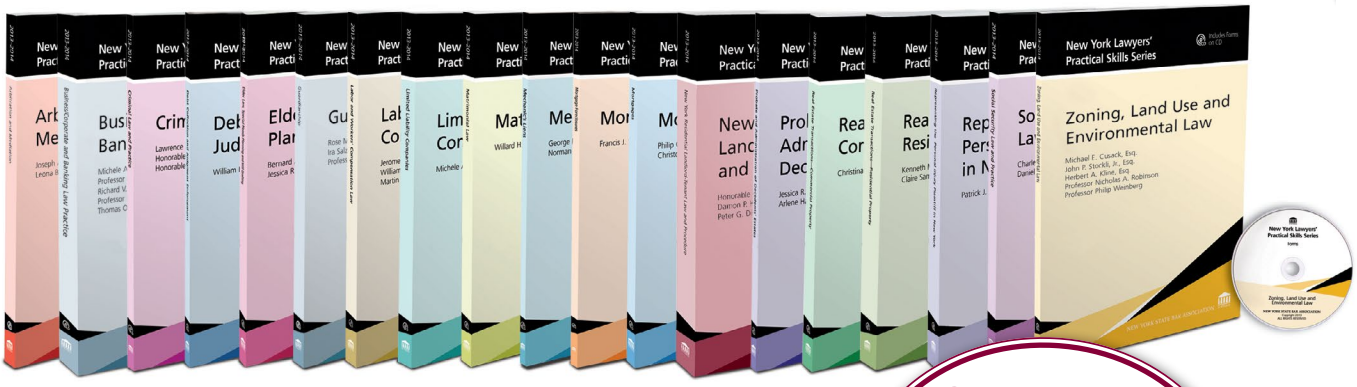

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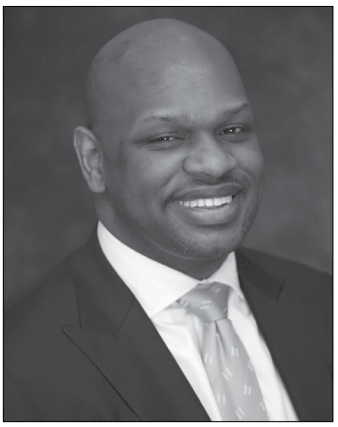
Message from the Chair



Abraham Lincoln reminds us that our democracy is not about one vote every four years, it is about actions we each take every single day. As a member of this Section's Election Law and Government Affairs Committee it is important that in the aftermath of this contentious election period—no matter how you feel about its outcome—that you take concrete action on issues that are important to you. What is vitally important is that the rule of law—as articulated in our constitutions, federal and state; our statutes, federal and state; and in our common law precedent—remains the cornerstone of our democracy. We as lawyers, in particular general practitioners, will continue to be called upon to ensure that the law is enforced in the "courts of justice."

We are currently looking for members to participate in our "Lessons Learned" Series. Participants will be asked to speak about lessons they have learned as practicing attorneys. Our Section's membership encompasses a broad range of practice areas: criminal law, accident and personal injury law, bankruptcy, business law, family law, estate planning, insurance law, litigation, and real estate. We better than most Sections stand prepared to offer our members the greatest range of topics to discuss as part of our lessons learned. The strategic planning committee is currently reviewing the results of the GP Section's member survey. I encourage you to share any additional ideas and thoughts that can help our Section continue to grow. Your continued involvement in the Section will assist us in our efforts to enhance the competence and skills of lawyers engaged in the general practice of law. Please contact me at jojesq@gmail.com if you are interested in participating in the "Lessons Learned" Series or would like to suggest a CLE topic of interest.

"Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges; let it be written in Primmers, spelling books, and in Almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice."

—Abraham Lincoln

John Owens Jr.

Message 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 ethics opinions. This issue, we are pleased to offer you the following articles, which we hope will be found very helpful and informative:

- *Working from Home*: *One on One*'s Co-Editor Martin Minkowitz shares his expertise in an article providing an insightful look into Workers' Compensation Law issues for employees who work from home.
- *Torture: Crime or Cure?*: Rabbi Yankel Raskin highlights how the issues around torture have resurfaced with the upcoming Trump presidency.
- *Spousal Support in New York State*: Joann Feld highlights New York's laws on support, also known as maintenance, and gives a detailed breakdown of the requirements.
- *Inside the Courts*: In an update provided by the attorneys of Skadden, Arps, Slate, Meagher & Flom LLP, the most recent and most impactful court cases related to business disputes are reviewed and analyzed.
- *Emerging Trends in Privacy and Cybersecurity*: Stuart D. Levi presents an overview of the key themes that emerged this year and what we expect to see in 2016.
- *Recent Employment Laws Impacting Private Employers*: Sharon Parella discusses two new laws that significantly impact private employers and their workplaces—NYC Council's amendment to the NYC Human Rights Law and the NY State Legislature's new paid family leave law.
- *Preparation of the Witness for Deposition*: Thomas P. Cunningham highlights the best communication methods and organization to use when preparing a witness for deposition.
- *You've Got Service: Service of Process by Email and Social Media*: James Ng gives an inside look into the newest precedent for service of process in non-traditional methods.
- *Attorney's Eyes Only? Confidential? Really?—Reducing Legislative Headaches in Confidentiality Agreements*: John Connor et al. advocates for a better standard in New York confidentiality agreements.

Martin Minkowitz

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 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.

Sincerely,
Martin Minkowitz
Richard Klass
Matthew Bobrow
Co-Editors

Working from Home

By Martin Minkowitz

Working from home. In a world where an employee can easily function in a location away from the employer's ordinary place of business new worker's compensation coverage issues are becoming more and more complex. It is more common today for professionals and management to take work home.

The Workers' Compensation Law provides for compensation benefits for injured employees who are classified, by location of work, as either an inside employee or an outside employee. The rules as to when an employee is injured in an accident that arose out of and in the course of the employment are dependent upon when and where the accident occurred.

An inside employee has a fixed time and place. An employee is, for example, to be at his or her desk from 9 to 5 at the employer's place of business. If the accident occurs in that time frame and location it is covered. Exclusions can include lunch breaks, commuting to and from that place of work, and personal time.

An outside employee does not have a fixed time and place of employment, such as a traveling salesman, to be covered if injured. Is a person who is working from home an inside or outside employee? In making that decision does it matter if the employee works from home on occasion or all the time?[1]

A person who works from home, and sustains an injury which arises out of and in the course of the employment is entitled to Workers' Compensation Law benefits on the basis of being an inside employee. The time, place, and location of the inside employment are based on the home location. That should be the employer's place of employment. That is the place the employee will be acting, in furtherance of his employer's business. The home has become and has the status of an additional place of employment.[2]

Once we accept that premise, if the proof in the case demonstrates that the employee has regularly performed work for the employer at home, then such home would have the status as the place of employment for the employer and be part, or an extension of, the employer's premises.[3] The Board in deciding whether there has been an extension of the employment premises to the employee's home may consider if the equipment or supplies for the work are continually present in the home. In addition it may consider how often and how much of the work is performed in the home and what special benefit the employer receives in the use of the employee's home as a worksite. If the employee did not regularly work at home, an injury could still be compensable if the employee had been directed or requested by the employer to do certain work at home. This would constitute the equivalent of a special errand for the employer and put the employee within the scope of the employment.

"A person who works from home, and sustains an injury which arises out of and in the course of the employment is entitled to Worker's Compensation Law benefits on the basis of being an inside employee."

If the employee decides to abandon the home work location and go to the employer's primary office, that trip might not be covered because it would be a commute to or from work for an inside employee, and an accident on route to work would not be covered.[4] However, trips to and from the office to drop off or pick up work could be covered. Such an accident would have a casual nexus to the employment.[5] Similarly, a lunch break accident, if not related to the work, and during solely personal time, would not be covered.

Therefore, as long as the finder of fact and decision maker stays within the traditional guidelines of evaluating the injury and accident to be or not be arising out of and in the course of employment of an inside employee, the decision is not as complicated as it might seem.

Endnotes

1. New York Workers' Compensation, 2nd Ed., West Practice Series § 2:24.
2. *Cal Pittner v. Beccari*, ___A.D.3d___(2016).
3. *Kirchgaessner v. Alliance Capital Mgt. Corp.*, 39 A.D.3d 1096 (2007).
4. *Bednarek v. Caring Professional Inc.*, 111 A.D.3d 997 (2013).
5. *Lemon v. NYCTA*, 72 N.Y.2d 324 (1988); *Monachino*, 300 A.D.2d 797 (2002).

Martin Minkowitz is of counsel with Stroock & Stroock & Lavan LLP.

Spousal Support in New York State

By Joann Feld

Spousal Support in New York State is referred to as Maintenance. The Maintenance law in New York is gender neutral, as is the term spouse. The New York State Maintenance Law is found in Domestic Relations Law § 236 B(6).

DRL § 236 B(1)(a) has three requirements to be met in order to qualify as Maintenance: that Maintenance may only be had between current or former spouses; that Maintenance must be pursuant to a written agreement or a court order; and that Maintenance must be paid in money by cash, check, money order, wire transfer or any other means by which to transfer cash. "Payment in kind" for goods or services is excluded from consideration.

A glaring mistake some practitioners are guilty of is to include a provision in the Marital Stipulation of Settlement that the payment of Maintenance terminates or is reduced upon a child becoming 18, 21 or attaining majority. ***Wrong***. According to the IRS (IRC § 71(c)), this reclassifies Maintenance as categorically being child support! When so reclassified, the payment no longer affords the tax deductibility to the paying spouse, nor can it be claimed as income by the receiving spouse.

Effective July 19, 1980, New York changed the term "alimony" to Maintenance, for the governing of laws in reference to spousal support. Since then, New York no longer uses the term "alimony," yet it is worthy to note that the IRS still uses the term alimony.

The most recent revision to the New York Maintenance law was January 25, 2016, and it is formula-based, much like the Child Support Standard Act since 1980 and the temporary Maintenance since 2010.

Between July 19, 1980 and January 25, 2016, DRL 236 B(6) provided specific factors for the court to consider when making an award of maintenance. The factors to be considered were amended several times throughout the 36 years. Recently, the discretionary method of the courts was exchanged for a new formula-based approach, which still contemplates some 13 factors when the income of the payor exceeds $178,000. "Payor" is the spouse with the higher income. For divorce actions filed prior to January 25, 2016, the former law is applied.

Beginning January 31, 2016 and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States Department of Labor, Bureau of Labor Statistics for the prior two years, multiplied by the then income cap and then rounded to the nearest $1,000. The Office of Court Administration shall determine and publish the income cap.

For divorces filed on or after January 25, 2016, Maintenance now contemplates two formulas—one when there is payment of child support and one when there is no child support payment. The statute calls for the application of the lower amount.

As alluded to hereinbefore, the income to be used in the calculations is presently capped at $178,000. For income above the cap, the court may use a revised set of factors to determine whether additional maintenance ought to be awarded.

When the payor's income is greater than the income cap, the amount of additional maintenance awarded by the court shall take into consideration any one or more of the factors and the court shall set forth the factors considered and the reasons for its decision in writing or on the record.

When the payor's income is lower than or equal to the income cap and an award of Maintenance would reduce the payor's income to below the self-support reserve for a single person, then the guideline amount of maintenance shall be the difference between the payor's income and the self-support reserve. Where the payor's income is below the self-support reserve, then there is the rebuttable presumption that no maintenance is warranted. Currently the self-support reserve is $16,038.

Maintenance under the new amendments in DRL § 236 B(6) more clearly define income and now is contingent upon whether child support payments are in place. The duration of Maintenance is presently based on a non-compulsory schedule:

Length of Marriage	Duration of Maintenance
0-15 years	15% to 30%
15-20 years	30% to 40%
Over 20 years	35% to 50%

Non-durational or lifetime maintenance is yet available in suitable cases. The statute currently defines the length of marriage as ending when the summons is filed.

Maintenance is terminated upon death of either spouse, proof the former spouse is remarried or some modification. Electively, Maintenance may be terminated upon proof that the former recipient spouse is habitually living with a third person and holding him or herself out as if a spouse.

DRL § 248 is gender-neutral for the both the Payor and the Payee spouses as well as the nature of the marriage, thereby making it applicable to same-sex marriages.

I would be remiss if I failed to point out that Maintenance may also be modified pursuant to DRL § 236B(9((b), which states, in part:

> Upon application by either party, the court may annul or modify any prior order or judgment made after trial as to maintenance, upon a showing of the payee's inability to be self-supporting or upon a showing of a substantial change in circumstance, including financial hardship or upon actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances. Where, after the effective date of this part, an agreement remains in force, no modification of an order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines.

The standards for a modification of Maintenance are different for a court order issued after trial or by that of a conciliatory agreement. Additionally, retirement, be it full or partial, is now a recognized means by which to seek a modification.

There are 20 factors to apply to the issuance of Maintenance. They are as follows:

Factor 1: **The income and property of the respective parties including marital property distributed pursuant to subdivision five of this part. DRL § 236 B(6)(a)(1).** The income of each party will be a consideration, the less the income, the greater the need for Maintenance, especially if the other spouse's income is significantly greater. Income-producing property or a distributive award of a pension may reduce the need for an award of Maintenance, so all property, and the nature of the property will be taken into consideration as well.

Factor 2: The length of the marriage. DRL § 236 B(6)(a)(2). The length of the marriage will be a significant consideration in combination with other factors as to whether or not a final award of Maintenance is granted. The longer the duration of the marriage, the greater an effect the other factors will play.

Factor 3: The age and health of both parties. DRL § 236 B(6)(a)(3). The age of the parties will be a meaningful consideration in combination with other factors. The age of the parties will be used to determine the ability of each party's ability to earn income, which in turn will be used to determine Maintenance.

Factor 4: The present and future earning capacity of both parties. DRL § 236 B(6)(a)(4). The current and anticipated future income of each spouse will be used to establish if a party is able to be or become self-sufficient or if that party requires Maintenance.

Factor 5: The need of one party to incur education or training expenses. DRL § 236 B(6)(a)(5). Both the need of the party seeking education, as well as the cost of that training, are used to decide Maintenance.

Factor 6: The existence and duration of a pre-marital joint household or a pre-divorce separate household. DRL § 236 B(6)(a)(6). This factor has two premises. The first is whether the parties lived together before marriage, since joint lifestyle may now be considered. The second is the separate household lifestyle that each party had prior to the marriage.

Factor 7: Acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law. DRL § 236 B(6)(a)(7). This factor is remedial on the recipient spouse and punitive on the paying spouse.

Factor 8: The ability of the party seeking Maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor. DRL § 236 B(6)(a)(8). Any steps a party can take to become self-sufficient will be considered. This factor will often be used to determine both the duration and the amount of any maintenance. A common example of this factor is the need for one spouse to return to school before returning to the workforce.

Factor 9: Reduced or lost lifetime earning capacity of the party seeking Maintenance as a result of having forgone or delayed education, training, employment, or career opportunities during the marriage. DRL § 236 B(6)(a)(9). The existence of reduced or lost earning capacity will determine whether or not Maintenance is awarded, with the goal here of maintenance being used to help bridge the gap until the lost earning capacity is recovered or diminished.

Factor 10: The presence of children of the marriage in the respective homes of the parties. DRL § 236 B(6)(a)(10). The presence of children will play an issue when combined with the financial positions of the parties.

Factor 11: The care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity. DRL § 236 B(6)(a)(11). The existence of family members of either spouse, who inhibited a party's ability to earn income, is an issue that will be considered. This is a separate factor from the presence of children. Factor 10 *infra*.

Factor 12: The inability of one party to obtain meaningful employment due to age or absence from the workforce. DRL § 236 B(6)(a)(12). The inability to work and the level of income presented from working as it relates to age or the length of time away from the workforce.

Factor 13: The need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment. DRL § 236 B(6)(a)(13). Child expenses may be considered in determining Maintenance, despite the fact that these expenses may already be part of a child support award under DRL 240.

Factor 14: The tax consequences to each party. DRL § 236-B(6)(a)(14). Experts may be needed in complex situations to fully understand the tax impact upon the parties.

Factor 15: The equitable distribution of marital property. DRL § 236 B(6)(a)(15). Any property award under equitable distribution may be a consideration.

Factor 16: Contributions and services of the party seeking Maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party. DRL § 236 B(6)(a)(16). Contributions refer to both financial and non-financial contributions made to the marriage and to other spouse. A non-financial example would be taking care of the children to allow the other spouse the time to advance his or her own career. A financial example would be the use of marital funds to open a business.

Factor 17: The wasteful dissipation of marital property by either spouse. DRL § 236 B(6)(a)(17). Awarding the other spouse maintenance may offset wasteful dissipation of marital assets by a spouse.

Factor 18: The transfer or encumbrance made in contemplation of a matrimonial action without fair consideration. DRL § 236 B(6)(a)(18). An award of Maintenance may offset transfers made in contemplation of a divorce for less than fair market value.

Factor 19: The loss of health insurance benefits upon dissolution of the marriage, and the availability and cost of medical insurance for the parties. DRL § 236 B(6)(a)(19). The loss of insurance benefits and the cost of obtaining new health insurance may be of consideration.

Factor 20: Any other factor which the court shall expressly find to be just and proper. DRL § 236 B(6)(a)(20). And last but not least is this "catch all" factor: The new Maintenance law in New York does not alter the rights of the parties to mediate their divorces or enter in Agreements or Stipulations of Marital Settlements, which deviate from the formulaic method of the statutory guidelines. As a cautionary word to the practitioner, when counsel does not represent one or both parties to the Agreement, the court is required to inform the unrepresented of the guideline award. Be sure to include language to that effect in your Agreement, so that it will be approved for the Judgment of Divorce.

Joann Feld, Esq. is the sole proprietor of Joann Feld Attorney at Law and Divorce Mediation in Dix Hills, NY. She practices Estate and Elder Law as well as being a Divorce and Family Mediator. She has worked extensively with mediated matrimonial matters involving transgender disputes, custody issues, maintenance, equitable distribution disputes and pre-nuptial agreements.

Torture: Crime or Cure?

By Rabbi Yankel Raskin

Since the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1984,[1] many countries have stopped the use of torture as a means to gain information;[2] however, this is only on the surface. Many of these countries, America included, have continued to use torture to secure important information;[3] they excuse themselves with the "Doctrine of Necessity"[4] or by simply denying the claims.[5]

Recently, this issue has resurfaced with the election of President-elect Donald Trump, in which he initially announced that he was considering the return of waterboarding and such tortures; however, after the election it seems that his approach has changed slightly.[6] The prevailing popular belief is that torturing in general does not produce the best results[7] and, to the contrary, the best effect is the information obtained from prisoners that the captors have developed trust in and rapport.

However, there is a situation in which we need to consider the necessity of torture—this would be the situation of *The Ticking Bomb*,[8] where we don't have time to befriend the prisoner; rather time is of the essence, with thousands of lives at stake. The situation of the Ticking Bomb is when there is an immediate threat that must be stopped, and the terrorist has the information. The issue is, are we allowed or even obligated to secure the information through torture so that we may save lives?

In this article, we will approach the issue from a rabbi's perspective to examine what a possible Jewish approach would be, and the rationale that would support the torture of a person, in order to gain a deeper understanding of the issue. I will try to enumerate some of the possible pros and cons that could possibly influence a decision.

To start, when we consider war ethics, generally the rabbinical procedure is to look at the early Talmudic commentaries. The situation, however, is that we do not have many rabbis who talk about it in the early commentaries.[9]

In pondering the reasons of those that support the application of torture, we find contemporary rabbis supporting the use of torture to extract information; however, they differ in their supporting logic.

The first can be based off the Talmud,[10] where it states that the Beth Din—Jewish Court—has the ability to punish even if, strictly speaking, it does not have substantial evidence. The question remaining would be how far does the flexibility of the Jewish court reach?

Even though the extent of the Beth Din's power is dependent on specific situations, the dominant view is that the Beth Din can punish if it deems it necessary.[11]

This is supported by Maimonides,[12] in which he states:

> A court has the authority to administer lashes to a person who is not required to receive lashes and to execute a person who is not liable to be executed. This license was not granted to overstep the words of the Torah, but rather to create **a fence** around the words of the Torah. When the court sees that the people have broken the accepted norms with regard to a matter, they may establish safeguards to *strengthen the matter according* to what appears necessary to them. All the above applies with regard to establishing directives for the immediate time, and not with regard to the establishment of Halacha for all time.

We can refer to the Code of Jewish law (HM 42:3) that states that a man possessing a contract may be whipped, so that we are certain that we are assessing a case truthfully.

Alan Dershowitz in his book, *Why Terrorism Works*, quotes Maimonides:

> An incident occurred where they had a man lashed for engaging in relations with his wife under a tree. And an incident occurred concerning a person who rode on a horse on the Sabbath in the era of the Greeks and they brought him to the court and had him stoned to death. And an incident occurred and Shimon ben Shetach hung 80 women on one day in Ashkelon. All of the required processes of questioning, cross-examination, and warnings were not followed, nor was the testimony unequivocal. Instead, their execution was a directive for that immediate time according to what he perceived as necessary.

This is in support of the position that the court is allowed to act outside of normal judicial protocol in order to deter crime.

Rabbi J. David Bleich mentions a second rationale. In his article, "Torture and the Ticking Bomb," he concentrates on the principle of *Rodef*—or "the law of the pursuer"—which refers to a halachic principle that one may kill a person who is threatening someone else's life based on the verse "if someone rises to kill you, you shall surely

kill him first," which would deem anyone or thing that poses a danger of extinction upon you as a formidable reason to terminate the threat, not taking into account the motives of the pursuant which he deems as an active or a passive *Rodef*.[13]

Rabbi Shlomo Brody, however, notes that this extreme case might not accurately reflect the state of the broader "war on terror." One could retort, as claimed by three former CIA directors and others in their published[14] response to the Senate report, that during the period following 9/11, "It felt like the classic 'ticking time bomb' scenario—every single day."[15]

The third model revolves around the theory of the *laws of war*. We see that during wartime the normal system of law is different than were it to be a normal situation (one can maybe compare this to an Army court-marshal). For example, we see that, in general, one is accountable for stealing; however, in wartimes one may forcibly take food and so forth. Another would be murder, which in general is not allowed; however, in a situation of war, it is.[16]

When one has finished analyzing the rationale for the "Torture and the Ticking Bomb" scenario, there still remains to ponder, when would we allow it? What's the level or barometer to determine the level of threat? Who are we to rely on to determine if this is truly a situation of the Ticking Bomb?

Many, of course, have doubted such claims, among them Jewish legal critics of torture like Rabbi Aryeh Klapper [17] and Dov Zakheim,[18] a former senior defense official in the Bush administration. They've passionately argued that given the paucity of evidence supporting the effectiveness of preventive interrogational torture and the well-founded worries of abuse, Jewish law prohibits such tactics.

To conclude, torture is unanimously considered a crime; however, our world is not only colored in black and white, but also full of gray. We as human beings are demanded to pursue justice with the greatest effort, and this is a demonstration of our commitment to democracy, which we are all entrusted to protect and grow.

Endnotes

1. The text of the convention came into force in 1987; see Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
2. Other motives would be deemed unethical (Bleich, David J., *Torture and the Ticking Bomb*, Tradition (Winter 2006) 39:4, Rabbinical Council of America).
3. Either by torture cells off of U.S. soil (Guantanamo Bay) or using foreign countries to torture for the U.S.
4. Many understand the doctrine of necessity to mean post facto, it is used as a defense after one acted out the torture to prevent consequences; however, the Jewish approach, according to some, will allow torture as a first response to the situation. Or in the words of David J. Bleich (*Id.*), "Curiously, ratification by the United States may prove to have been more symbolic than substantive 'Torture and the Ticking Bomb.' In the resolution ratifying the treaty the Senate declared, " . . . the United States considers itself bound by the obligation . . . to prevent 'cruel, inhuman or degrading treatment or punishment,' only insofar as the term means the cruel, unusual and inhuman treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States." See Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment—Reservations, Declarations, and Understandings, part I (1), 136 Cong. Rec. § 17491 (daily ed., Oct. 27, 1990).
5. In January 2009, Susan J. Crawford, appointed by Bush to review DoD practices used at Guantanamo Bay and oversee the military trials, became the first Bush administration official to concede that torture occurred at Guantanamo Bay on one detainee. (Woodward, Bob. *Guantanamo Detainee Was Tortured, Says Official Overseeing Military Trials*, The Washington Post, 14 January 2009).
6. Matt Apuzo and James Risen, *Donald Trump Faces Obstacles to Resuming Waterboarding*, The NY Times, Nov. 28, 2016.
7. In which in an article by *The Atlantic*, they quote Napoleon Bonaparte on the outcome of torture. (Khazan, Olga, *The Humane Interrogation Technique That Actually Works*, The Atlantic, Dec, 14, 2014). See also an article by Jarrett, Christian, *Rapport-building interrogation is more effective than torture*, The British Phsycological Society, Dec. 11, 2014.
8. Alan Dershowitz point's out how the CIA complained that they were left with no other choice other then to torture, following 9/11, yet he ends the paragraph, "But in democracy there is always a choice"(*Why Terrorism Works*, Yale Publishing, 2002, p. 134).
9. Alan Dershowitz tries to make a point that no one should ever be able to torture another without having the situation sufficiently evaluated by a judge (unlike the present situation); rather it should become part of the public policy, and not just defense of post facto, which seems to be the situation now (*Why Terrorism Works*, p.158).
10. Babylonian Talmud, Sanhedrin 46a. The Talmud states a "Beraita—an alternative source" that describes the authority of the Beth Din.
11. Code of Jewish law—H"M 1:1.
12. Maimonides, Eliyahu Touger, Translation, Yad Chazakah, Sanhedrin, Chapter 24, Moznaim Publishers.
13. Bleich, J. David, *Id.*, p.102.
14. In a response from former CIA Directors George J. Tenet, Porter J. Goss and Michael V. Hayden and former CIA Deputy Directors John E. McLaughlin, Albert M. Calland and Stephen R. Kappes to the Wall Street Journal, *Ex-CIA Directors: Interrogations Saved Lives*, Wall Street Journal, Dec. 10, 2014.
15. Brody, Shlomo, *Does Jewish Law Allow Torture?*, The Tablet (Dec. 12, 2014).
16. Minchas Chinuch, Mitzvah N.34, P. 106, Commentary on Commandment of "*Thou Shall Not Kill.*"
17. Rabbi Aryeh Klapper, "Torah Does Not Support Torture," Edah. org.
18. Brody, Shlomo, *Id.*

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Inside the Courts

An Update by the Attorneys at Skadden, Arps, Slate, Meagher & Flom LLP

Class Certification

Colorado District Court Certifies Class of Investors in Municipal Bond Fund Case

In re Oppenheimer Rochester Funds Grp. Sec. Litig., No. 09-md-02063-JLK-KMT (D. Colo. Oct. 16, 2015)

Judge John L. Kane reaffirmed a prior ruling certifying a class of investors in the Oppenheimer California Municipal Bond Fund who alleged claims under Sections 11 and 12(a)(2) of the Securities Act, after reconsidering the order in light of *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015). While the defendants conceded that certain alleged misstatements were appropriate for class treatment, they argued that the allegation that the fund failed to adhere to its investment objective was too individualized to be dealt with on a classwide basis. After an evidentiary hearing, the court found that the commonality element was satisfied because of the presence of "numerous common questions in [the] case, including whether the Fund's offering documents contain[ed] misstatements or omissions, whether those misstatements and omissions were material, and whether Class members sustained monetary losses." With regard to the typicality requirement, the court rejected the defendants' argument that the putative class representative's sophistication as an investor rendered him atypical and subject to unique defenses concerning his actual knowledge of the fund's poor performance. The court reasoned that the lead plaintiff's knowledge of the fund's performance was not unique to him but was available to the rest of the market, and that "its significance to a reasonable investor [would be] subject to common proof." The court similarly held that the plaintiff's sophistication did not render him an inadequate class representative and rejected attacks on the plaintiff's credibility. Finally, the court determined that the requirements of Rule 23(b)(3) had been satisfied because common issues predominated and were not defeated by individual investor knowledge. The court determined that, under *Omnicare*, "whether a statement is misleading' depends on the perspective of a reasonable investor," and proof of the misleading nature and materiality of the statements and omissions in the fund's offering documents, measured against a "reasonable investor" standard, would be common to all class members, as would be the calculation of damages. The defendants' affirmative defenses of negative loss causation and due diligence similarly did not defeat a finding of predominance because they relied on "generalized proof." The court also found that the superiority prong of Rule 23(b)(3) was met, given that the class format is the "favored method" in the Tenth Circuit for litigating securities actions. The court noted that case management tools are available if the need to address any individualized issues arises.

Dodd-Frank Act

Cost-Benefit Analysis Required in Financial Stability Oversight Council's SIFI Designations, DC District Court Holds

MetLife, Inc. v. Fin. Stability Oversight Council, No. CV 15-0045 (RMC) (D.D.C. Mar. 30, 2016)

Judge Rosemary M. Collyer rescinded MetLife's designation as a systemically important financial institution (SIFI) subject to enhanced supervision under the Dodd-Frank Act. The court ruled that in imposing the designation, the Financial Stability Oversight Council ignored its own guidance and failed to conduct a required cost-benefit analysis.

In designating MetLife as a SIFI, the council determined that any "material financial distress" at MetLife "could pose a threat to the financial stability of the United States." MetLife challenged its SIFI designation on the grounds that the council failed to assess MetLife's vulnerability to financial distress and the magnitude of that distress on the broader economy. The council argued that its guidance require only an evaluation of whether, and how, MetLife's vulnerabilities could impact the broader economy—not an assessment of the probability or likelihood of material financial distress. The council also argued that its guidance permits it to describe the magnitude of the potential harm in broad terms and that it was therefore unnecessary to estimate actual dollar figures. The court disagreed, ruling that the council's "straightforward" guidance required the council to evaluate the risk of financial distress and assess the magnitude of that risk based on reasoned predictions and quantified analysis.

MetLife also challenged its SIFI designation on the ground that the council ignored the costs the designation imposed on the company. MetLife argued that the designation imposed billions of dollars of regulatory compliance costs on the company, thereby increasing its financial vulnerability. The council countered that Dodd-Frank does not require a cost-benefit analysis because the statute requires only that the regulation be "appropriate." The court disagreed. Citing the U.S. Supreme Court's opinion in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the court ruled that "cost must be balanced against benefit because [n]o regulation is 'appropriate' if it does significantly more harm than good."

Fiduciary Duties

Books and Records

Delaware Court of Chancery Orders Production of Books and Records Subject to 'Incorporation Condition'

Amalgamated Bank v. Yahoo! Inc., C.A. No. 10774-VCL (Del. Ch. Feb. 2, 2016)

Vice Chancellor J. Travis Laster issued an opinion ordering production of certain books and records to a plaintiff stockholder of Yahoo! Inc. under Section 220 of the Delaware General Corporation Law (DGCL). Post-trial, the court determined that the plaintiff had demonstrated a "credible basis" to suspect wrongdoing, including possible breaches of fiduciary duty by Yahoo's directors and corporate waste, in connection with the firing of Yahoo's chief operating officer, which triggered a nearly $60 million severance payment. As a result, the court found that certain of the documents the plaintiff sought were necessary for a meaningful investigation into such potential claims.

In addition, in what it described as an "issue of first impression," the court granted Yahoo's request that the court "condition any further production on [the plaintiff] incorporating by reference into any derivative action complaint that it files the full scope of the documents that Yahoo has produced or will produce in response to the Demand." The court reasoned that this incorporation condition "protects the legitimate interests of both Yahoo and the judiciary by ensuring that any complaint that [the plaintiff] files will not be based on cherry-picked documents." The court explained that the condition does not change the pleading standard that governs a motion to dismiss, under which a plaintiff is entitled to all reasonable inferences and must be credited with all well-pleaded factual allegations. Thus, the court concluded, "[t]he only effect of the Incorporation Condition will be to ensure that the plaintiff cannot seize on a document, take it out of context, and insist on an unreasonable inference that the court could not draw if it considered related documents." The parties have filed notices of appeal and cross-appeal to the Delaware Supreme Court, which has stayed the case below pending resolution of the appeals.

Derivative Litigation

Delaware Court of Chancery Finds Demand Is Not Excused With Respect to Challenges to Secondary Offering

Sandys v. PInCus, et al., C.A. No. 9512-CB (Del. Ch. Feb. 29, 2016)

Chancellor Andre G. Bouchard dismissed a derivative claim brought by a stockholder of Zynga, Inc., finding the plaintiff did not adequately allege that demand on the board of directors would have been futile. The plaintiff brought a derivative action to recover damages allegedly suffered by Zynga, claiming the board approved certain transactions, namely exceptions to lock-up agreements and trading restrictions, that allowed directors and officers to sell shares in a secondary offering—shortly after which the company's stock price fell dramatically. By the time the plaintiff filed his action, two of the directors who sold in the secondary offering had been replaced by outside directors with no involvement in the underlying events.

The court granted the defendants' motion to dismiss pursuant to Rule 23.1, finding that presuit demand was not excused because the board at the time the complaint was filed consisted of a majority of disinterested and independent directors. The court held that demand was not excused with respect to the insider trading claim governed by *Brophy v. Cities Serv. Co.* against the secondary offering participants based on their alleged misuse of Zynga confidential information to sell shares at the time of the secondary offering. Applying the test for demand futility set forth in *Rales v. Blasband*, the court found that only two of the current board members participated in the secondary offering and were therefore likely to face a substantial likelihood of liability, and that the other seven directors were disinterested and independent. The court found that the fact that directors had "interlocking business relationships" and sat on the board of other companies together was insufficient to raise a reasonable doubt as to their independence.

The court also held that demand was not excused with respect to the plaintiff's claim that the board breached its fiduciary duties by approving the secondary offering and modifications to the lock-up agreements. The court again applied a *Rales* analysis to that claim, finding that while a majority of the members of the board in place at the time of the secondary offering were interested, and even though a majority of those board members had not been replaced, "enough of the *interested* members of that board were replaced (and an additional director was added) so that the [board existing at the time the suit was filed] had a majority of directors (seven of nine) who derived no personal financial benefit from the challenged transaction" (emphasis in original). Thus, the court found that "it makes no sense under these circumstances to focus any aspect of the demand futility inquiry on the board that approved the underlying transaction," and that "demand here should not be excused if a majority of the Demand Board can impartially consider a demand, even when less than a majority of them were replaced." The court also found that even if entire fairness applied to the board's decision to approve the secondary offering, the plaintiff had not stated any nonexculpated claims against a majority of the board in connection with the secondary offering, because the plaintiff did not make particularized allegations that the disinterested directors "knowingly failed to inform themselves about the Secondary Offering or otherwise consciously disregarded their directorial duties, as is required to allege a non-exculpated claim against them." The court also found that demand was not excused with respect to the plaintiff's *Caremark* claim that the defendants failed to ensure that Zynga maintained adequate controls regarding its public disclosures and failed to disclose material information. The court found that two of the directors were disinterested and independent because they joined the board after the alleged *Caremark* violations occurred, and that the three other independent directors did not face a substantial likelihood of liability for the *Caremark* violations because the plaintiff

did not plead particularized facts linking the alleged "red flags" to the outside directors' knowledge or actions.

Delaware Court of Chancery Declines to Dismiss Claim Alleging Controlling Stockholder "Extract[ed] a Non-Ratable Benefit" Through Consulting Agreement

In re EZCORP Inc. Consulting Agreement Derivative Litig., C.A. No. 9962-VCL, slip op. (Del. Ch. Jan. 25, 2016)

Vice Chancellor J. Travis Laster issued a memorandum opinion granting in part and denying in part the defendants' motions to dismiss derivative claims for breach of fiduciary duty challenging certain consulting agreements entered into between EZCORP and an advisory firm, Madison Park, which was affiliated with EZCORP's controlling stockholder. After determining that a demand on the EZCORP board of directors would have been futile because it was not sufficiently independent and disinterested, the court found that the complaint stated a claim for breach of fiduciary duty related to the challenged transactions that would be governed by the entire fairness standard of review. The court explained that Delaware courts have historically applied the entire fairness framework broadly, not just in the squeeze-out merger context but to any transaction in which a controller allegedly "extracts a non-ratable benefit," including "compensation arrangements, consulting agreements, services agreements, and similar transactions between a controller or its affiliate and the controlled entity."

Mergers and Acquisitions

Delaware Court of Chancery Declines to Approve Disclosure-Based Settlement

In re Trulia, Inc. Stockholder Litig., C.A. No. 10020-CB (Del. Ch. Jan. 22, 2016)

Chancellor Andre G. Bouchard declined to approve a disclosure-based settlement of deal litigation arising from Zillow's $3.5 billion acquisition of Trulia. Shortly after the proposed merger was announced, stockholder plaintiffs filed suit, engaged in expedited discovery and ultimately settled the claims in exchange for additional disclosures in a supplemental proxy statement. The court found that the additional disclosures were not "material" or even "helpful" to stockholders. In addition, the court explained that the settlement's release, which had been narrowed following the settlement hearing, was overbroad because it released all claims relating "in any conceivable way" to the merger.

In refusing to approve the settlement, Chancellor Bouchard stated that "the Court's historical predisposition toward approving disclosure settlements needs to be reexamined" but stopped short of saying that future disclosure-based settlements will be automatically rejected. Instead, Chancellor Bouchard explained that disclosure-based settlements will be met with "continued disfavor…unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently." Chancellor Bouchard elaborated that in "using the term 'plainly material,'" he meant "that it should not be a close call that the supplemental information is material as that term is defined under Delaware law." The court also left open the possibility that if the information was not plainly material, it may be appropriate to appoint an *amicus curiae* to "assist the Court in its evaluation of the alleged benefits of the supplemental disclosures, given the challenges posed by the non-adversarial nature of the typical disclosure settlement hearing."

Insider Trading Claims

SDNY Denies Motion for Summary Judgment on Insider Trading Claims

SEC v. Payton, 14 Civ. 4644 (S.D.N.Y. Dec. 28, 2015)

Judge Jed S. Rakoff denied a defense motion for summary judgment filed on claims by the Securities and Exchange Commission (SEC) that certain individuals violated Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder by trading on inside information they had obtained downstream from a lawyer who worked on an acquisition. Specifically, the court noted that under Rule 10b5-2, there is a duty of trust and confidence where "the person communicating…material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences." The court recounted the history of sharing confidences between the lawyer who worked on the transaction and the lawyer's friend with whom the lawyer shared the allegedly inside information, and between and among the lawyer's friend and certain other friends and colleagues several degrees removed from the original source of the allegedly inside information, including the defendants. The court noted that, for the defendants to be liable, the SEC would have to demonstrate that (1) the lawyer's friend owed a duty of trust to the lawyer, (2) the lawyer's friend breached that duty by disclosing it to others receiving a personal benefit thereby, and (3) the defendants understood the information was confidential and the lawyer's friend obtained a personal benefit by breaching a confidence. Regarding the first element, the court concluded that it was a genuinely disputed material fact whether a duty of trust existed between the lawyer and his friend because there was competing evidence on either side of the issue. Regarding the second element, the court likewise noted that, based on competing evidence, "a reasonable jury could find that" the lawyer's friend provided the tip for a personal benefit under the "quid pro quo" standard set forth by *United States v. Newman*, 773 F. 3d 438 (2d Cir. 2014) because the lawyer's friend and the tippee to whom he disclosed the allegedly inside information had a history of mutual favors. Regarding the third element, the court concluded that the remote tippees, *i.e.*, the defendants, had reason to know that the allegedly inside information was

obtained by breaching a confidence because, among other reasons, they were sophisticated and had been in the securities industry for several years.

Interpreting *Omnicare*

Second Circuit Affirms Pre-*Omnicare* Dismissal of Securities Act Claims Based on a Pharmaceutical Company's Opinions

Tongue v. Sanofi, Nos. 15-588-cv, 15-623-cv (2d Cir. Mar. 4, 2016)

The Second Circuit affirmed the dismissal of claims that Sanofi violated Sections 11 and 12(a)(2) of the Securities Act by concealing information about the company's clinical trials of a multiple sclerosis drug. The plaintiffs alleged that the Food and Drug Administration (FDA) repeatedly expressed concerns about the company's use of a single-blind study rather than a double-blind study, but that the company concealed those concerns from investors, and the FDA subsequently denied the drug application. The district court had dismissed the claims because the alleged misstatements were statements of opinion and the plaintiffs failed to sufficiently allege that the defendants did not genuinely believe the statements when made. The Second Circuit affirmed the district court's determination that the plaintiffs had failed to plead misstatement claims, but—in light of the Supreme Court's opinion in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015)—also reviewed whether the plaintiffs had sufficiently alleged that the company failed to disclose information in connection with the opinions.

Under *Omnicare*, the plaintiffs failed to state a claim: The court determined that the company had not improperly concealed information about the FDA's interim feedback because the company had a legitimate basis to expect approval based on the positive results of the trials, and sophisticated investors should be aware that a drug application will necessarily entail some dialogue between the company and the FDA. In addition, the offering documents included "numerous caveats," including one that addressed the reliability of the company's projections of the drug's success. Further, the FDA had publicly disclosed its general preference for double-blind clinic tests. The court reiterated that investors were "not entitled to so much information as might have been desired to make their own determination about the likelihood of FDA approval by a particular date," and the company need not have disclosed additional information "merely because it tended to cut against their projections." *Omnicare* requires only that the opinion "fairly align[]" with the information in the issuer's possession at the time.

Jury Trial

Eleventh Circuit Affirms Jury Instruction in Civil Securities Fraud Trial, Holds That Rule 10b-5(b) Does Not Impose Duty to Disclose All Material Information

FrIed v. StIefel Labs., Inc., No. 14-14790 (11th Cir. Mar. 1, 2016)

The Eleventh Circuit affirmed a jury instruction given in a rare civil securities fraud trial, holding that Rule 10b-5(b) promulgated under Section 10(b) of the Securities Exchange Act "does not prohibit a mere failure to disclose material information."

The plaintiff, a former executive at the defendant company, brought suit against the defendant and its president after the defendant announced that it had been acquired at a sizable per-share premium by a large pharmaceutical manufacturer. The plaintiff claimed that the defendants committed securities fraud because, among other things, the president failed to notify the plaintiff of the pending sale during a conversation in which the officer advised the plaintiff to cash out his stock options in the defendant. Before trial, the district court refused to issue the plaintiff's proposed jury instruction that the defendants had a "duty to disclose all material information" to the plaintiff. The jury returned a verdict in favor the defendants.

In affirming the district court, the Eleventh Circuit held that the plaintiff's proposed jury instruction misstated the law. Rule 10b-5(b) imposes a duty only "to update prior statements if the statements were true when made, but misleading or deceptive if left unrevised." It does not require individuals to disclose material facts if the individual never made affirmative statements that would be misleading if left uncorrected. The plaintiff's jury instruction thus misstated the law, because the defendant's only duty was to disclose information necessary to prevent prior statements from being misleading, not to disclose all material information to the plaintiff. Accordingly, the court held that the district court correctly refused to issue the plaintiff's proposed jury instruction and affirmed the judgment in favor of the defendants.

Securities Fraud Pleading Standards

Northern District of California Dismisses Securities Fraud Class Action Against Apple Supplier for Failure to Plead False or Misleading Statements

In re Invensense, Inc. Sec. Litig., No. 15-cv-00084-JD (N.D. Cal. Mar. 28, 2016)

District Judge James Donato dismissed a securities fraud class action brought against a technology company that supplies iPhone parts to Apple, finding that the plaintiff failed to plead with particularity that the defendant made false or misleading statements.

The plaintiff, representing a putative shareholder class, brought suit under Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder, alleging that the defendant and its officers waited too long to write down the value of certain obsolete inventory and made inflated estimates about the company's gross margins. Specifically, the plaintiff alleged that the defendant had overstated the value of its inventory and presented unrealistic gross margin projections in various earnings calls.

In dismissing the complaint, the court concluded that while the plaintiff had presented substantial and detailed evidence that the defendant's statements relating to the value of its inventory were false and misleading, the plaintiff had nonetheless failed to meet the heightened pleading requirements of the Private Securities Litigation Reform Act (PSLRA) and Federal Rule of Civil Procedure 9(b) because it did not allege the source of its knowledge. The court further concluded that the defendant's gross margin projections were forward-looking statements protected by the PSLRA's safe harbor provision and were thus inactionable as a matter of law. Accordingly, the court dismissed the plaintiff's inventory-related claims with leave to amend but dismissed the gross margin-related claims with prejudice.

Finally, because the Section 20(a) claims against the defendant's officers were predicated on the plaintiff's Section 10(b) claims, those claims were likewise dismissed.

Misrepresentations

Southern District of California Dismisses Securities Fraud Class Action Against SeaWorld Arising From Alleged Mistreatment of Captive Killer Whales

Baker v. SeaWorld Entm't, Inc., et al., No. 14cv 2129-MMA (KSC) (S.D. Cal. Mar. 31, 2016)

District Judge Michael M. Anello dismissed a putative securities fraud class action brought against SeaWorld, its officers and its underwriters, finding that the plaintiffs had failed to plead with particularity that SeaWorld made false or misleading statements, as required by the Private Securities Litigation Reform Act and Federal Rule of Civil Procedure 9(b).

The plaintiffs, seeking to represent a class of SeaWorld shareholders that purchased shares in various public offerings, brought claims under Sections 11, 12 and 15 of the Securities Act and under Sections 10(b) and 20(a) of the Securities Exchange Act. They alleged that SeaWorld and its officers committed securities fraud by publicly denying that the documentary "Blackfish"—which severely criticized SeaWorld's orca breeding program—had an adverse impact on the theme park's attendance. Plaintiffs alleged, among other things, that the documentary must have caused attendance to decline because attendance did decline during the class period, SeaWorld's competitors' attendance rose during the class period, "Blackfish" caused SeaWorld tremendous negative publicity and the California legislature considered a bill banning SeaWorld's orca breeding program.

In dismissing the Exchange Act claims as well as the claims brought under Sections 11 and 15 of the Securities Act, the court concluded principally that the plaintiffs had failed to plead with particularly that SeaWorld's denials were false or misleading because the plaintiffs failed to plead the existence of reports or data analyzing SeaWorld's attendance figures and attributing the decline in attendance to the negative publicity and pending legislative action following the release of "Blackfish." The court further concluded that the plaintiffs' other evidence of falsity—including the comparisons to SeaWorld's competitors—was fatally flawed, because factors other than "Blackfish," including increased competition and poor weather, may have been responsible for SeaWorld's attendance decline.

Finally, the court dismissed the Securities Act Section 12(a)(2) claims against all defendants, though for different reasons. The court dismissed the 12(a)(2) claims against SeaWorld and its directors because the plaintiffs did not adequately allege that these defendants sold or solicited purchases of SeaWorld shares.

And it dismissed the 12(a)(2) claims against the underwriter defendants because the plaintiffs failed to allege that they purchased shares from any of the underwriters specifically.

Northern District of Illinois Dismisses Former Employees' Securities Fraud Claims for Failure to Meet Heightened Pleading Standard

Cornielsen v. Infinium Capital Holdings, LLC, No. 14-cv-00098 (N.D. Ill. Mar. 3, 2016)

Judge Andrea R. Wood dismissed without prejudice securities fraud claims brought under Section 10(b) of the Securities Exchange Act against a diversified alternative asset and risk management firm as well as certain officers and board members. The plaintiffs, former employees of the firm, claimed that the defendants made material misrepresentations and omissions regarding an employee program through which the plaintiffs' loans to the firm were converted into equity.

In dismissing the claims, the court concluded that the plaintiffs failed to adequately plead actionable misstatements under the heightened pleading standard of Rule 9(b) of the Federal Rules of Civil Procedure. The court reasoned that several of the plaintiffs' allegations failed because the plaintiffs did not identify the specific defendants who made the alleged misrepresentations or omissions, or the allegations were made "upon information and belief" with no supporting facts, as required by Rule 9(b). With respect to the omissions, the court reasoned that the plaintiffs failed to allege facts establishing that any defendant had a duty to speak. The court explained that there is generally no affirmative duty for a company to disclose all information that could potentially affect share prices, unless such silence renders an affirmative statement misleading. Finally, the court concluded that the plaintiffs failed to state with particularity how the alleged omissions rendered any affirmative statement misleading.

Colorado District Court Denies Motion to Dismiss Securities Fraud Claims Against Mining Corporation

In re Molycorp, Inc. Sec. Litig., No. 12-CV-00292-RM-KMT (D. Colo. Jan. 20, 2016)

Judge Raymond P. Moore declined to dismiss, in large part, claims that a mining company violated Sec-

tion 10(b) of the Securities Exchange Act and Sections 11 and 12(a) of the Securities Act by allegedly stating that a particular mine contained deposits of heavy rare earth elements (HREEs) (the company's "principal" products), while daily analysis of the mine demonstrated that there were no HREEs present. The court found that three types of allegations raised a plausible inference that the defendants acted with scienter: (1) information from a former analytical chemist (a confidential witness) about daily ore analysis that was entered into a computerized system, to which senior management had access, (2) the discrepancy between certain defendants' sales of the company's stock during and after the class period, and (3) the position of certain senior executives within the company, which gave them access to and knowledge of the information concerning the daily ore analysis and absence of HREEs. The court also found that the plaintiffs had sufficiently pleaded loss causation because they alleged that the stock suffered an abnormal decline in value following a senior executive's disclosure at a conference that the company had not found any HREEs in the mine. However, the court held that the complaint failed to state a claim against the individual defendants for insider trading because it did not sufficiently allege that those defendants had knowledge concerning the absence of HREEs at the mine. The court also determined that the complaint stated a claim under Section 11 of the Securities Act for material misrepresentations in the company's registration statement. The court further held that the complaint stated a claim under Section 12 of the Securities Act against the underwriter defendants. Although the court noted the "express privity requirement" under Section 12 and observed that plaintiffs might not ultimately prevail on their claim, it nevertheless found that the plaintiffs had sufficiently pleaded that they had "purchased...shares [of] Molycorp common and preferred stock in the February and June 2011 Offerings pursuant to the February and June 2011 [p]rospectuses" and that the "Underwriter Defendants were sellers, offerors, and/or solicitors of sales of the common and preferred stock" offered in connection with the registration statements at issue.

Omissions

Second Circuit Affirms Dismissal of Claims Against Online Video Advertisement Company

Medina v. Tremor Video, Inc., No. 15-2178-cv (2d Cir. Feb. 8, 2016) (Summary Order)

The Second Circuit affirmed the dismissal of claims brought by a putative class of investors alleging that an online video advertisement company violated Section 11 of the Securities Act by purportedly failing to disclose in a registration statement for the company's initial public offering certain material trends or uncertainties regarding delays in upfront ad buys, demographic pricing and ad buying. The plaintiffs alleged that the trends and uncertainties became apparent when the company released its quarterly financial results several months later. The court also affirmed the denial of the plaintiffs' request for leave to amend their complaint as futile. Reviewing those rulings *de novo*, the Second Circuit held that the complaint failed to allege sufficient facts to give rise to a plausible inference that defendants omitted material trends or uncertainties, and it noted that the registration statement included adequate cautionary language. The Second Circuit also held that the proposed amended complaint was flawed because it failed "to plausibly allege that defendants *knew* of the alleged uncertainties and trends at the time of the Registration Statement." The court rejected the plaintiffs' argument that because publicly available information placed defendants in a "position to know" that their statements were false or misleading, that actual knowledge could therefore be imputed to defendants. The court concluded that although "[w]ith the benefit of hindsight," those trends were apparent by the time the company released its financial results, the plaintiffs could not use "hindsight alone" to impute to the defendants knowledge that certain events that constituted the trends "were omens of future material problems."

SDNY Dismisses Putative Securities Fraud Class Action for Failure to State Claim

In re China Mobile Games & Entm't Grp. Ltd. Sec. Litig., No. 14-CV-4471 (KMW) (S.D.N.Y. Mar. 7, 2016)

Judge Kimba M. Wood granted the dismissal of claims that a Chinese developer and publisher of mobile games violated Sections 10(b) of the Securities Exchange Act by allegedly making false or misleading statements concerning the company's involvement in a bribery scheme and by failing to disclose certain related-party transactions. The plaintiffs alleged that the company assured investors in its offering documents that it had disclosed all material weaknesses of the company's operations but in fact failed to disclose that the company was paying bribes to maintain good relationships with its distributors and that the company's president's former company was one of the distributors receiving the alleged bribes. The court determined that the plaintiffs failed to sufficiently allege that the company's statements made in SEC filings were false at the time they were made because they were made more than three months before news articles and analysts reports speculated that the company had terminated employees for engaging in alleged bribery. Further, the court discredited the plaintiffs' confidential witness because the witness worked for the company's subsidiary, not the company itself.

In addition, although the court held that the company was under a duty to disclose related-party transactions, it determined that the plaintiffs failed to sufficiently allege facts showing that the company's president controlled his former company after he had sold his entire interest in it. The court also determined that the plaintiffs failed to adequately plead scienter. The plaintiffs' conclusory allegations that the company had a desire to conceal the alleged bribery and related-party transactions failed because the plaintiffs did not offer any factual support that the com-

pany benefited in some concrete or personal way from the alleged schemes or that the company concealed the alleged schemes in an effort to shore up its offering. Further, with respect to the alleged related-party transactions, the court determined that the company's president had divested all interest in his former company before joining the company, and no facts supported the allegation that the president's divestment was a sham. The court also reasoned that the plaintiffs failed to show that the company concealed the alleged bribery because the company did an independent investigation into the market's speculation of bribery and no misconduct was identified. Finally, the court found that the plaintiffs' reliance on the core operations doctrine failed because the mere fact that the company's publishing department was at the core of the company's business, without more, was insufficient to find an inference of scienter.

Eastern District of Michigan Dismisses Securities Fraud Claims Against Bank Holding Company and Its Officers

Lubbers v. Flagstar Bancorp. Inc., No. 14-cv-13459 (E.D. Mich. Feb. 10, 2016)

Judge Bernard A. Friedman dismissed a federal securities class action against a holding company and two corporate officers. The court held that the plaintiff failed to plead any actionable misstatements or omissions under Section 10(b) of the Securities Exchange Act and therefore also failed to state a Section 20(a) control person liability claim against the two corporate officers.

The plaintiff alleged that the defendants misrepresented or failed to disclose certain information in public filings, including: (1) the existence of regulatory investigations into the company's mortgage servicing practices, (2) the effect of cost reductions in the company's mortgage servicing business, and (3) the ongoing risk of liability notwithstanding its sale of certain of its mortgage servicing rights.

The court held that the company's disclosures were adequate, noting that the company was not required to disclose every fact that may have been of interest to potential investors. The court further stated that the plaintiff failed to show particular statements were misleading because the allegedly omitted information was not logically related to the subject of the statements.

SDNY Dismisses Putative Securities Fraud Class Action for Failure to State Claim

In re Sano! Sec. 4ItIG., No. 14-cv-9624 (PKC) (S.D.N.Y. Jan. 6, 2016)

Judge P. Kevin Castel granted a motion to dismiss a putative class action that alleged claims under Sections 10(b) and 20(a) of the Securities Exchange Act. The plaintiffs' claims arose from an alleged illegal marketing scheme whereby defendant Sanofi purportedly funneled millions of dollars to third-party consultants who "served as middlemen in a scheme to induce pharmaceutical retailers and hospitals to favor Sanofi's diabetes drugs over competing drugs." In reliance on a whistleblower's report, the complaint alleged that Sanofi undertook an internal investigation into nine potentially fraudulent contracts, which confirmed violations of internal policies and federal laws, but that the defendants nonetheless misrepresented Sanofi's legal compliance and corporate integrity. The complaint further alleged that the failure to disclose the alleged scheme boosted sales of Sanofi's diabetes products, but that once the company abandoned the scheme, sales of the products dropped off considerably.

The court first found that the plaintiffs had failed to allege the presence of an illegal scheme—or that Sanofi had conducted an internal investigation that confirmed the existence of the scheme—with the requisite particularity. Although the plaintiffs had pleaded that the whistleblower had learned that her co-workers had processed "improper inducement payments," they had pleaded no facts concerning the specific circumstances surrounding how the whistleblower had gained this knowledge. The plaintiffs also failed to identify the contracts in question or plead facts demonstrating that consultants had actually engaged in unlawful referral services on behalf of Sanofi, or that drug retailers and hospitals in fact received kickbacks. The court next determined that the complaint had not alleged that the defendants had made any material misstatements or omissions: Statements made on conference calls and in SEC filings about "efforts toward transparency, accountability, and disclosure" were mere "corporate puffery," too general to induce reliance. Furthermore, the CEO's Sarbanes-Oxley certification that the reports did not contain any untrue or misleading statements or omissions was not actionable because the plaintiffs did not allege that the CEO did not believe what he said. And although the plaintiffs complained of allegedly misleading statements made in SEC filings, press releases and conference calls concerning growth in diabetes products, "the allegation that a corporation properly reported income that is alleged to have been, in part, improperly obtained is insufficient to impose Section 10(b) liability." The court also held that the plaintiffs had failed to plead scienter. Knowledge of the alleged scheme could not be imputed to the CEO by virtue of his managerial position and the operation of corporate policies that would have, in the abstract, given him access to allegations concerning such a scheme. Finally, the court held that the plaintiffs had failed to allege loss causation because they had not pleaded any facts showing that Sanofi's alleged scheme in fact materially inflated sales of diabetes products. Because the complaint failed to state a primary violation of Section 10(b), it also did not state a claim under Section 20(a).

Scienter

Eighth Circuit Reverses Dismissal of Investors' Securities Fraud Claims Against Professional Services Company

Rand & Heart of New York, Inc. v. Dolan, No. 15-1838 (8th Cir. Feb. 10, 2016)

The Eighth Circuit affirmed in part and reversed in part a district court ruling dismissing a class action brought against the officers of a professional services company for alleged violations of Sections 10(b) and 20(a) of the Securities Exchange Act. The plaintiff investors alleged that, in a press release and during a conference call with analysts regarding second-quarter results, the company omitted material facts about the financial stability of its subsidiary, predicting double-digit growth while failing to disclose the subsidiary's loss of its largest customer. The plaintiffs sought to recover for losses they sustained between the date of the allegedly misleading statements and the date the company announced its appointment of a chief restructuring officer. The district court granted the defendants' motion to dismiss, reasoning that the plaintiffs failed to adequately allege scienter and establish loss causation for the second half of the period at issue.

The Eighth Circuit reversed the district court's ruling that the plaintiffs failed to adequately plead scienter, holding that the investors sufficiently alleged that the company's failure to disclose its subsidiary's loss of its largest customer was reckless. Pointing to the plaintiffs' allegation that the customer had formerly provided more than 50 percent of the subsidiary's business, the court concluded that the financial instability caused by this loss was so obvious that the defendants must have been aware of it. The court rejected the defendants' argument that the company's statements were protected by the Securities and Exchange Act's safe harbor provision, holding that the "boilerplate" cautionary language accompanying the statements was not "*meaningfully* cautionary" because it did not include "company-specific warnings based on a realistic description of the risks applicable to the particular circumstances."

The court affirmed the district court's ruling that the plaintiffs failed to adequately plead loss causation for the period between the company's second press release during the alleged time period, which disclosed the company's financial hardships and the lost customer, and its announcement that it had appointed a chief restructuring officer. Emphasizing that corrective disclosures must actually present new information to the market, the court concluded that announcing the appointment of a restructuring officer did not correct a misrepresentation but merely elaborated on the company's previously disclosed plan to restructure.

Fifth Circuit Sets Forth 'Special Circumstances' Under Which Officers' Positions May Give Rise to Inference of Scienter

Local 731 I.B. of T. Excavators & Pavers Pension Trust Fund v. Diodes, Inc., No. 14-41141 (5th Cir. Jan. 13, 2016)

The Fifth Circuit affirmed the dismissal of a securities class action against a semiconductor manufacturer and two of its officers, holding that the complaint failed to plead facts giving rise to a strong inference of scienter.

Plaintiffs alleged that the semiconductor manufacturer and its CEO and chief financial officer violated Section 10(b) of the Securities Exchange Act by failing to disclose that the company's labor policies exacerbated a labor shortage at the company's Shanghai facility. The plaintiffs alleged that the officer defendants must have known about the policies due to their executive positions. In response to defendants' motion to dismiss, the plaintiffs argued that although an officer's position alone does not suffice to create a strong inference of scienter, "special circumstances" taken together with an officer's position may support the requisite inference of scienter.

The Court of Appeals observed that the "'special circumstances' cases exhibit some combination of four considerations that might tip the scales in favor of an inference of scienter": (1) whether a company is small, such that the executives would be familiar with the intricacies of day-to-day operations, (2) whether the transaction at issue is critical to the company's vitality, (3) whether the alleged misrepresentation or omission would have been readily apparent to the speaker, and (4) whether the defendant's statements were internally inconsistent. The court held, however, that none of these factors was present in this case. First, the company had more than 4,000 employees at locations around the world, and it was not clear that senior executives in Dallas would be aware of labor policies in Shanghai. Second, the plaintiffs did not allege that the labor shortage jeopardized the company's existence. Third, the plaintiffs did not plead facts showing that the impact of Shanghai's labor policies would have been readily apparent to the officer defendants. Finally, the court held that the officers' statements were not inconsistent—the officers repeatedly informed investors of the labor shortage and accurately predicted the impact the shortage would have on the company's financial performance.

Northern District of California Dismisses Securities Fraud Class Action Against Electronic Payment Company

In re Verifone Sec. Litig., No. 5:13-cv-01038-EJD (N.D. Cal. Mar. 29, 2016)

District Judge Edward J. Davila dismissed securities fraud claims brought against a leading provider of secure electronic payment services, finding that the plaintiffs failed to adequately allege either the misrepresentation or scienter elements of their claims.

The plaintiffs, representing a putative shareholder class, brought suit under Sections 10(b) and 20(a) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder, alleging that the defendants hid and misrepresented the failure of the company's transition from a product-oriented to service-oriented business model. Specifically, the plaintiffs alleged that the defendants misled the market by claiming to have achieved "record revenues and record profit" during the transition period, even though the defendants knew that the company's business model transition was a failure. The plaintiffs also claimed

that the defendants failed to disclose transition-related decreases in the defendant's research and development budget, among other things.

In evaluating the plaintiffs' claims, the court found that the plaintiffs adequately pleaded that the "record revenues and record profits" statement could constitute a material misrepresentation because such statements were capable of objective verification. The court nevertheless dismissed the plaintiffs' claims based on those statements, concluding that the plaintiffs had failed to establish a strong inference that the defendants made that statement with scienter. First, the timing of the statement—10 weeks before the defendant announced its actual financial results—did not give rise to the inference that the defendants must have known that the company would not achieve record revenues and profits when the statement was made. Second, the termination of key company employees more than two months after the statement was made did not support an inference of scienter in context, because the terminations were not obviously related to revelations of fraud. Finally, the plaintiffs' allegations regarding certain internal statements made by the defendant officers were insufficient to establish scienter because the plaintiffs failed to plead the time, place and context in which the statements were made.

The court then dismissed the claims predicated on the defendant's research and development budget, reasoning that the defendants had not made any affirmative statements that required the defendants to disclose its disinvestment in research and development in order to avoid misleading the market.

After dismissing the plaintiffs' Section 10(b) claims for failure to adequately plead falsity and scienter, the court dismissed the plaintiffs' Section 20(a) claims, which were predicated on the underlying 10(b) claims.

Northern District of California Refuses to Dismiss Securities Fraud Claims, Finds That Magnitude of Accounting Violations Created Strong Inference of Scienter

Thomas v. Magnachip Semiconductor Corp., No. 14-cv-01160-JST (N.D. Cal. Mar. 4, 2016)

District Judge Jon S. Tigar refused to dismiss securities fraud claims against a South Korean technology manufacturer, finding among other things that the plaintiffs pleaded sufficient facts to create a strong inference that the defendant made false or misleading statements with scienter.

The plaintiffs, a group of investors, brought suit principally under Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated thereunder, alleging that the defendant consistently inflated its financial results over a two-year period from 2011 to 2013 through widespread accounting irregularities. For example, in 2014, the defendant restated its earlier financial results, to report that it suffered a roughly $11 million loss in net income in 2011 rather than gained nearly $22 million, as it had previously reported. The plaintiffs alleged that the magnitude of the defendant's accounting violations, which the defendant admitted were "illegal," combined with the resignations of two top employees, were sufficient to show a strong inference that the company's accounting violations were committed with scienter.

In denying the defendant's motion to dismiss, the court found that because the accounting violations "dramatically affected" the defendant's financial results in ways that strongly suggested "a typical corporate executive should have noticed them," the plaintiffs had pleaded facts sufficient to create a strong inference of scienter. The court further reasoned that the defendant company's admission that its management was responsible for the accounting errors, combined with the magnitude of the errors, was enough to suggest that the individual officer defendants were at least reckless in reporting the company's financial results. Moreover, the court found that the resignation of two of the defendant's top employees soon after the purported wrongdoing came to light contributed to an inference of scienter.

While the court allowed the plaintiffs' Section 10(b) claims to proceed, it found that the plaintiffs' additional claims under the Securities Act were time-barred because the plaintiffs failed to file those claims within one year after a reasonably diligent plaintiff would have discovered facts constituting the violations.

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Emerging Trends in Privacy and Cybersecurity

By Stuart D. Levi

Entering 2016, the relentless stream of cyberattacks continues unabated, having become a "business as usual" reality to which companies must adapt. All companies, regardless of size or industry, are potential targets, and the pool of attackers is expanding. Below is an overview of the key themes that emerged this year and what we expect to see in 2016.

Best Practices for Cybersecurity Preparedness

In 2015, a number of regulators, including the Securities and Exchange Commission's (SEC) Office of Compliance Inspections and Examinations (OCIE), issued guidance and alerts about cybersecurity preparedness. The good news for companies, whether regulated or not, is that consistent themes are emerging as to what constitutes best practices. They include:

- **Conducting a Risk Assessment.** Cybersecurity preparedness needs to start with assessing the company's risks and designing a plan that addresses those risks.
- **Strong Governance.** A cybersecurity plan must involve the active participation of senior management, and where applicable, the board.
- **Data Access**. Employees should be able to access only the data they require, with appropriate authentication steps.
- **Training.** Many attacks prey on employees who may unknowingly surrender their passwords or click on malware links. Regular employee training on cybersecurity is therefore critical.
- **Vendor Management.** Attacks are often launched through a third-party vendor that has access to the company's system for business purposes. Companies must have robust cybersecurity requirements for vendors.
- **Incident Response Plan.** All companies should have incident response plans to deal with cyberattacks and run tabletop exercises to walk through different scenarios.
- **Cyber Insurance**. Cyber insurance is emerging as an important component of any risk mitigation strategy.
- **Information Sharing.** Companies across multiple industries have begun to appreciate that sharing cyberthreat information and best practices with their competitors is a critical tool to reduce risks. The White House has been encouraging this practice, and in February 2015, President Barack Obama issued an executive order encouraging the development and formation of Information Sharing and Analysis Organizations. We expect these efforts to greatly expand in 2016, and all companies should consider joining an information-sharing group in their industry.

Outlook on Legislation

As in previous years over the past decade, Congress attempted to enact various privacy or cybersecurity legislation. These initiatives were expected to gain more traction following President Obama's release of a number of proposed bills in January 2015, including a federal data breach notification law and information-sharing legislation. However, the only piece of legislation that was enacted was the Cybersecurity Act of 2015, a bill that made it through Congress at the end of the year as part of the 2016 omnibus spending bill. The act creates a voluntary framework for real-time sharing of "cyber threat indicators" and "defensive measures" and provides liability protections and an antitrust exemption for such sharing. We do not anticipate any other meaningful additional privacy or cybersecurity legislation being enacted in 2016. Indeed, state attorneys general responded to widespread calls for a federal data breach notification law by urging Congress to preserve state authority in this area. Such a federal law will probably continue to be discussed but is unlikely to pass in 2016.

The Role of the FTC

The Federal Trade Commission (FTC) has long been the most active regulator in the areas of privacy and cybersecurity. In 2015, the FTC won a significant victory when the U.S. Court of Appeals for the Third Circuit held in the *Wyndham* case that the agency has authority to deem a company's cybersecurity practices unfair under Section 5 of the FTC Act, and that companies had fair notice as to what practices could violate that section. However, as the year drew to a close, the FTC was handed a defeat when its own administrative law judge held in the *LabMD* case that the FTC must show more than the mere "possibility" of harm from a cybersecurity incident in order to sustain a Section 5 case. Despite this setback, we anticipate that the FTC will remain highly active in this area, and that companies should be familiar with the types of cases the FTC is bringing in order to understand the issues on which the agency is focused.

EU Emerges as a Force to Be Reckoned With

Although the European Union has had a robust privacy regime for close to 20 years, the impact on U.S. com-

panies has been relatively limited. A dramatic shift in this equation occurred last year. In December 2015, the EU announced completion of a new General Data Protection Regulation (GDPR), which will replace and significantly broaden the current EU Data Protection Directive. The GDPR is widely expected to be approved in early 2016 and go into effect two years later. The impact on any company doing business with European residents—even if not situated in Europe—will be significant.

The expanding impact of the EU was also felt two months earlier, when the Court of Justice of the European Union invalidated the U.S.-EU Safe Harbor framework on which thousands of companies had relied to send personal data from the EU to the U.S. The court also empowered local data protection authorities to decide for themselves whether personal information was being protected by international agreements. These developments suggest a far more activist European privacy regime than had been in place— one that could have a significant impact on global commerce in 2016 and beyond.

Class Action Lawsuits Must Remain Part of a Company's Risk Calculus

Most data breaches result in multiple class action lawsuits against the victim company. The gating issue has been whether the plaintiffs' alleged injury is sufficiently concrete and imminent to establish Article III standing, especially since these plaintiffs often have not suffered any monetary loss or other tangible injury. Cases from the past year offered little clarity on this issue. For example, in June 2015, in the Zappos litigation, a Nevada district court held, as have many other courts, that the possibility that a "credible threat may occur at some point in the future" is insufficient to confer standing. However, the U.S. Court of Appeals for the Seventh Circuit adopted a more lenient position, finding standing in the *Neiman Marcus* case because the presumed purpose of the theft of personal information was to make fraudulent charges or engage in identity theft, and plaintiffs should not be required to wait until such harm occurs. The decision by the Seventh Circuit and other courts that have found standing may further incentivize plaintiffs' counsel to bring class action lawsuits. The potential for such suits should therefore be part of the risk calculus of any company that collects or processes personal information.

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Recent Employment Laws Impacting Private Employers in New York

By Sharon Parella

1. Introduction

Recently, the New York City Council and the New York State Legislature enacted two new laws that significantly impact private employers and their workplaces. First, the New York City Council's amendment to the New York City Human Rights Law prohibits discrimination against caregivers. Second, the New York State Legislature's new paid family leave law provides substantial benefits for eligible employees. In addition, the New York City Commission on Human Rights has released a comprehensive Legal Enforcement Guidance on issues relating to discrimination based on gender identity and gender expression. Furthermore, the Equal Employment Opportunity Commission has issued an extensive resource document on employer-provided leave as a reasonable accommodation under the federal Americans with Disabilities Act.

A summary of these laws and guidelines is set forth below.

2. New York City Council

a. Prohibition of Discrimination Against Caregivers

Effective May 4, 2016, an amendment to the New York City Human Rights Law[1] prohibits workplace discrimination against employees based on their actual or perceived "caregiver status."[2] Under this new law, a "caregiver" is defined as a person who provides direct and ongoing care for (i) a child under eighteen (18) years of age, or (ii) a "care recipient."[3] In this connection, a "care recipient" is defined as a person who has a disability, relies on the caregiver for medical care or to meet the needs of daily living, and is:

(i) the caregiver's child of any age (including a biological, adopted or foster child, a legal ward or a child of a caregiver standing *in loco parentis*);

(ii) the caregiver's spouse;

(iii) the caregiver's domestic partner;

(iv) the caregiver's parent (including a biological, foster, step- or adoptive parent, legal guardian or a person who stood *in loco parentis* when the caregiver was a minor child);

(v) the caregiver's sibling (including half-siblings, step-siblings and siblings related through adoption);

(vi) the caregiver's grandchild;

(vii) the caregiver's grandparent;

(viii) a child of the caregiver's spouse or domestic partner;

(ix) a parent of the caregiver's spouse or domestic partner;

(x) a person who resides in the caregiver's household; or

(xi) a person in a familial relationship with the caregiver as designated by the rules of the New York City Commission on Human Rights ("NYCCHR").[4]

In its effort to eradicate employers' negative assumptions about a caregiver's commitment or ability as an employee, among the protections for caregivers under the law the NYCCHR has particularly emphasized the issues of flexible scheduling and accommodations. Specifically, while the new law does not require employers to provide either flexible scheduling or accommodations (which may be available to caregivers under the New York City Earned Sick Time Act and/or the federal Family and Medical Leave Act), the NYCCHR has stated that "[e]mployers cannot provide certain benefits, like flexible scheduling, to some employees and refuse to provide the same benefits to employees who request them because of their caregiving responsibilities."[5] With respect to flexible scheduling, the NYCCHR has provided the following example that would likely constitute a violation under the new law:

> An employee works as a medical assistant for a small medical practice. Two months ago, the employee's husband was diagnosed with cancer. For the next six weeks, the employee's husband will be attending twice weekly chemotherapy appointments in the morning before the employee goes to work. The employee asked her office manager if she could arrive up to an hour late on the days when her husband goes to chemotherapy so that she can drive him home before coming to work. The office manager said no, explaining that the practice can't function if everybody doesn't arrive on time. A couple of weeks later, the employee notices another medical assistant arriving late and being greeted by the office manager. When she asked the medical assistant why she was late, the medical assistant explained that the office manager is allowing her to come late a couple of times a week while she trains for an upcoming marathon.[6]

Likewise, the NYCCHR has stated that employers cannot deny accommodations "to employees with caregiving responsibilities if they provide these benefits to other employees."[7]

3. New York City Commission on Human Rights

a. Prohibition of Discrimination Based on Gender Identity and Gender Expression

Recently, the New York City Commission on Human Rights ("NYCCHR") issued a comprehensive Legal Enforcement Guidance regarding discrimination on the basis of gender identity and gender expression (which constitute gender discrimination under the NYCHRL).[8] In this Guidance, the NYCCHR provides several examples of conduct by employers which may constitute violations of the NYSHRL including:

(i) failing to use an employee's preferred name or pronoun. Specifically, the NYCCHR requires employers "to use an individual's preferred name, pronoun and title (*e.g.*, Ms./Mrs.) regardless of the individual's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the individual's identification." The Guidance further provides that employees "have the right to use their preferred name[s] regardless of whether they have identification in that name or have obtained a court-ordered name change, except in very limited circumstances where certain federal, state, or local laws require otherwise (*e.g.*, for purposes of employment eligibility verification with the federal government). Asking someone their preferred gender pronoun and preferred name is not a violation of the NYCHRL."

(ii) refusing to allow an employee to utilize single-sex facilities (such as bathrooms and locker rooms) or participate in single-sex programs consistent with the employee's gender, regardless of his or her sex assigned at birth. Pursuant to the Guidance, "the law does not require entities to make existing bathrooms all-gender or construct additional restrooms.… Some people, including, for example, customers…or employees, may object to sharing a facility or participating in a program with a transgender or gender non-conforming person. Such objections are not a lawful reason to deny access to that transgender or gender non-conforming individual."

(iii) engaging in sex stereotyping—namely, discrimination based on any employee's failure to conform to sex stereotypes. For example, an employer may not have a policy which prohibits men from wearing jewelry or make-up at work or "[overlook] a female employee for a promotion because her behavior does not conform to the employer's notion of how a female should behave at work."

(iv) imposing dress codes or uniforms, or apply grooming or appearance standards, that contain different requirements for individuals based on sex or gender.

(v) providing employee benefits that discriminate based on gender. As set forth in the Guidance, to "be non-discriminatory with respect to gender, health benefits plans must cover transgender care [including hormone replacement therapy, voice training and surgery], also known as transition-related care. In no case, however, will an employer that has selected a non-discriminatory plan be liable for the denial of coverage of a particular medical procedure by an insurance company, even when that denial may constitute discrimination on the basis of gender."

(vi) considering gender when evaluating requests for accommodations. According to the Guidance, when an employer "grants leave requests to address medical or health reasons, it shall treat leave requests to address medical or health-care needs related to an individual's gender identity in the same manner as requests for all other medical conditions." Such health-care needs relating to gender transition include "medical leave for medical and counseling appointments, surgery and recovery from gender affirming procedures, surgeries and treatments."

(vii) engaging in discriminatory harassment based on an employee's actual or perceived gender identity or expression, including actual or threatened violence, verbal harassment, defacing or damaging real property and cyber bullying.

(viii) engaging in retaliation against an employee who opposes discrimination or requests a reasonable accommodation for a disability based on gender identity or gender expression.[9]

As set forth in the Guidance, the NYCCHR may impose civil penalties of up to $125,000 for violations, and up to $250,000 for willful violations.

4. New York State Legislature

a. Paid Family Leave

Effective January 1, 2018, the newly enacted New York State Paid Family Leave Law will require employers to provide eligible employees with paid, job-protected leave each year (i) to care for a new child, (ii) to care for a family member with serious medical condition, or (iii) when a family member is called to active military service.[10] This paid leave, which amends the New York State disability law and will be funded through nominal payroll deductions, applies to all full-time and part-time employees who have been working for their employers for at least twenty-six (26) weeks. Such employees may use paid leave to:

(i) bond with a new child (including an adopted or foster child) within the first twelve (12) months after the child's birth (or adoption or placement);

(ii) provide physical or psychological care when the employee's child, spouse, domestic partner, parent (including step-parent or legal guardian), parent-in-law, sibling, grandchild or grandparent is suffering from a serious health condition; or

(iii) address certain exigent needs when the employee's spouse, domestic partner, child or parent is called to active military service.

Beginning on January 1, 2018, an eligible employee may take up to eight (8) weeks of paid leave, and will be paid at the rate of fifty percent (50%) of the employee's average weekly wage (capped at fifty percent (50%) of the statewide average weekly wage). On January 1, 2019, the paid leave period will increase to ten (10) weeks, and the pay rate will increase to fifty-five percent (55%); on January 1, 2020, the pay rate will increase to sixty percent (60%) (both pay rate increases will be capped at the respective statewide average weekly wage). Finally, on January 1, 2021, an eligible employee may take up to twelve (12) weeks of paid leave at the rate of sixty-seven percent (67%) of the employee's average weekly wage (capped at sixty-seven percent (67%) of the statewide average weekly wage).

Under the new law, employees who elect to take family leave are entitled to guaranteed job protection and continued health care benefits during the leave period. Moreover, the law prohibits retaliation against any employee who exercises his or her rights to take paid family leave under the program.

5. Federal Law

a. Employer-Provided Leave and Reasonable Accommodation

On May 9, 2016, the Equal Employment Opportunity Commission ("EEOC") released a new resource document on employer-provided leave as a reasonable accommodation under the Americans with Disabilities Act ("ADA").[11] These new guidelines provide, among other things, as follows:

(1) A reasonable accommodation may include making modifications to existing leave policies (including to extend the amount of available leave time) and also providing leave for a disability even where an employer does not offer leave to other employees (unless such modifications or leave would cause undue hardship). Such leave may be required despite the fact that the employer does not offer leave, the employee is not eligible for leave under the employer's policy or the employee has already exhausted all available leave. The employer need not, however, provide paid leave beyond what the employer normally provides as part of its paid leave policy, if any.

(2) Employees with disabilities must be provided with access to leave on the same basis as all other similarly situated employees. For example, if an employer provides five (5) days of "paid time off" and does not set any conditions on its use, the employer cannot require that an employee who uses paid time off due to a disability must provide a note from his or her health care provider.

(3) An employer who had granted leave with a fixed return date may not ask the employee to provide periodic updates. The employer may, however, contact an employee on an extended leave to check on the employee's progress.

(4) An employee on leave for a disability may request reasonable accommodation in order to return to work. This request may be made by the employee, or in a health care provider's note releasing the employee to return to work with certain restrictions. As set forth in the guidelines, an "employer will violate the ADA if it required an employee with a disability to have no medical restrictions—that is be '100%' healed or recovered—if the employee can perform her job with or without reasonable accommodation unless the employer can show providing the needed accommodations would cause undue hardship."[12]

Endnotes

1. N.Y.C. Admin. Code §§ 8-102 *et seq.*
2. *Id.* at §§ 8-101 & 8-107(a).
3. *Id.* at § 8-102 (30) (a) & (j).
4. *Id.* at § 8-102 (30) (b)—(i).
5. *FAQ's for Caregiver Protections,* NYC Commission on Human Rights, at www.nyc.gov/html/cchr/downloads/pdf/materials/Caregiver_FactSheet-Employer.pdf.
6. *Protections for Workers with Caregiving Responsibilities,* NYC Commission on Human Rights, 26 Apr. 2016 at www.nyc.gov/html/cchr/downloads/pdf/materials/Caregiver_FAQ.pdf.
7. *Id.*
8. *Gender Identity/Gender Expression: Legal Enforcement Guidance,* NYC Commission on Human Rights, 21 Dec. 2015 at www.nyc.gov/html/cchr/html/law/gender-identity-legalguidance.shtml.
9. *Id.*
10. Assemb. 09006, 2016 Leg. Gen. Assemb. (N.Y. 2016).
11. *Employer-Provided Leave and the Americans with Disabilities Act,* Equal Opportunity Employment Commission, at www.eeoc.gov/eeoc/publications/index.cfm.
12. *Id.*

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Preparation of the Witness for Depositions

By Thomas P. Cunningham

The most critical part of a case prior to trial is the deposition of the parties. A case can be won or lost based on both the content and presentation of the testimony. It would be foolish to believe that you could make someone into a great witness. A party to an action is not generally a person who has had any experience testifying. It is not a natural setting, and is difficult to reproduce with the same stress that will be experienced during questioning at a deposition. Does this mean that witnesses should not be prepared before testifying? Of course not. The key to preparation is setting your goals for the deposition for the particular witness. With correct goals, the deposition preparation will lead to a successful deposition. The common goals for all depositions should be to provide testimony that is truthful, complete, accurate, and well thought out. Witnesses should be prepared so that they are not thinking about certain facts or issues for the first time during the questioning. They should be prepared so that they are comfortable with the facts and issues. This will lead to them providing the most accurate and complete account of the facts of the case.

A. Preparation by the Attorney

Preparation of a witness begins with preparation by the attorney. An attorney cannot begin to prepare for the deposition of the witness without first having a complete understanding of both the facts and the law of the particular case. You must know the facts of the case so that you know what the witness may need to testify to at the deposition. You need to be familiar with any accident reports, statements, photographs, contracts, etc. The attorney will also need to understand the prima facie case and the burdens of proof. You must know what is significant in the case, so that you know the potential topics for questioning and the critical components that the client will need to understand about the case. The witness will also see that you are prepared. This will give the witness confidence in you and make him or her more relaxed.

B. The Purpose of Preparing the Witness

Preparing a witness does not mean telling him or her everything he or she will need to say to establish the case. This has both ethical and practical problems. Ethically, we cannot tell a witness what he or she should say at a deposition—we cannot suborn perjury. Practically, a witness cannot remember everything he or she is told and say it the way it would need to be said to be both factually correct and credible. Why prepare? The function of the preparation is to make sure that a witness is not being asked to consider an issue or fact for the first time at the deposition. The witness should have an opportunity to think through his or her responses so that he or she can be both complete and accurate. The witness does not need to know every specific question that will be asked, but you should have had a discussion before the deposition of each of the critical facts and issues in the case. For example, if a witness needs to think at the deposition about the color of the light, the speed of the car, the distance to certain landmarks, then you have not done your job. Again, the purpose is not for you to provide the answers. The purpose of the preparation is to assist the witness with recall so that the testimony he or she provides is an accurate account of what he or she observed.

C. The Mechanics of Testifying

Timing

It is generally not ideal in a complex case to meet with a client the morning of the deposition to prepare for testimony. You should provide the witness with time to think about the issues you discussed. This may lead to additional questions by the witness or recall of events that he or she was unable to remember at your meeting. The meeting should take place a couple of days before the testimony so that the issues you have discussed are fresh in his or her mind. It should not be too long before so that the witness has forgotten your preparation.

General Information

The witness should be told the purpose of depositions. It has both a fact finding component and to lock in testimony if the case were to proceed to trial. The witness should be told that he or she will be taking the same oath that will be taken at trial. The proceedings are informal, but this does not mean that it should not be taken seriously. The witness should not let the informal nature of the proceeding lull him or her into a sense of false security. The witness should be told not to make the deposition a conversation. The testimony he or she provides cannot be easily undone if it is incorrect or only partially complete. You should discuss the following:

- Your role in the process
- The role of the other attorneys
- The role of the court reporter
- Where the deposition will be conducted and who will be present
- The type of questioner and personality of the attorney
- Attorney-client privilege—tell you everything
- Use of objections
- Opportunity to take breaks during questioning
- Possible length of the deposition
- The order of the proceedings

A witness who knows what to expect is generally less nervous about the process and will be more relaxed when he or she testifies.

General Advice

These are things to discuss with your witness about testifying in general. These are things that are not specific to the case.

- Dress appropriately
- Be likeable and keep your cool
- Always tell the truth
- Listen carefully to the *entire* question before answering
- Understand the question before answering
- Think about your answer before speaking
- Do not volunteer information
- Be accurate and complete in your responses
- Provide reasonable estimates
- Do not guess, speculate, or assume
- Correct inaccurate answers immediately
- Do not adopt the testimony of other witnesses who testified before you
- Do not accept the statements of counsel as facts
- It is okay to say you don't know or don't remember
- It is proper for you to have met with your attorney
- This is not the time to tell your side of the story
- Do not be intimidated by a bully
- Read the entire document before answering
- Do not try to provide the response you think your lawyer may want
- There is no "best" answer

D. To Review or Not to Review—That Is the Question

Some attorneys will tell you to have your client review nothing. The less he or she knows the better. I believe that this is the wrong approach. You should have every document or photograph that the witness may be asked to review at the time of the deposition present for the witness to review. These are documents that have been previously disclosed by the parties. There should not be any issues relating to confidentiality or disclosure. Do not show the witness documents that you do not intend to produce to other parties because they are not subject to disclosure. This would include the statement of a witness to an accident. A witness should not be reviewing a document for the first time at the deposition. This will often lead to incomplete or not well thought out testimony. It could be the downfall of your case if the witness testifies incorrectly concerning this evidence.

For example, the witness may be shown a photograph of the area where a fall down occurred. He or she has not been in the area in three years and had not reviewed any photographs. At the deposition, the witness is asked to show where he or she fell. He or she may be nervous and not take his or her time in examining the photograph. This could result in the witness marking the incorrect area because the photograph was not taken from a perspective that he or she had at the time of the accident. It would take the witness time and possibly an explanation of the perspective or other photographs to show the entire area. Preparation would be the key.

The witness should also review all statements that he or she has given that have been produced and any pleadings that he or she has verified. He or she should be consistent with what he or she has said previously or be prepared to testify as to why something was incorrect or inaccurate.

E. Review Background

Review the background of your witness. Tell him or her that he or she will be required to answer personal questions about his or her background. Some people are reluctant to discuss personal information. This may start the deposition on a bad note. The witness may become immediately agitated and not respond thoughtfully. Counsel may also take an immediate dislike to the witness. This will not help the case during questioning or after the deposition. Do not make your client's case a crusade for your opposing counsel.

You should review your client's education, criminal history, marital status, military service or any other aspect of his or her background that may be significant to the particular case. This part of the deposition should proceed smoothly.

F. Discuss Your Client's Recollection

- Review all of the facts in a chronological order
- Take notes of the your client's recollection
- Review in more detail the events and circumstances
- Discuss any potential exaggeration
- Review any documents that may assist his or her recollection
- Question whether the information is from his or her own knowledge or was obtained from another source

G. Refreshing Your Client's Recollection

This is a difficult decision to make during preparation. As discussed briefly above, there are dangers in not having your client review any documents. The primary concern is that the witness will not be prepared to respond with the best and most accurate answer at the time of the deposition. You must weigh the pluses and minuses of showing your client documents or photographs that may refresh his or her recollection of certain facts.

Pros

- Facts may be needed to satisfy your burden of proof at trial

- Failure to recall the fact may hurt your client's credibility
- The witness may be shown a document or photograph at deposition and recall the fact at that time
- His or her recollection may conflict with evidence in the case

Cons

- Documents used to refresh recollection are discoverable
- The witness may adopt the information as his or her own recollection
- Educate the witness on topics that he or she may not recall

H. Preparation for Questioning of the Witness

Advise your client that your purpose in preparing him or her for a deposition is not to ask every question he or she can expect to be asked at a deposition. Tell the witness that you hope to cover almost everything that he or she can expect to be questioned on. The witness may become nervous the first time they are asked a different question or in a different way. He or she should anticipate different questions. This also prevents the witness from attempting to prepare what he or she believes to be the perfect response to the question. Tell the witness that the only correct answer is the accurate, complete, and truthful answer. Tell him or her that a good lawyer will eventually be able to uncover and expose a lie. The entire case will fall on the lie. Don't lie.

You should ask the witness the questions that he or she can expect to be asked. Listen for incomplete responses and things that the witness is misunderstanding. You should ask your client questions to determine whether he or she is prone to guessing. Counsel the witness against guessing. This is the time for you to get a good feel as to how he or she will testify, his or her weaknesses as a witness, and whether his or her nerves will override the ability to think. The purpose is to make sure that your witness is able to present the facts in an accurate and complete manner. The testimony should not be clouded by the inability to present the case. For example, if your client saw the car cross over into his or her lane 10 feet from him or her, then he or she should be able to provide the same information at the deposition when asked the questions. This may be easier said than done with some witnesses.

A complete preparation will include discussing your client's responses to the questions you prepared. It is proper for you to discuss how he or she responded to the questions, whether the responses were complete, what he or she may be misunderstanding in the question, why the response may be misconstrued, etc. For example, a common question of a plaintiff is: "What activities are you unable to do as a result of the injuries you claim to have sustained in this accident?" The witness may answer in preparation: "I can't golf or bowl." You know from prior discussions that your client told you that she can no longer cut the lawn, clean the house, garden, and shovel the driveway. When you follow up on this issue with your client, she advises that she thought the question meant "recreational activities." You cannot assume that the client understands or appreciates the impact of an incomplete response. This simple example will show the client that she must be thinking broader when asked questions. She also should not assume that she knows what the questioner was looking for and limit the response. This question called for a very broad response.

The key is not to over-coach the witness. You are asking questions he or she can expect to hear at the deposition, but not providing him or her with the best answer. This is both an ethical and practical problem. Lawyers cannot tell a witness to perjure himself or herself. Even if the answer is truthful, the practical problem is that a witness will have difficulty saying something the way you may want it said. He or she is not a professional witness and will have a difficult time remembering exactly how something should be said. This will be more difficult if the question is not asked the exact way it had been asked during the preparation.

I. Remember Your Goals

The strategy for your case should be incorporated into the deposition. The deposition, like every other part of your case, should follow a strategy. List your goals prior to preparation. Your goal may be summary judgment, to establish the value of the injuries, solidify a defense, etc. You should consider:

- Burdens of proof
- Critical facts of your case
- Weakness in proof
- Presentation of the witness and testimony
- Theory of the case

The witness may not be testifying on all parts of your case; however, you must understand the role of the particular witness and how he or she fits into your case. A well thought out strategy and defined goals will assist in preparing the particular witness for the types of questions he or she will be expected to answer. It will also assist the witness in understanding his or her role in the process.

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You've Got Service: Service of Process by Email and Social Media

By James Ng

Courts, however, cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.[1]

Introduction

As the world changes, so does the law, but always a couple steps behind. The developments of email and social media have taken a great technological leap in closing the gaps between people. Despite the widespread usage of email and social media, the law has been somewhat reluctant to recognize these methods of communication for service of process.

Under New York law, electronic service has only been recognized as an alternative method to serve process when other more traditional methods have been found by the court to be "impracticable."[2] Under federal law, electronic service on foreign defendants is permissible when the court determines that it has not been prohibited by international agreement.[3]

When permitted by the applicable procedural rules, the central consideration that courts consider is whether electronic service comports with constitutional due process—namely, whether service through email or social media is reasonably calculated to provide notice to the defendant. This article will suggest that courts have generally analyzed two factors when making this due process assessment: authenticity and reliability.

Authenticity is a concern because it is often uncertain whether the email or social media account actually belongs to the defendant. Accordingly, the authenticity factor considers whether the named account, in fact, belongs to the defendant. Even if authenticity is confirmed, reliability remains a concern because there should be a high likelihood that the defendant will receive notice and be afforded an opportunity to respond. Reliability thus evaluates the likelihood that the defendant will receive notice from the email or social media account. Ultimately, this article will discuss the various circumstances when these twin due process factors have been examined in the context of electronic service.

I. N.Y. Practice

A. CPLR 308(5)

Under New York law, electronic service stands as an alternative to general practice. CPLR 308(5) permits electronic service after the plaintiff receives court approval that the traditional methods of personal service, substitute service, and "nail and mail" service have been shown to be "impracticable." An impracticability showing often involves demonstrating that service to a last known address has been attempted or that a current address could not be ascertained despite a duly diligent search.

Thereafter, the courts utilize authenticity and reliability assessments in order to determine whether service to the email or social media account is "reasonably calculated" to provide notice. As a practical consideration, electronic service is seemingly more readily approved when locating the physical whereabouts of the defendant is difficult, if not impossible. Additionally, courts seem more willing to sanction electronic service when it is coupled with other methods such as service by mail and service by publication.

B. Authenticity

Predictably, courts have permitted service by email where the plaintiff has demonstrated that defendant had used a particular email account for prior correspondence with the plaintiff,[4] or when the defendant had provided the particular account as a possible contact.[5] In the social media context, a plaintiff sufficiently demonstrated authenticity by submitting copies of Facebook exchanges with defendant and submitted an affidavit attesting that the photographs appearing in the exchanges were of the defendant.[6]

C. Reliability

As a clear indication of reliability that the defendant will receive the service provided to a particular account, courts have determined a high likelihood of notice where the plaintiff recently corresponded with the defendant at a particular email account.[7] Furthermore, plaintiffs have shown that defendants are regularly online at a particular account by showing recently acknowledged delivery receipts of emails.[8] With regards to social media, a court has found that submitting copies of recent Facebook exchanges between the plaintiff and the defendant successfully addressed the issue of reliability.[9]

II. Federal Practice

A. Fed. R. Civ. P. R. 4(f)(3)

Under the federal Rules, so long as it is "not prohibited by international agreement," a district court may order

foreign service of process by electronic means.[10] "Service of process under Rule 4(f)(3) is neither a last resort nor extraordinary relief. It is merely one means among several which enables service of process on an international defendant."[11] "[U]nder Rule 4(f)(3), a plaintiff is not required to attempt service through the other provisions of Rule 4(f) before the [c]ourt may order service pursuant to Rule 4(f)(3)."[12] While the decision to permit foreign service of process through electronic means is left to the sound discretion of the district court, the court conducts authenticity and reliability assessments in order to ensure electronic service comports with constitutional due process.[13]

B. Authenticity

Unsurprisingly, a plaintiff showed that an email account was sufficiently authentic because the defendant had acknowledged receiving a verified complaint by email.[14] Furthermore, email accounts that were used to "correspond regularly with customers" in the course of the defendant's business that operated "extensively, if not exclusively" through the internet,[15] or used for official government communications,[16] were found to be authentic. In the social media context, a district court found the Facebook accounts sufficiently authentic where the email addresses used in the business were used to register the Facebook accounts of the individual defendants, the individual defendants listed their job titles at the defendant companies in their Facebook profiles, and the individual defendants were "friends" of each other.[17]

C. Reliability

Most directly, district courts have been more lax in finding that the reliability factor is satisfied where the defendant had received actual notice of the litigation.[18] Furthermore, a district court found that there was a high likelihood that defendants would receive sufficient notice at a particular email address after they had sent messages to the court from the particular account on multiple occasions.[19] Reliability was also satisfied when the plaintiff showed that a defendant foundation representative promptly responded to an email within two months of a request for electronic service of process.[20]

III. Conclusion

While email and social media are new to the public conscience, electronic service of process will surely find a more prominent place as an alternative method of service. In the modern era of quickly dissolving physical borders and rapidly forming bridges of digital communication, courts will progressively recognize that email and social media comport with constitutional requirements as citizens become more susceptible to electronic notice. Until a mechanism for definitively gauging the likelihood the recipient defendant will receive electronic notice, courts will continue to balance the factors of authenticity and reliability in order to preserve the enduring principle of constitutional due process in this changing nation.

Endnotes

1. *New England Merchants Nat'l Bank v. Iran Power Generation & Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980).
2. N.Y. Civil Practice Law and Rules § 308(5) (CPLR).
3. Federal Rules of Civil Procedure Rule 4(f)(3) (Fed. R. Civ. P.).
4. *Hollow v. Hollow*, 193 Misc. 2d 691, 692, 747 N.Y.S.2d 704, 705 (Sup. Ct. 2002).
5. *See Snyder v. Energy Inc.*, 19 Misc. 3d 954, 958, 857 N.Y.S.2d 442, 445 (Civ. Ct. 2008).
6. *Baidoo v. Blood-Dzraku*, 48 Misc. 3d 309, 314-315, 5 N.Y.S.3d 709, 714 (Sup. Ct. 2015).
7. *Snyder*, 19 Misc. 3d at 957-958.
8. *Id.*; *Safadjou v. Mohammadi*, 105 A.D.3d 1423, 1425, 964 N.Y.S.2d 801, 803-804 (4th Dep't 2013).
9. *Baidoo*, 48 Misc. 3d at 315.
10. *See* Fed. R. Civ. P. R. 4(f)(3).
11. *AMTO, LLC v. Bedford Asset Mgmt., LLC*, 2015 U.S. Dist. LEXIS 70577, at *11-*12 (S.D.N.Y. June 1, 2015) (quoting *In re GLG Life Tech Corp. Sec. Litig.*, 287 F.R.D. 262, 265 (S.D.N.Y. 2012) (internal citations omitted)).
12. *Id.*, at *12 (*Stream SICAV v. Wang*, 989 F. Supp. 2d 264, 278 (S.D.N.Y. 2013) (alteration and internal quotation marks omitted)).
13. *See id.*, at *11-*12.
14. *Enovative Techs., LLC v. Leor*, 2014 U.S. Dist. LEXIS 178442, at *1 (S.D.N.Y. Dec. 24, 2014).
15. *Philip Morris USA Inc. v. Veles Ltd.*, 2007 U.S. Dist. LEXIS 19780, at *9 (S.D.N.Y. Mar. 13, 2007); *see also Sulzer Mixpac AG v. Medenstar Indus. Co.*, 2015 U.S. Dist. LEXIS 159762 (S.D.N.Y. Nov. 27, 2015) (find the defendant's email address reliable because it had been used "at least partially" to conduct overseas business); *AMTO, LLC*, 2015 U.S. Dist. LEXIS 70577, at *25 (finding the defendant's email address reliable because it was used for "business purposes"). *Cf. Nykcool A.B. v. Pac. Int'l Servs.*, 66 F. Supp. 3d 385, 391-392 (S.D.N.Y. 2014) (finding insufficient reliability because there was no evidence that the defendant used the email address for "business purposes or otherwise").
16. *Gurung v. Malhotra*, 279 F.R.D. 215, 220 (S.D.N.Y. 2011).
17. *See FTC v. PCCare247 Inc.*, 2013 U.S. Dist. LEXIS 31969, at *16 (S.D.N.Y. Mar. 7, 2013).
18. *See Gurung*, 279 F.R.D. at 220.
19. *Id.*, at *13-*15.
20. *Fisher v. Petr Konchalovsky Found.*, 2016 U.S. Dist. LEXIS 31014, at *6 (Mar. 10, 2016).

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Attorneys' Eyes Only? Confidential? Really?

Reducing Logistical Headaches in Confidentiality Agreements

By John M. O'Connor, Carrie Maylor DiCanio, and Jorge R. Aviles

I. Introduction

Business litigation these days frequently involves the production of voluminous documents in discovery. At the same time, clients may want their documents to be held confidential and to limit the persons who can examine them. The solution is usually for the parties to make the document production and related discovery subject to a Confidentiality Agreement.

Given the time pressures inherent in meeting discovery deadlines, and the prodigious number of documents to be reviewed and produced, counsel may adopt a Confidentiality Agreement that has been used before and a "let's worry about that later" approach when it comes to identifying specific documents that will be subject to the agreement.

However, kicking the can down the road in this fashion can lead to trouble later on. Two items that are problematic are "attorneys' eyes only" provisions and attempts to require that documents filed in court be sealed.

II. What About the Client?

"Attorneys' eyes only" provisions generally prohibit documents so designated from being disclosed to anyone other than the attorneys litigating the matter, including prohibiting disclosure to the client. Yet, many attorneys are not aware that such provisions may run afoul of two important and related principles:

1. A client is entitled to participate meaningfully in litigation in which it is involved, and
2. Outside counsel has an ethical obligation to inform the client of information obtained in the litigation so that the client can make informed decisions.

For these reasons, case law, both state and federal, and the New York Rules of Professional Conduct effectively counsel that "attorneys' eyes only" provisions must be strictly limited to trade secrets or information that is akin to a trade secret in that it would provide competitors with an advantage.

A. New York Law

In *Gryphon Domestic VI, LLC v. APP Int'l Fin Co., B.V.,* the New York Appellate Division held that documents should not be designated "attorneys' eyes only" when such a designation "prevents counsel from fully discussing with their clients all of the relevant information in the case so as to properly formulate a defense to the action against them."[1] In so holding, the First Department also pointed out that the defendants in the *Gryphon* case were not business competitors of the plaintiffs; instead, the parties were simply adversaries in litigation. Claims of "prejudice" in litigation, not involving trade secrets, do not justify marking documents "attorneys' eyes only."[2]

Similarly, the New York Rules of Professional Conduct compel lawyers to keep their clients informed to an extent that would violate most "attorneys' eyes only" provisions. Specifically, Rule 1.4(b) requires counsel to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."[3] The rules also require a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," to "keep the client reasonably informed about the status of the matter," and "promptly comply with a client's reasonable requests for information."[4] If an "attorneys' eyes only" provision prohibits counsel from consulting with in-house counsel or business principals concerning certain documents or information obtained in discovery, complying with that provision could result in a violation of the New York Rules of Professional Conduct.[5]

B. Federal Law

Courts within the Second Circuit have also held that "attorneys' eyes only" designations should be used "as sparingly as possible."[6] The information must be of a type, the disclosure of which would "work a clearly defined and very serious injury" to the party seeking to protect such information, for example, the revelation of trade secrets.[7] As do the New York cases, federal cases stress that "attorneys' eyes only" designations are meant to shield information from parties that are competitors within an industry.

III. What About the Public?

Provisions that require the sealing of "confidential" documents that are submitted in court are also problematic.

A. New York Law

The Appellate Division has held that there is a strong public interest, grounded in both constitutional and common law, in providing the public with access to documents and information that a court may use to render a decision.[8] In light of the "broad constitutional presumption" arising from the First and Sixth Amendments, "any order denying access must be narrowly tailored to serve compelling objectives, such as a need for secrecy that outweighs the public's right to access."[9] The right of the pub-

lic to access is also recognized in common law principles, which have "long recognized that civil actions and proceedings should be open to the public in order to ensure that they are conducted efficiently, honestly, and fairly."[10]

Accordingly, rules in New York prohibit sealing of court records "except upon a written finding of good cause" that must specify the grounds for the sealing and must "consider the interests of the public as well as of the parties."[11] Even where the litigants agree to sealing, the strong public interest in the transparency of judicial proceedings may override their agreement.

B. Federal Law

Federal cases have also stated a strong common-law interest of the public in access to court proceedings. In *United States v. Amodeo*, the Second Circuit held that this public interest in access to information produced in litigation should be analyzed on a sliding scale.[12]

> In determining the weight to be given to public access, the Court in *Amodeo* suggested ranking the documents along a continuum ranging from those at the heart of the judicial process to those with little or no relationship to that process. Thus, it noted that the public has an "especially strong" interest in access to materials received in evidence at trial [citations omitted] and that any materials that informed the basis for a court's adjudication—even if on motion—should also be accessible absent "exceptional circumstances."[13]

At the other end of the *Amodeo* continuum are documents that have been produced in litigation but have not been submitted to the court on motions or presented as evidence at trial. The public interest in access to these documents produced privately in litigation is limited, "although most courts have held that the producing party still has the burden of demonstrating good cause for preventing public access to discovery materials."[14] In the middle of the continuum are documents filed with the court but that did not form the basis of the court's adjudication. As to these documents, the weight to be afforded the public's right to access is "determined by the exercise of judgment," taking into consideration whether such documents have generally been subject to public access.[15]

The classic situation in which there might be "good cause" for sealing would be a document containing a true trade secret, perhaps a patented manufacturing formula. In contrast, a claim of "prejudice" in the litigation is not sufficient, especially where the opposing party is not a business competitor but is only a garden-variety adverse party.[16]

IV. The Commercial Division and the New York City Bar Association Model Confidentiality Agreements

As mentioned above, both the Commercial Division of the New York State Supreme Court and the New York City Bar Association ("NYCBA") websites provide model Confidentiality Agreements.

Where a Confidentiality Agreement is warranted, the Commercial Division rules require the parties to use the model form that is contained in Exhibit B to the rules.[17] If the parties wish to deviate from the form in Exhibit B, they must submit a "red-line" of the proposed changes and a written explanation of why the deviations are warranted.

The model agreement appearing on the website of the NYCBA is endorsed by the NYCBA Committee on State Courts of Superior Jurisdiction ("Committee"). The introduction to the NYCBA model agreement states that the Committee specifically decided not to include an "attorneys' eyes only" provision out of concern that it would be invoked far more than necessary and would lead to inevitable disputes. The Committee encouraged counsel to use its model agreement, to modify the model agreement to accommodate the needs of each case, and to inform the Court that the parties are using the NYCBA model.

The Commercial Division's model Confidentiality Agreement and that of the NYCBA are very similar.[18] Among the differences are that the Commercial Division model agreement recognizes that: (1) non-parties may produce documents or information that they wish to designate confidential; and (2) non-parties may subpoena confidential information that is in the possession of a party. In each case, the model agreement includes provisions addressing these situations.[19] The Commercial Division model agreement also explicitly recognizes the prevailing law that the burden of establishing the propriety of a "confidential" designation remains with the Producing Party.

The basic structure of each model Confidentiality Agreement is the same, and, for simplicity, this article refers to the Commercial Division model agreement ("Agreement"). The Agreement defines "Confidential Information," the "Producing Party," and the "Receiving Party." Either party (or a non-party) may designate documents to be produced as "confidential"—for example, by stamping that legend on the document. Information subject to the Agreement may only be used in the litigation in which it is produced. The Receiving Party has the right to challenge the "confidential" designation at any time. If the Producing Party does not agree to declassify, the Receiving Party may move before the Court for an order declassifying the documents. The burden is always on the Producing Party to establish the propriety of its designations. The documents remain "confidential" unless and until the Court rules otherwise. The model Agreement also contains provisions as to who may have access to the "confidential" information and how deposition transcripts or portions of deposition transcripts may be marked "confidential."

Documents marked "confidential" may be used at depositions, subject to the other provisions of the Agreement designed to limit access.

A party that wishes to file with the court documents or transcripts that have been designated "confidential" must follow the procedures stated in the Agreement. Where there is electronic filing, a redacted version of the submission is electronically filed. A complete and unredacted version is provided to the other parties and the court. If the Producing Party does not move to seal within seven days of the electronic filing, the party that filed must replace the redacted version previously filed with an unredacted version. If a motion to seal is made, the information remains "confidential" until the court renders a decision. If a motion to seal is granted, there are detailed procedures for filing in court the unredacted versions of the submissions.

Where there is no electronic filing, the party filing serves upon the other parties, and transmits to chambers, both a redacted and unredacted version of the submission. A redacted version is filed with the court. The Producing Party then has three days to move to seal the documents or information designated "confidential."[20] As with electronic filings, if no motion is made, the filing party must file an unredacted submission, and if a motion is made, the information remains "confidential" until the court renders a decision. If a motion to seal is granted, the detailed procedures for filing submissions under seal must be followed.

Memoranda of law or other filings that contain references to confidential information are also subject to the redaction and sealing requirements.

V. Confidentiality and the Stages of Litigation

The need to enter into a Confidentiality Agreement usually arises initially in connection with document production. Especially where voluminous documents are being produced by category, it is possible that neither counsel nor the client is entirely sure of the extent of the information contained in the documents at the time they are being produced. They therefore welcome a Confidentiality Agreement that would limit the access to the documents—and the course of least resistance at this stage will likely result in an overuse of the "confidential" designation. Rather than examining the content of each document to determine whether it truly is confidential, it is much less time consuming, and also less expensive, to stamp all, or nearly all, of the documents produced "confidential." At this stage of the litigation, document production, this over-designation is not likely to cause significant problems.

However, as the litigation progresses and documents are identified for use in depositions and in motions, the prior overuse of the "confidential" stamp becomes troublesome. If the "confidential" designation remains, papers that contain confidential information and are submitted in support of a motion will have to be redacted or filed under seal, and pages of deposition transcripts where confidential documents are discussed would have to be marked "confidential" as well. The resulting logistical headaches will prompt counsel to consider taking steps to de-designate those documents that do not fit the criteria in the Confidentiality Agreement or do not match the criteria set out by the courts for the filing of documents under seal.

Agreements such as the models offered by the Commercial Division and the NYCBA generally place the burden of moving for a de-designation of documents upon the party that seeks the de-designation.[21] The documents retain their "confidential" status pending the court's ruling on the motion to de-designate. So, if the Producing Party decides not to do a document-by-document review and instead stamps nearly all of the documents it produces "confidential," it is the Receiving Party that must go to the trouble of preparing a motion to correct the over-designation. This arrangement would seem to reward and encourage the initial over-designation. There is little to lose in over-designating—the opposing party may not go to the trouble of making a motion, and even if the motion succeeds, the Producing Party is merely back where it started from—it has simply produced a document that is not confidential.

"Agreements such as the models offered by the Commercial Division and the NYCBA generally place the burden of moving for a de-designation of documents upon the party that seeks the de-designation."

Of course, if the party that initially stamped the documents "confidential" would agree to the de-designation, it would save the time all counsel would otherwise devote to the motion, as well as saving the court's time in examining the documents and rendering a determination.

VI. Possible Modifications to Standard Confidentiality Agreements[22]

The various incentives and disincentives present in this situation suggest that it might be useful to consider at the outset placing in the Confidentiality Agreement a provision that would award attorneys' fees to the party prevailing on a motion to de-designate documents or on a motion for an order to seal documents. This would presumably compel a party that originally over-designated to take a hard look at its use of the "confidential" stamp

on the documents at issue. It would also suggest that the moving party proceed with caution. In short, a provision for an award of attorneys' fees to the prevailing party on motion to de-designate would require both counsel and the client to give individualized and careful attention to each document that is challenged—which would provide a counterweight to the earlier tendency to take the expedient route and over-designate.[23]

While over-designation may not cause significant practical problems at the early, document-production stage, the same is not true at the deposition and motion stage. It may be that confidential documents that are used at depositions should be automatically de-designated within a specified time after the deposition unless the Producing Party affirmatively confirms the "confidential" designation. Documents that have been identified for use at deposition presumably are more likely to have a greater relevance to the issues in the litigation and it does not seem unreasonable to require the Producing party to make an individualized determination with respect to these documents.

VII. Court-Imposed Attorneys' Fees

Courts have sometimes imposed sanctions and awarded attorneys' fees following discovery disputes on issues related to the over-designation of documents under a Confidentiality Agreement. For example, in *Broadspring, Inc. v. Congoo*, the Confidentiality Agreement provided that "designations that are shown to be clearly unjustified" may "expose the Designating Party to sanctions." Relying on both Federal Rule of Civil Procedure 37 and a provision in the parties' Confidentiality Agreement, the Southern District imposed sanctions due to the defendants' "abuse of the AEO [attorney's eyes only] designation throughout the discovery process" because disclosure of the information at issue would not create a "substantial risk of serious injury that could not be avoided by less restrictive means."[24]

VIII. Conclusion

Model Confidentiality Agreements are available and on the website of the New York City Bar Association and in the rules of the Commercial Division of the New York Supreme Court. Neither model agreement includes an "attorneys' eyes only" provision and in most commercial cases such designations are probably unwarranted. The New York Rules of Professional Conduct militate against the use of such provisions in that the rules require counsel to keep clients informed of information obtained in litigation so that the client can exercise its right to make informed litigation decisions.

While it may seem convenient in the midst of document production to sign off on a Confidentiality Agreement and worry about the ramifications later, some provisions may warrant more immediate scrutiny and analysis so as to avoid significant problems down the road when documents designated "confidential" are used at depositions and in support of motions.

To address the problem of over-designation of documents as "confidential," counsel may wish to consider modifying the model agreements to provide: (1) that attorneys' fees will be awarded to the prevailing party on any motion involving a court determination as to whether documents have been properly designated; and (2) that confidential documents used at a deposition will automatically lose their "confidential" designation unless that designation is confirmed by the Producing Party within a specified time.

In commercial cases, designating as "confidential" a document that will be filed or presented in court should be limited to those situations, such as trade secrets, in which sealed filings are actually warranted. In other situations, the public interest in access to the workings of the judicial system will likely trump a party's interest in sealing court records in order to keep information private.

Endnotes

1. 28 A.D.3d 322, 326, 814 N.Y.S.2d 110, 114 (1st Dept. 2006); see *TC Ravenswood, LLC v. National Union Ins. Co.*, No. 400759- 2011, 2015 N.Y. Misc. LEXIS 4940, at *10 (Sup. Ct., N.Y. Co. June 10, 2015) (parties were not competitors; alleged harm in other litigation insufficient).
2. *Gryphon*, 28 A.D.3d at 326, 814 N.Y.S.2d at 114.
3. N.Y. Comp. Codes R. & Regs. tit. 22, §1200 (N.Y.C.R.R.) rule 1.4(b).
4. *Id.* at rule 1.4(a)(2-4).
5. Both the Rules of the Commercial Division of the New York State Supreme Court and the website of the New York City Bar Association provide model Confidentiality Agreements. Neither model agreement contains an "attorneys' eyes only" provision. However, as discussed below, both contain "sealing" provisions that can create both logistical and legal complications down the road. The model Confidentiality Agreement contained in the Commercial Division Rules is available at http://www.nycourts.gov/rules/trialcourts/202.70(g)%20-%20Rule%2011-g%20(attachment).pdf. The NYCBA model agreement is available at http://www.nycbar.org/pdf/report/ModelConfidentiality.pdf.
6. *Fendi Adele S.R.L. v. Burlington Coat Factory Warehouse Corp.*, No. 06 CIV 0085, 2006 U.S. Dist. LEXIS 89546, at *6 (S.D.N.Y. Dec. 5, 2006).
7. *HSqd, LLC v. Morinville*, No. 3:11CV1225, 2013 U.S. Dist. LEXIS 37356, at *6 (D. Conn. Mar. 18, 2013); *Renaissance Nutrition, Inc. v. Jarrett*, 747 F. Supp. 2d 374, 380 (W.D.N.Y. 2010).
8. *Danco Lab., Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 711 N.Y.S.2d 419, 423 (1st Dept. 2000).
9. *Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., B.V.*, 28 A.D.3d 322, 324, 814 N.Y.S.2d 110, 112-113 (1st Dept. 2006).
10. *In re Conservatorship of Brownstone*, 594 N.Y.S.2d 31, 32 (1st Dept. 1993).
11. 22 N.Y.C.R.R. § 216.1.
12. 71 F. 3d 1044 (2d Cir. 1995).
13. *Byrnes v. Empire Blue Cross Blue Shield*, No. 98 Civ. 8520, 2000 U.S. Dist. LEXIS 702, at *8 (S.D.N.Y. Jan. 24, 2000). The *Byrnes* decision by Magistrate Michael Dolinger contains a clear and succinct summary of the federal law in the Second Circuit.
14. *Id.* at *4.
15. *Amodeo*, 71 F. 3d at 1050; *Byrnes*, 2000 U.S. Dist. LEXIS 702 at *9.

16. See Fed. R. Civ. P. 26(c)(G); *United States v. International Business Machines Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975); *Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., B.V.*, 814 N.Y.S.2d 110 (1st Dept. 2006); *TC Ravenswood, LLC v. National Union Ins. Co.*, No. 400759- 2011, 2015 N.Y. Misc. LEXIS 4940, at *8 (Sup. Ct., N.Y. Co. June 10, 2015); *Mosallem v. Berenson*, 905 N.Y.S.2d 575 (1st Dept. 2010); *Mancheski v. Gabelli Group Capital Partners*, 835 N.Y.S.2d 595 (2d Dept. 2007).
17. See 22 N.Y.C.R.R. § 202.70 at rule 11(g).
18. It appears that the Commercial Division's model agreement is based upon an editing of the NYCBA model agreement, or perhaps they both are based upon the same source document.
19. The Commercial Division's model agreement also separately addresses procedures in counties with electronic filing and in counties without electronic filing and includes additional clarifying language as well as details of procedures.
20. No explanation is given as to why the Producing Party has seven days to move to seal in counties that have electronic filing, but only has three days in counties that do not have electronic filing. Both the seven and three day periods would appear to be unrealistic and to prompt requests for additional time.
21. Where documents are filed in unredacted form, the burden of moving for a sealing order is upon the Producing Party, the party seeking to retain the "Confidential" designation.
22. 22 N.Y.C.R.R. § 202.70 at rule 11(g) (the parties must submit a "red-line" of any changes proposed to the model Agreement that is contained in the Rules and a written explanation as to why the change is warranted).
23. It might be that each side prevails as to certain documents and that the Court would decide if there is an overall prevailing party.
24. *Broadspring, Inc. v. Congoo, LLC*, No. 13-CV-1866, 2014 U.S. Dist. LEXIS 116070, at *54, *56 (S.D.N.Y. Aug. 20, 2014). In *ULLICO Inc. Litig.*, 237 F.R.D. 314, 317-19 (D.D.C. 2006), the United States District Court for the District of Columbia awarded expenses and fees in connection with a successful motion challenging the over-designation of documents as "Confidential."

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New York State Bar Association Committee on Professional Ethics Ethics Opinions 1104–1107

OPINION 1104 (10/5/2016)

Topic: Legal fees; lien; mortgage; securing legal fees by having client sign promissory note secured by a mortgage against the client's property.

Digest: A lawyer may secure legal fees by having the client sign a promissory note or other instrument, secured by a mortgage against the client's property, provided that (i) the promissory note or instrument and mortgage are fair and reasonable to the client, (ii) the terms of the transaction are fully disclosed to the client in language that the client reasonably can understand, (iii) the client provides informed consent to the essential terms of the note and mortgage and the lawyer's role in the transaction, and (iv) the client is advised in writing to seek independent legal advice and given sufficient opportunity to obtain such advice.

Rules: 1.8(a)

FACTS

1. The inquirer's law firm wishes to secure legal fees for estate planning and Medicaid planning legal services by having the client sign a promissory note secured by a mortgage against the client's property.

QUESTION

2. May a law firm secure legal fees for estate planning and Medicaid planning by having the client sign a promissory note secured by a mortgage against the client's property?

OPINION

3. Rule 1.8(a) of the New York Rules of Professional Conduct (the "Rules") prohibits a lawyer from entering into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment for the protection of the client, unless:

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

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

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

See also Rule 1.0(j) (explaining "informed consent").

4. Comment [4C] to Rule 1.8(a) explains that the Rule does not apply to ordinary fee arrangements between a client and a lawyer entered into at the inception of the lawyer-client relationship, but that it will apply "when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of the lawyer's fee." The Comment explains that Rule 1.8(a) applies in this situation because of the risk that the lawyer's judgment will be skewed by the financial interest in a way that may affect the lawyer's professional judgment on behalf of the client. *See also* ABA Formal Op. 02-427 (lawyer who acquires a contractual security interest in a client's property to secure payment of fees earned or to be earned must comply with Rule 1.8(a)), N.Y. City 1988-7 (July 14, 1988) (finding that securing a fee with a mortgage on a client's home was a business transaction governed by DR 5-104(A), the predecessor to Rule 1.8(a)); *cf.* Rule 1.8(i) (prohibiting a lawyer from acquiring a proprietary interest in a cause of action or subject matter of a litigation the lawyer is conducting for a client, but permitting the lawyer to "acquire a lien authorized by law to secure the lawyer's fees and expenses").

5. Rule 1.8(a) by its terms applies only if the client expects the lawyer to exercise professional judgment for the benefit of the client in the matter. The determination of this issue turns on several factors, including the sophistication and expectations of the client, the complexity of the proposed promissory note and mortgage, and the relationship of those instruments to the estate and Medicaid planning services to be provided (for example, whether the purpose of the planning services is to ensure that the real property passes to the client's heirs). *See* N.Y. State 1051 (2015) (where contingent fee agreement provides for the fee to be calculated on the amount of the recovery "by settlement or judg-

ment" and the lawyer wishes to amend the agreement to allow taking a percentage of an amount loaned to the client by a third party, the amendment would be subject to scrutiny under Rule 1.8(a); N.Y. State 910 (2012) (setting forth factors that determine whether an amendment to a fee agreement warrants scrutiny as a business transaction under Rule 1.8(a)).

6. Here, the client may be looking to the lawyer's professional judgment to understand the significance of the proposed mortgage and promissory note to the services for which the lawyer is being engaged. Further, although the mortgage that will secure the promissory note will not, in the first instance, be relied upon to pay legal fees, the attorney may seek to foreclose on the mortgage in order to recover legal fees if the client fails to make timely and complete payment. The lawyer and client have conflicting interests in the promissory note and associated mortgage because, if the client fails to pay legal fees on a timely basis, the client would want to prevent the lawyer from enforcing rights against the client under the promissory note and mortgage. Accordingly, the lawyer ordinarily will have to comply with Rule 1.8(a) in connection with entering into the promissory note and mortgage.

7. We note also that Rule 1.5(d)(5)(ii) prohibits a lawyer from entering into an arrangement to collect a fee in a domestic relations matter if "the written retainer agreement includes a security interest, confession of judgment or other lien without prior notice being provided to the client in a signed retainer agreement and approval from a tribunal after notice to the adversary." However, this Rule is applicable only to domestic relations matters, and has no bearing on an engagement to provide Medicaid and estate planning services.

8. Because the inquirer has not asked, we do not in this opinion discuss the ethical considerations with respect to executing on the note and mortgage. *See* Rule 1.5(f) ("Where applicable, a lawyer shall resolve fee disputes by arbitration at the election of the client pursuant to a fee arbitration program . . . approved by the Administrative Board of the Courts"); 22 N.Y.C.R.R. Part 137; N.Y. State 684 (1996) (reporting a client to a credit bureau); N.Y. State 608 (1990) (lawyer may use a collection agent after determining that fee is justly owed and considering other factors); N.Y. State 591 (1988) (before engaging a collection agent, lawyer must first determine that fees billed are justly owed for services properly rendered); N.Y. State 567 (1984) (lawyer may protect the right to retain papers or property until the client pays the fees or provides adequate security with a statutory retaining lien, subject to the need to protect against immediate harm to the client).

CONCLUSION

9. A lawyer may secure legal fees for Medicaid and estate planning services by having the client sign a promissory note or other instrument, secured by a mortgage against the client's property, provided that (i) the promissory note or instrument and mortgage are fair and reasonable to the client, (ii) the terms of the transaction are fully disclosed to the client in language that the client reasonably can understand, (iii) the client provides informed consent to the essential terms of the note and mortgage and the lawyer's role in the transaction, and (iv) the client is advised in writing to seek independent legal advice and given sufficient opportunity to obtain such advice.

(25-16)

OPINION 1105 (10/5/2016)

Topic: Imputed conflict of interest

Digest: Conflicts of a partner in a private law firm are imputed to all of the lawyers associated with the private law firm. Consequently, absent informed, written consent, if the public defender's office in which the lawyer is a part-time public defender is prevented by a conflict from representing a person, then neither the part-time defender nor any lawyer in the part-time defender's private law firm may represent the person.

Rules: 1.0(t), 1.7(a) & (b), 1.10(a) & (b)

FACTS

1. The inquiring lawyer ("Lawyer A") is "of counsel" to a law firm and maintains a large caseload of family court assignments and criminal court assignments, including misdemeanors and felonies, from the local county and city courts. Lawyer A handles exclusively assigned matters and does not discuss them with any other lawyer in the firm.

2. Lawyer A does not accept assignments from town or justice courts that hold court in the evening. Lawyer A receives case assignments from the local courts when the public defender's office has a conflict of interest.

3. Recently, one of the partners of the firm ("Lawyer B") accepted a part time position with the county public defender's office. Lawyer B's caseload for that office consists of misdemeanors and violation level offenses, but not felonies, before town and justice courts with evening appearances.

QUESTION

4. May the inquiring lawyer continue to receive assigned family court and criminal court matters when (i) the public defender's office has a conflict of interest and (ii) a partner in the firm where the inquiring attorney is "of counsel" is also a part-time public defender?

OPINION

Applicable Rules

5. This inquiry directly implicates Rules 1.7 and 1.10(a) of the New York Rules of Professional Conduct (the "Rules").

6. Rule 1.7 provides:

   (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

      (1) the representation will involve the lawyer in representing differing interests; or

      (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

   (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

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

      (2) the representation is not prohibited by law;

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

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

7. Rule 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided herein." (emphasis added)

Imputation Within the Public Defender's Office

8. Under Rule 1.10, when lawyers are associated in a firm, none of them may undertake a representation when any of them practicing alone would be prohibited from undertaking the representation as a result of a conflict of interest. Comment [2] to Rule 1.10 explains that the rule of imputed disqualification gives effect to the duty of loyalty to the client, as applied to lawyers who practice in law firms. Some courts, for purposes of disqualification motions, will allow this presumption to be rebutted. See, e.g., *Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127 (2d Cir. 2005). But imputation under Rule 1.10(a) is absolute unless waived by the client.

9. Therefore, the initial questions under Rule 1.10 are (i) whether the public defender's office constitutes a law firm and (ii) whether a part-time public defender is "associated" with the firm. Regarding the first question, Comment [1] to Rule 1.10 states that the term "firm" includes lawyers employed in a legal services organization. Comment [4] to Rule 1.0 notes that, with respect to lawyers in legal aid and legal services organizations, depending upon the structure of the organization, the entire organization or components of it may constitute a firm or firms for purposes of the Rules. This is a factual question that is beyond the jurisdiction of our Committee. However, for purposes of this opinion, we assume that the public defender's office is structured in such a way that the entire office is considered a single law firm. See N.Y. State 1036 (2014) (local sections of a national legal services project are considered a single law firm for conflict of interest purposes where, among other things, the local sections share a single case management system and there is supervision across the local sections); N.Y. State 862 (2011) (public defender's office is a "firm" for purposes of Rule 1.10); N.Y. State 975 (2013) (county public defender office is a firm for imputation purposes even if its lawyers work independently).

10. Regarding the second question, we have previously held that a part-time attorney is "associated" with a firm for purposes of the conflict rules. See N.Y. State 862 (2011) (a part-time assistant public defender is "associated" with that firm). In N. Y. State 862, we noted that the imputation rule applies to all lawyers in a firm, regardless of practice area or department.

Imputation from the Public Defender's Office to Lawyer B's Private Practice

11. Where two "law firms" have a common lawyer, a conflict of interest is imputed to both firms. See *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976) (counsel disqualified from representing client because a partner in his NYC law firm is also a partner in a Buffalo firm that represents the client's opponent). Thus, in N.Y. State 862 (2011), we opined that a lawyer who was a part-time as-

sistant public defender could not, in the lawyer's private practice, represent a client that another full-time or part-time assistant public defender in the same public defender's office could not represent because of a conflict of interest, unless the conflict could be and was waived.

12. N.Y. State 862 makes it clear that Lawyer B—the part-time public defender—cannot represent a client in private practice where another lawyer in the public defender's office is disqualified from undertaking the representation, unless the conflict may be and is waived.

Imputation from the Lawyer B to Lawyer A

13. Under Rule 1.10(a), if Lawyer B is disqualified from a representation, then, unless the conflict may be and is waived, the conflict is imputed to all lawyers who are "associated" in Lawyer B's firm. We have long held that a lawyer who is "of counsel" with a firm is "associated" with that firm. See N.Y. State 615 (1991); cf. Rule 7.3(a)(2)(v) (affiliated as a partner, associate or of counsel). Thus, if Lawyer B is disqualified from the representation, then Lawyer A is disqualified by imputation. Consequently, absent a waiver, if the public defender's office has a conflict that prevents it from undertaking a representation, then neither Lawyer B nor Lawyer A may undertake the representation in their private practice.

Exceptions to Imputation

14. The inquirer notes that Lawyer B's cases as a part-time public defender involve solely misdemeanors and violation level offenses before town and justice courts with evening appearances and that Lawyer A does not handle any cases in such courts. Rule 1.10 applies to law firms. Consequently, unless the public defender's office is organized so that matters heard in daytime and evening session or in different courts were handled by different "firms," the fact that Lawyer A and Lawyer B practice in different courts would be irrelevant.

15. Even if the public defender work of Lawyer A and Lawyer B are effectively screened from the work of the other lawyer, New York does not recognize screening to eliminate conflicts of interest, except where the original disqualification occurs under Rule 1.11, 1.12 or 1.18. See Rule 1.0, Cmt. [8]. This inquiry does not arise under one of those Rules.

16. Finally, Rule 6.5 contains an exception to the application of Rules 1.7, 1.8 and 1.10 for lawyers who participate in "limited pro bono legal services programs," which involve short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter. See N.Y. State 1012 (2014). This inquiry does not involve such a program.

Consent

17. In N.Y. State 862 (2011) we concluded that a conflict of interest could be waived if the conditions set forth in Rule 1.7(b) were met. Assuming that the representation was not prohibited by law and that the lawyer reasonably believed the lawyer would be able to provide competent and diligent representation to the assigned client, we provided additional guidance on obtaining consent:

> To cure a conflict, Rule 1.7(b) requires informed consent from "each affected client." Which clients are affected depends on why the conflict arises. If the imputed conflict arises under Rule 1.7(a)(1) because of another current client, then the inquirer (or some other attorney in the Public Defender's office) must obtain informed consent, confirmed in writing, from both the inquirer's assigned client and the conflicted Assistant Public Defender's current client. If the conflict arises under Rule 1.7(a)(2) because of the conflicted Assistant Public Defender's personal interests, then consent is required only from the inquirer's own assigned client, because no other client is affected. If the conflict arises under Rule 1.9 because of the conflicted Assistant Public Defender's former client, then the inquirer must obtain consent from the conflicting former client. (Since the inquirer did not personally represent the former client, we assume that the inquirer does not personally possess any confidential information of the former client. If the inquirer were in possession of any of the former client's confidential information that has not become generally known, further analysis would be necessary.)

18. However, when the lawyer seeks consent from a client who is receiving free legal services, the lawyer must consider whether such consent would be freely given. See N.Y. State 490 (1978) (when a legal aid office seeks consent to share client confidential information with board members of the organization, "the staff should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and . . . the staff [must be] satisfied that their clients could refuse to consent without any sense of guilt or embarrassment.")

CONCLUSION

19. Conflicts of a partner in a private law firm are imputed to all of the lawyers associated with the private law firm. Consequently, absent informed, written consent, if the public defender's office in which the lawyer is a part-time public defender is prevented by a conflict from representing a person, then neither the part-time defender nor any lawyer in the part-time defender's private law firm may represent the person.

(23-16)

OPINION 1106 (10/14/16)

Topic: Advice on non-legal issues; allocation of authority

Digest: An attorney may render advice that includes considerations such as the benefits and risks of entering a drug treatment program. The attorney must act competently and must adequately explain to the client the material risks of the proposed course of conduct and reasonably available alternatives. However, once the client decides to take a certain course of action, the attorney must follow the directives of the client even if the client's directive conflicts with what the lawyer believes to be in the best interest of the client. If the client is eligible for a diversion program, the attorney must be mindful of confidentiality concerns since treatment records may be provided to judges, prosecutors and program staff. The attorney must provide the client with full disclosure and obtain informed consent before asking the client to execute any release authorizing disclosure of confidential information to the judge or prosecutors.

Rules: 1.1(a), 1.2(a), 1.4(a) & (b), 1.6, 2.1

FACTS

1. The inquirer is a criminal defense attorney whose clients sometimes have underlying substance abuse issues. The inquirer is concerned that a failure to address the client's substance abuse issues could result in recidivism, or even the client's death.

2. The client may be eligible to participate in a court-sponsored diversion program. In an effort to break the cycle of addiction, criminal activity and recidivism, New York State has instituted judicial diversion programs and has set up drug courts to address the issues emanating from drug abuse. The mission of drug courts is to end the abuse of alcohol and other drugs and related criminal activity. *See* Problem Solving Courts—Drug Treatment Courts—Overview, *available at* http://www.nycourts.gov/courts/problem_solving/drugcourts/overview.shtml. Specifically, pursuant to Criminal Procedure Law Article 216, courts are authorized to divert eligible felony offenders into substance abuse treatment programs. The defense lawyer's traditional role as zealous advocate for the client may be at odds with the focus of drug courts and diversion programs, which utilize a "non-adversarial, collaborative approach" among the prosecutor, defense attorney, judge and others. *See* National Association of Criminal Defense Lawyers, *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*, September 2009 p.30.

3. Often, the defendant may receive two plea offers from the prosecution. One involves diversion to a treatment program, and the other does not involve diversion. The penalty for failure to complete the treatment program successfully may be greater than the sentence offered for conviction without diversion.

4. For purposes of this opinion, we will assume that the procedures detailed in CPL Article 216 regarding the judicial diversion program apply:

   - At any time before the entry of a guilty plea or commencement of trial, the court, at the defendant's request, may order an alcohol and substance abuse evaluation.
   - The defendant must, in writing, authorize disclosure of the results of such evaluation to the defense attorney, the prosecutor, the local probation department, the court, and authorized court personnel.
   - After receipt of the evaluation, the court may hold a hearing on the issue of whether the defendant should be offered treatment pursuant to Article 216, and, upon completion of such a hearing, will make findings about whether the defendant's participation in judicial diversion could effectively address the defendant's substance abuse or dependence.
   - Before the court issues an order granting judicial diversion and releasing the defendant into the diversion program, unless an exception applies, the eligible defendant must plead guilty to the charge or charges.
   - The defendant must agree on the record or in writing to abide by the release conditions set by the court, which will include participation in a specified period of treatment, and may include periodic court appearances and urinalysis, to

enable the court to monitor the defendant's progress in treatment.

- If the court determines that the defendant has violated a condition of his or her release under the judicial diversion program, the court may impose any sentence authorized for the crime for which the defendant has been convicted in accordance with the plea agreement, although the court will consider the extent to which persons who ultimately successfully complete a treatment regimen sometimes relapse by not abstaining from alcohol or substance abuse or by failing to comply fully with all requirements imposed by a treatment program and may use graduated and appropriate responses or sanctions designed to address inappropriate behaviors. See CPL Article 216.

QUESTIONS

5. Under this backdrop, the inquirer raises several questions:

   a. May a defense attorney ethically counsel the client regarding the client's drug addiction? In particular, may the defense attorney suggest that the client enter a drug rehabilitation program, even if such participation is not required to resolve the client's criminal case?

   b. May defense counsel advise a client to request a substance abuse evaluation and enter a rehabilitation program in connection with a court-sponsored diversion program, even if there are negative consequences if the client is not successfully discharged?

   c. May a defense attorney permit a client to sign a release authorizing a court-supervised program to receive information regarding the client's performance in treatment?

OPINION

Rendering advice on non-legal matters, such as drug addiction

6. The initial question is addressed by Rule 2.1 of the New York Rules of Professional Conduct (the "Rules"). Rule 2.1 ("Advisor") reads:

   > In representing a client, a lawyer *shall* exercise independent professional judgment and render candid advice. In rendering advice, a lawyer *may* refer not only to law but to other considerations such as moral, economic, social, psychological, and political factors that may be relevant to the client's situation. [Emphasis added.]

7. The Comments to Rule 2.1 provide further guidance. Comment [2] to Rule 2.1 specifically states that "[it] is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice."

8. Comment [5] to Rule 2.1 states: "In general, a lawyer is not expected to give advice until asked by the client. However, ... it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation."

9. A lawyer is not required to give advice on medical or other non-legal matters. However, when rendering "candid advice" as required by Rule 2.1, the lawyer "may" refer to considerations beyond the law. Thus, a lawyer may discuss with the client the client's substance abuse/addiction and provide advice regarding the pros and cons of entering a treatment program. If the lawyer believes that continued substance abuse may lead to adverse legal consequences for the client, such as subsequent charges or arrest, the lawyer should discuss the consequences with the client. See Rule 2.1, Cmt. [5]; Rule 1.4. As advisor, the lawyer may point out the potential consequences of the client's actions or inaction related to the treatment of the underlying substance abuse, including recidivism and death.

10. This Committee has previously addressed the lawyer's role as advisor and has said that a lawyer's advice need not be confined to purely legal considerations. In N.Y. State 769 (2003), quoting EC 7-8, the Committee said:

    > A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to the client need not be confined to purely legal considerations. A lawyer should advise the client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his or her experience as well as the lawyer's objective viewpoint.

11. N.Y. City 2011-2 (2011) also discussed the lawyer's role as advisor, saying: "In providing candid advice, a lawyer should advise the client to consider the costs and benefits [of a course of action], as well as possible alternatives." Opinion 2011-2 added that "lawyers must be cognizant of the various ethical issues…and should advise clients accordingly. The issues may include the compromise of confidentiality and waiver of attorney-client

privilege, and the potential impact on a lawyer's exercise of independent judgment."

12. In sum, the inquirer ethically may counsel the client regarding the client's drug addiction, including recommending that the client enter a drug rehabilitation program.

The Duty to Advise the Client About Diversion Programs

13. If the client has been charged with a drug-related crime and is eligible for a court-sponsored diversion program, then the lawyer must advise the client about the pros and cons of entering such a program. *See* Rule 1.4(a)(2) ("A lawyer shall ... reasonably consult with the client about the means by which the client's objectives are to be accomplished."); Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation").

14. This mandated consultation requires that the lawyer be familiar with the procedures of the diversion program or drug court, the sanctions that may apply for failure to complete the program, as well as the options and alternatives available to the client, so that the lawyer can explain to the client the options, alternatives, and possible consequences. *See* Rule 1.1(a) ("[t]he lawyer should provide the client with competent representation," which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"; *see also* Rule 1.1, Cmt. [5] ("Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem"); *Cf. Padilla v. Kentucky*, 559 U.S. 356 (2010) (lawyer advising a non-U.S. citizen whether to plead guilty to a felony must advise that felony conviction would make client subject to deportation).

15. The objective of most individuals charged with a drug offense may be to avoid a criminal conviction or to minimize or avoid incarceration or other penalties. A diversion program may achieve those objectives. However, one risk of a diversion program (which may include progressive sanctions or incarceration) is that sanctions for violating the terms of the program may be more severe than the penalty offered by the prosecutor for conviction without participation in a diversion program. Thus, entering into a diversion program may conflict with the client's stated objective of minimizing penalties. The attorney must therefore advise the client of the nature of the drug court or diversion program, the consequences of abiding or failing to abide by the rules, and how participation in a diversion program will affect the client's interests. In addition, the lawyer should provide information and advice on alternative courses of action, including legal and treatment alternatives available outside of the drug court program, the opportunity to plea bargain, and the right to go to trial. The lawyer should then discuss these options with the client.

16. The inquirer asks if it is ethical to recommend a diversion program that would include the imposition of sanctions against the lawyer's client. If the lawyer believes there is a reasonable possibility that the client will succeed in the rehabilitation program, the lawyer may not only explain but may actually recommend a rehabilitation program even though the program could result in the imposition of harsh sanctions against the client if the client fails in the program.

Determining Client's Best Interest

17. The ultimate decision whether to enter a program with sanctions, to which the client will be subject if the client violates the terms of the program, rests with the client. Rule 1.2(a) states:

    (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

18. Comment [1] to Rule 1.2 states: "Paragraph (a) confers upon the client the ultimate authority to determine the purpose to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." Once the lawyer presents the relevant considerations and alternatives pursuant to Rule 1.4 and the client makes a decision as to the desired course of action, Rule 1.2 compels the lawyer to pursue the client's stated objective.

19. As this Committee stated in N.Y. State 1037 (2014), "Rule 1.2(a) requires a lawyer to abide by a client's decisions concerning the 'objectives' of a representation, and to consult with the client as to the 'means' by which those objectives are to be pursued. Rule 1.4(a)(2) reinforces that provision by providing that a lawyer shall reasonably consult with the client about the means by which the client's objectives are to be accomplished." Thus, the lawyer must sufficiently explain a matter to a client so that the client can make informed decisions.

20. Where the sanctions for failing the rehabilitation program may be more severe than the criminal penalties offered to the client for pleading guilty to a drug charge, the client may prefer a criminal penalty rather than being monitored for upwards of a year in a drug treatment program. Even if the lawyer believes it would be in the 'best interests of the client' to obtain treatment for addiction, the decision is not the lawyer's to make. Under Rule 1.2(a), a lawyer must abide by the client's decision concerning the objectives of representation, and, in a criminal case, must abide by the client's decision (after consultation with the lawyer) as to the "plea to be entered, whether to waive jury trial and whether the client will testify." Once the client makes his or her choice, whether it be to attend a treatment program or to go through the traditional criminal justice system, the lawyer must abide by that decision.

Confidentiality

21. Typically, as a condition of entry into a diversion program, the client is required to consent to the release of health and treatment information to the judge, attorneys and other personnel of the court. This treatment and monitoring information raises confidentiality concerns.

22. Rule 1.6 generally bars a lawyer from knowingly revealing "confidential information" unless the client gives "informed consent." *See* Rule 1.6(a)(1). The Rule defines "confidential information" as "information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or information that the client has requested be kept confidential." The client's treatment information would be "confidential information," as it is likely to be embarrassing or detrimental to the client if disclosed. Although it would not be the lawyer who discloses it, by recommending that the client agree to be diverted to a drug program, the lawyer is in effect asking the client's consent to the disclosure of confidential information. Thus, the defense lawyer must counsel the client on how those disclosures could undermine the attorney client privilege or otherwise be detrimental to the client, and must ensure that the client has enough information to give informed consent before executing confidentiality waiver forms.

23. The lawyer, where possible, should also seek to limit the scope of the release, such as specifying the persons to whom information will be provided, the uses to which such disclosures may be put, the nature of the information that will be disclosed and the time period in which disclosures may be made. *See also* N.Y. State 1059 (2015) (lawyers for clients in immigration proceedings may disclose the names and certain procedural information regarding the clients' cases where the clients give voluntary, informed consent to the disclosure). Whether the lawyer should recommend the client to sign a release for the court/attorneys to receive the client's treatment information depends on the client's stated objectives.

Other Considerations

24. Finally, whether, the plea agreement signed by the client as a condition for diversion may be used as evidence against the client in future criminal or civil proceedings is an evidentiary question that is beyond the jurisdiction of this committee.

CONCLUSION

25. An attorney may render advice that includes considerations such as the benefits and risks of entering a drug treatment program. The attorney must act competently and must adequately explain to the client the material risks of the proposed course of conduct and reasonably available alternatives. However, once the client decides to take a certain course of action, the attorney must follow the directives of the client even if the client's directive conflicts with what the lawyer believes to be in the best interest of the client. If the client is eligible for a diversion program, the attorney must be mindful of confidentiality concerns since treatment records may be provided to judges, prosecutors and program staff. The attorney must provide the client with full disclosure and obtain informed consent before requesting the client to execute any release authorizing disclosure of confidential information to the judge or prosecutors.

(28-16)

Endnotes

1. Drug courts combine drug treatment with ongoing judicial supervision. In this way, drug courts seek to break the cycle of addiction, crime, and repeat incarceration. While practice varies widely from state to state (and county to county), the outlines of the drug court model are that: addicted offenders are linked to treatment; their progress is monitored by a drug court team composed of the judge, attorneys, and program staff; participants interact directly with the judge, who responds to progress and setbacks by providing a range of rewards and sanctions; and successful participants generally have the charges against them dismissed or reduced, while unsuccessful participants are generally convicted and incarcerated. See The New York State Drug Court Evaluation—Center for Court Innovation 2003, page ix.

2. Whether the contract or release signed by the client complies with the Health Insurance Portability and Accountability Act of 1997 ("HIPAA"), which prohibits release of health information by certain agencies, and whether the contract or release complies with 42 CFR Part 2, which prohibits the release of alcohol or drug use information, is a matter outside the jurisdiction of this committee—but pursuant to Rule 1.4, a lawyer advising a client about a drug rehabilita-

tion program, whether in response to criminal charges or otherwise, should counsel the client about the client's rights under those laws.

3. See Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 Wash U.L.Q. 1205, 1289-1290 (1998) ("[I] f the choice to enter treatment is to be genuine, defendants must be helped to understand the potential costs and benefits involved, including the potentially harmful consequences that can result from the disclosure to judges or prosecutors of personal and sometimes incriminating information gained in the course of substance abuse treatment. Defendants must be informed of the considerable benefits in terms of confidentiality to which defendants are entitled if they enter treatment on their own without mandate from the criminal justice system. In other words, a genuine choice with respect to the waiver of confidentiality requires that defendants be informed of the unusually generous privacy protections already in place, which their consent will extinguish.").

OPINION 1107 (10/21/16)

Topic: Law firm name; use of "legal services" in firm name.

Digest: A law firm that is not a qualified legal assistance organization may not use the name "Jane Doe Legal Services, PLLC" without violating Rule 7.5(b), which prohibits law firms from using certain names that are associated with legal assistance organizations.

Rules: Rule 7.5(b)

FACTS

1. The inquirer, a lawyer we will call "Jane Doe," is an attorney who is forming a new law firm and wants to know if she can use her name in the title together with the phrase "Legal Services, PLLC."

QUESTION

2. May a private law firm use the name "Jane Doe Legal Services, PLLC"?

OPINION

3. Rule 7.5(b) contains prohibitions relating to the naming of law firms engaged in private practice. Relevant to the current inquiry, the rule states that "[s]uch terms as 'legal clinic,' 'legal aid,' 'legal service office,' 'legal assistance office,' 'defender office' *and the like* may be used only by qualified legal assistance organizations, except that the term 'legal clinic' may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein." [emphasis added]. The question then is whether the title "legal services" is "like" the terms "legal aid," "legal service office," "legal assistance office," or "defender office."

4. The title "legal services" is almost identical to the title "legal service office." *Cf.* N.Y. State 869 (2011) (use of the title "Smith Law Firm" does not violate Rule 7.5); N.Y. State 732 (2000) (use of the title "The [Attorney Name] Group" does not violate Rule 7.5). In addition to this facial similarity, the term "legal services," like the other terms on the list, is often used by qualified legal assistance organizations (*e.g.*, "Bronx Legal Services," "Legal Services of Central New York," "Prisoner's Legal Services of New York," "MFY Legal Services," "Neighborhood Legal Services"). Thus, the use of the term "legal services" in a title is likely to cause the public to believe that the law firm at issue is a legal assistance organization. Preventing this type of misunderstanding by the public is the very purpose of Rule 7.5(b).

5. That the term "legal services" is joined with the name of one of the lawyers in the firm does not save the title. Notably, Rule 7.5(b) allows one term—"legal clinic"—to be used by private law firms when it is joined with the name of one of the lawyers in the firm, but this safe harbor does not apply to any of the other terms. Thus, any term that is "like" the other terms cannot take advantage of the legal clinic safe harbor. Moreover, since legal assistance organizations sometimes use one of the terms on the Rule 7.5(b) list together with the name of an individual as their title—either in memoriam or to recognize a sponsoring donor (*e.g.*, "Hiscock Legal Aid Society," "Jerome N. Frank Legal Services Organization," "WilmerHale Legal Services Center"), the risk of confusion remains.

6. Although Rule 7.5(b) prohibits the use of "legal services" in the name of a law firm, the provision of legal services is, of course, central to what lawyers do. Consequently, nothing in this opinion is meant to prohibit a lawyer from indicating, other than as part of the name of a firm, that the lawyer renders legal services.

CONCLUSION

7. A law firm that is not a qualified legal assistance organization may not use the name "Jane Doe Legal Services, PLLC" without violating Rule 7.5(b), which prohibits law firms from using certain names that are associated with legal assistance organizations.

(27-16)

Endnote

1. We recognize that restrictions on a law firm's use of a trade name may raise constitutional issues. *Compare Friedman v. Rogers*, 440 U.S. 1 (1979) (upholding a Texas law prohibiting optometry trade names), with *Alexander v. Cahill*, 598 F.3d 79, 95 (2d Cir.), *cert. denied*, 131 S. Ct. 820 (2010) (distinguishing *Friedman* on its facts but also noting doubt as to *Friedman*'s continued validity). As of now, however, the courts have not struck down Rule 7.5(b). Nor was that provision challenged in *Alexander v. Cahill*. If the constitutionality of the prohibition on the use of trade names by private lawyers is someday litigated, one of the issues may be the potential for deception that we have mentioned above. Ultimately the courts may or may not see that potential as sufficient to justify the restriction, but the constitutionality of the prohibition on trade names is a question of law beyond our Committee's jurisdiction.

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GP Section Hosts Branding for Lawyers Program

On September 28th, the General Practice Section sponsored a program entitled "Branding for Lawyers: Using Low-Tech and High-Tech Ways to Boost a Law Firm or Individual Marketing Skills Sets for Business and Career Development Opportunities."

The program was held at the offices of Patterson Belknap Webb & Tyler LLP in Manhattan.

The speakers were David B. Sarnoff of the Sarnoff Group LLC, a legal search firm); and Juda Engelmayer and Warren Cohn of Herald Strategies Public Relations. They spoke to the Section members and attendees about methods of marketing and growing a lawyer's or law firm's image through various online and social media platforms.

The primary considerations before embarking on a lawyer's online presence include developing a business plan, building a brand, setting a budget and targeting an audience. After these parameters are set out, choosing the appropriate online platforms is critical. These platforms include a law firm website, LinkedIn and Facebook profiles, and Google Ads. Discussion was also had of how to track results and analyze data.

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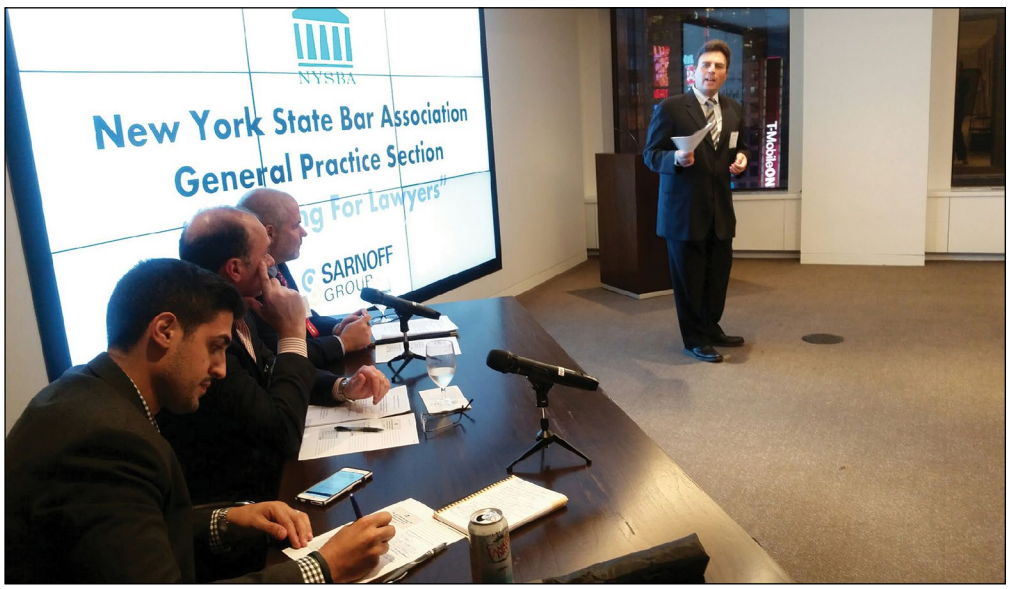

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