NYSBA SUMMER 2018 | VOL. 39 | NO. 2

ONEONONE

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

In This Issue

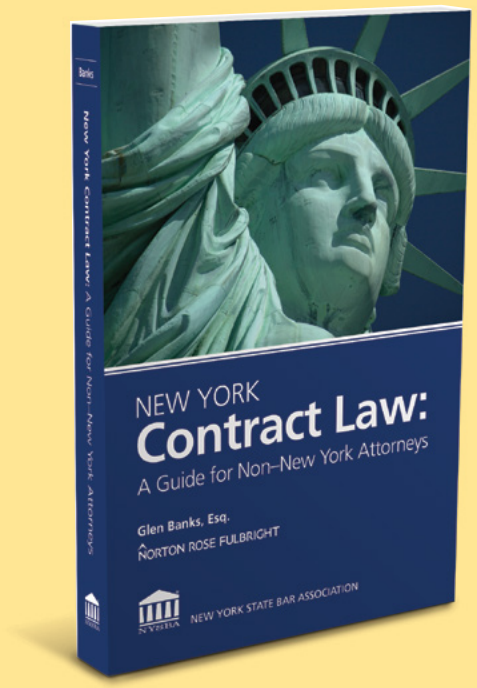
From the NYSBA Book Store >

New York Contract Law

A Guide for Non-New York Attorneys

Also Available as a Downloadable PDF!

Section Members get 20% discount* with coupon code PUB9017N



AUTHOR
Glen Banks, Esq.
Norton Rose Fulbright

Written by a recognized authority on contract law, *New York Contract Law: A Guide for Non-New York Attorneys* is an invaluable reference allowing the practitioner to quickly and easily gain an understanding of New York contract law.

Many contracts involving parties outside the United States contain New York choice-of-law clauses and, until now, the foreign practitioner had no practical, authoritative reference to turn to with questions regarding New York law. This book fills this void.

In addition to lawyers outside the United States, this book will also benefit lawyers within the United States whose practice includes advising clients regarding contracts governed by New York law.

Key Discussions
Is there a binding agreement?
Is that agreement valid and enforceable?
How is meaning given to the terms of the agreement?
What constitutes a breach of the contract?
When is a breach excused?
How is action taken to enforce the contract after a breach?
What remedy can the court grant to redress a breach?

PRODUCT INFO AND PRICES
2014 • 622 pp., softbound
PN:4172 – Book & CD
PN: 4172E – Downloadable PDF

Order Now!

NYSBA Members	**$95**
Non-members	$130

A $60 fee is charged for shipping and handling outside the continental U.S. A $5.95 shipping and handling fee applies to orders shipped within the continental U.S. Prices do not include applicable sales tax.

"All told, a genuine gift to those in search of the ready, reliable New York contract law answer, whether they are located in, or beyond, our state's borders."

From the Foreword by Judith S. Kaye, Former Chief Judge of the State of New York

Get the Information Edge

1.800.582.2452 www.nysba.org/pubs

Mention Code: PUB9017N *Discount good through Nov. 1, 2018.

NYSBA

Table of Contents

Summer 2018 • Vol. 39, No. 2

Page

Message from the Chair

Paul T. Shoemaker

The General Practice Section has been given—and has met—targets for growth in membership by the New York State Bar Association. Many thanks to all of you who have joined the Section and, to those of you who have not yet done so, please join us at your earliest convenience!

The General Practice Section offers great opportunities for professional development and for meeting and getting to know other members of the bar. This publication, *One on One*, is just one of the many ways in which the Section provides benefits and information to its members.

For example, the Section's active online community is a valuable forum where members can ask and answer questions about real issues they face in their practices, view the member directory, share documents, and more. As a member, you can participate in the community online at www.nysba.org/GPCommunityIntro, or via updates sent to your email inbox.

We are sponsoring peer-driven events where solo and small firm attorneys meet to discuss real challenges—together. The first event, The Solution Room,℠ which was held in Albany June 19, was very well received. The goal of these events is to give attorneys opportunity to receive advice and support from their peers on challenges they face in their practice. They enable our members to build connections with fellow lawyers and to discover the broad range of peer experience that is available. A facilitated format keeps the discussion lively and allows every participant to both give and receive advice on real world challenges.

The Section is also co-sponsoring gatherings intended to promote lawyer well-being. These are "Meeting of the Minds" events held in collaboration with the Senior Lawyers Section, the first of which is scheduled as of this writing to take place in Monroe County, and others are planned for locations around the state in the near future. These events bring lawyers together to hear about and discuss, among other things, ways to make transitions in their practices, including more experienced lawyers who are seeking to wind down and newer lawyers who are seeking to develop their practices.

We also are sponsoring a CLE program in New York City that will address "Commercial Litigation for the General Practitioner." Our past Chair, Richard Klass, is moderating that program.

A new Section initiative involves the Committee on Cannabis of the New York State Bar Association. We are going to be co-sponsoring an event with them and hope that you will be on the lookout for it. It should be a high point of our year!

Our CLE program at the Annual Meeting last January was a sellout. It was a very stimulating and well-received program which generated a great deal of interest with presentations on subjects such as "Loose Lips and E-mailing Lawyers: The Ethics of Protecting Client Confidences." A recording of the program is available with a discount for GP Section members. See below for details. We expect to present another timely array of topics at the 2019 Annual Meeting. Our program will take place the morning of Tuesday, January 15, 2019 at the New York Hilton Midtown. Please save the date!

I hope to see you there and at the other events I have described above.

Paul T. Shoemaker

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.

The Compensable Heart Attack: Martin Minkowitz, *One on One*'s editor, helps make lawyers who do not practice in the field of workers' compensation claims aware of the different ways heart-related medical conditions can be compensable.

N.Y. General Practitioner 101—EU General Data Protection Regulation (GDPR): Matthew Bobrow, *One on One*'s co-editor, provides a short but focused overview of how the new EU regulation impacts general practitioners and their firms.

Facebook Is Open to Discovery: David A. Glazer and Melissa Persaud depict how courts grapple with finding balance between the admissibility of evidence from an individual's social media accounts and that individual's right to privacy.

Inside Interview—Miya Owens, Assistant General Counsel, Jewelers Vigilance Committee: Maverick James, a second-year New York Law School student, peeks into what motivates an established attorney to devote time to volunteerism and NYSBA.

Acts Like a Lawyer, Talks Like a Lawyer…Non-Lawyer Advocates Representing Parties in Dispute Resolution: Professor Elayne E. Greenberg addresses the ethical issues that abound in non-lawyer dispute resolution proceedings related to education, sports, and unions.

Business Essentials for Neutrals: Starting, Growing, and Sustaining Your Practice: Reginald A. Holmes and Merriann M. Panarella provide the basics for all types of lawyers to master the business essentials necessary for a financially successful practice.

Martin Minkowitz

Pros and Cons of Practicing Guardianship Law: Stephen Donaldson provides a first-hand look into the realities of trying to make a living as a lawyer focused on guardianship law, relying somewhat on court appointments while trying to build a favorable reputation.

A Field Guide to New York's "Recreational Use Statute" General Obligations Law § 9–103: V. Christopher Potenza and James Maswick provide details on situations where an owner, lessee or occupant owes no duty to keep the premises safe for entry or use by others.

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. 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

The Compensable Heart Attack

By Martin Minkowitz

When there is a sudden inadequate supply of blood to the heart muscle, there is damage to the heart muscle, and we call that a myocardial infarction, or a heart attack. When that happens as a result of a work related event and a physician can opine that the injury was causally related to an event or stress on the job, it may be covered by the Workers' Compensation Law.

Martin Minkowitz

Heart attacks occur almost 800,000 times a year in the United States. Coronary artery disease is the most common cause of an attack. If the workplace did not contribute to the heart attack it is not compensable under the Workers' Compensation Law. The claimant's counsel's burden, as in any workers' compensation claim, is to prove the injury to the heart arose out of and in the course of the employment.[1] It is then the job of the employer's counsel or its carrier, if it disagrees, to prove that the injury was only caused by something not related to the employment. In heart attack cases this challenge is not uncommon.

If a claim is filed for a disability caused by a heart attack and the claimant later dies from the injury to the heart, even if there was an award by the Workers' Compensation Board in favor of the claimant before the death, a new claim would have to be filed for death benefits. Failing to timely file a new claim for death benefits, and proving the death arose from the previous heart attack, could result in a loss of the right to receive significant death benefits.[2]

In many cases of disabilities and deaths caused by heart attacks a claim is never pursued before the Workers' Compensation Board because people just don't know that such an injury can be compensable under the Workers' Compensation Law. Law firms who represent claimants, and who recognize this problem, actively advertise their services for victims of heart attacks. They will inform the prospective client that a heart attack, caused by work stress, can be compensable.

Physical or mental stress can cause a worker to have a heart attack or stroke but not all of these events are compensable. For physical stress and strain causing the attack, it only needs to be shown that it was work related, not that it was greater than that which usually occurs in the normal work environment.[3]

"In many cases of disabilities and deaths caused by heart attacks a claim is never pursued before the Workers' Compensation Board because people just don't know that such an injury can be compensable under the Workers' Compensation Law."

In a mental cause of an attack it must be shown that the stress was greater than the usual wear and tear of life in the workplace. For example if a lab technician has the job of going to patients' homes to take blood samples, and tries to move faster from place to place, causing his heart attack at a patient's home, it is not compensable. It was not such greater tension or stress that would be outside of his normal work environment.[4]

A claim can be compensable even if the claimant has a pre-existing pathology which contributed to the attack or other risk factors such as high cholesterol. However, there must be the employee's work factors that contribute to the injury or death to be compensable.[5]

For lawyers who do not practice in the field of workers' compensation claims, they should be aware that these medical conditions are compensable, even when they arise in the course of representing the client in another cause of action. Be prepared to counsel the potential for benefits to the client under the Workers' Compensation Law. When in doubt they should discuss it with a lawyer familiar with the Workers' Compensation Law whose practice is representing claimants.

Endnotes

1. WCL § 2(7).
2. WCL § 16.
3. *Loftus v. NY News*, 279 A.D.2d 657 (2001).
4. *McLoughlin v. New Rochelle Hosp.*, 34 A.D.2d 1064 (1970).
5. *Lavigne v. Hannaford Bros. Co.*, 153 A.D.3d 1067 (2017).

Martin Minkowitz is counsel to Stroock & Stroock & Lavan LLP and practices in the area of Insurance and Workers' Compensation regulation, and an adjunct professor at Brooklyn Law School.

NY General Practitioner 101
EU General Data Protection Regulation (GDPR)

By Matthew N. Bobrow

What Are We Talking About?

Europe recently enacted the toughest privacy rules in the world with the General Data Protection Regulation (GDPR). The GDPR is intended to strengthen privacy protections for individuals who reside in European Union (EU) member states. Penalties for institutions that violate these new privacy rights are up to €20,000,000 EUR or 4 percent of total annual firm revenue. The GDPR impacts U.S. entities/individuals who market to, or systemically monitor, EU resident individuals. This includes data stored on EU individuals when working with commercial clients.

Why Should a New York General Practitioner Care?

1. Firms that have GDPR covered data on EU individuals may have to address GDPR's requirements or face liability. Every firm that markets to, or systemically monitors, EU individuals will need to review guidance and invest in upgrading their firm's privacy protections.[1]

2. There is a private cause of action the practitioner could make on behalf of EU clients against U.S. companies/individuals under Article 82(1-2). "Any person who has suffered material *or non-material* damage as a result of an infringement of this Regulation shall have the right to receive compensation from the controller or processor for the damage suffered."[2]

   Actions need to be commenced in EU member states and only for EU individuals. Notably, collections against U.S. entities/individuals would still need to be forwarded to U.S. courts for enforcement by use of international law.

Is There a Cause of Action in the U.S. or at the State Level That Is Comparable to GDPR?

No. Most states that have advanced the privacy topic have enacted breach notification laws, but they only create a cause of action after a breach has occurred. California is the only state that recently (and quickly) passed a "GDPR-light," which does mirror parts of GDPR (2020 effective date).

The GDPR is based on "protection of natural persons in relation to the processing of personal data," and has a whole chapter for data subjects' rights (e.g., right to access, correct, move, restrict, erase).

"Every firm that markets to, or systemically monitors, EU individuals will need to review guidance and invest in upgrading their firm's privacy protections."

New York's Stop Hacks and Improve Electronic Data Security (SHIELD) Act stalled in the Senate and Assembly, even with broad support from former N.Y. Attorney General Eric Schneiderman and current N.Y. Attorney General Barbara D. Underwood.[3]

Didn't I Hear Something About Facebook and Privacy in the News? Is That Related?

Yes. Facebook CEO Mark Zuckerberg was recently called to testify before Congress on perceived privacy transgressions by his company, including those related to Cambridge Analytica and Russian election manipulation. This new wave of interest by Congress stems from the public's urge to control their digital assets. A few of the strongest motivators for this seemingly new urge are (1) fear of personal information theft (e.g., Social Security numbers) and (2) the realization by the public that they are losing the potential income from selling instead of giving away their digital assets and data. While it is unlikely that the U.S. would enact comparable legislation to the GDPR, many states may take up the torch.

Endnotes

1. *See* Anthony E. Davis and Steven M. Puiszis, *The EU General Data Protection Regulation: Why It Matters Here*, New York Law Journal, May 4, 2018, available at https://www.law.com/newyorklawjournal/2018/05/04/the-eu-general-data-protection-regulation-why-it-matters-here.
2. *See also* Article 79.
3. *See A.G. Underwood Announces Broad Support for Shield Act from Major Business and Consumer Groups*, N.Y. Attorney General Press Release (June 5, 2018).

Matthew N. Bobrow, Esq. (NY/NJ), is the regulatory change manager at Capital One's Commercial Bank. He focuses on understanding how a new law may impact his clients in the lines of business, and implements any necessary changes. In his spare time, Matt contributes to the NY State Bar Association through volunteering as a co-editor of this *Journal*. He's reachable at matthew.bobrow@law.nyls.edu for any questions related to this *Journal*.

Predatory Marriages: A Growing Concern

By Deborah S. Ball and Malya Kurzweil Levin

Introduction

Deborah S. Ball

For many Americans today, older adulthood is a time of increased financial security. According to the Centers for Disease Control, people 65 and older have the lowest poverty rate of all demographics. There are a number of reasons for this phenomenon. Older adults can take advantage of government entitlements such as Medicare and Social Security to buoy their financial security. They may have saved money, often utilizing financial services like IRA or 401(k) accounts, through which funds may only be accessed penalty-free once the individual is a certain age. Additionally, many large expenses like raising children or paying off mortgages have been concluded, leaving older adults with increased disposable income.

This enviable financial situation, coupled with the isolation and loneliness that can sometimes accompany aging as family members and friends pass away and scatter, makes older adults increasingly vulnerable to financial abuse with an emotional component. One such gambit, the predatory or secret marriage, has been seen increasingly by attorneys and the courts in recent years. In this scheme, a man or woman enters into a relationship with an older adult for the purpose of gaining access to the victim's assets or estate. The victim may believe that the relationship is romantic, but the perpetrator, who is often significantly younger and commonly plays some type of caretaker role in the victim's life, is motivated solely by financial gain. Some cases may also involve a long-standing relationship that never resulted in marriage while both parties were in good health, but then a marriage is secretly and hastily obtained once one of the parties has become cognitively impaired. The perpetrator swiftly and secretly marries the victim in a courthouse ceremony, often taking advantage of a period when other family supports are away or unavailable. The victim may misguidedly believe he or she has found love and companionship, or alternatively, due to cognitive impairment, may not even realize the marriage has occurred.

Once the marriage has been performed, the perpetrator typically moves quickly, becoming a joint owner of bank accounts that had belonged to the victim and draining large sums of money; transferring real property; or arranging to inherit significant amounts from the victim's estate, either through a new will, changing the beneficiary designations, or even via elective share.

Malya K. Levin

Case Study: Predatory Marriage: Jack's Story

Jack was a lifelong bachelor in his late 60s. A car accident is his youth had left him with a traumatic brain injury, which impaired his judgment and impulse control. He had always lived with his mother, and upon her death he inherited her sizable estate. One day, shortly after his mother's death, Jack was approached on the street outside his bank by Rae, a woman in her 30s, who said she'd seem him around the neighborhood and would like to get to know him better. Jack, living alone for the first time in his life, was eager for companionship. Jack and Rae began spending time together, and Jack was happy to sponsor their lavish dinners. Just a few weeks after they had met, Rae brought Jack to City Hall, where they were married. They went directly from the ceremony to the bank, where Jack listed her as a joint owner on all of his accounts. Jack was thrilled, believing he had at last found the love of his life. Once they had married, though, Jack saw Rae much less. She claimed she couldn't move in with him because of her work schedule, but sometimes he didn't see her for weeks at a time. When she appeared, she often wanted things from the apartment, like the television or pieces of his mother's jewelry. Mysterious bills began to arrive at the house. Jack got a call from his bank inquiring about suspicious activity, a pattern of large withdrawals. Confused and agitated, Jack hung up on the bank. Concerned about the possibility of financial exploitation, the bank referred the case to Adult Protective Services.

A caseworker visited Jack. She found him alone in an unkempt apartment, his clothes hanging on him from all the weight he had lost. Though he was highly defensive, the caseworker gathered enough information to realize that a call to the District Attorney was appropriate. When the Elder Abuse Unit reviewed the case, the details

This article originally appeared in the Winter 2018 issue of *Elder and Special Needs Law Journal*, a publication of the Elder Law and Special Needs Section of the New York State Bar Association.

sounded familiar. They had been investigating the same woman for perpetrating the same scheme with another man simultaneous to Jack's case. The District Attorney's Office ultimately entered into a plea agreement with Rae which included restitution and jail time. Jack was transferred to the Harry and Jeanette Weinberg Center for Elder Justice, an elder abuse shelter located within the Hebrew Home at Riverdale, where he was able to receive medical care, counseling to process the true nature of his relationship with Rae, therapeutic activities to engage him in a new community, and legal advocacy to stabilize his finances. An Article 81 guardianship proceeding was initiated, and Jack was found to lack capacity. A cousin who had known Jack since childhood was appointed. The guardianship court was also able to annul Jack and Rae's marriage, thus ensuring Rae would no longer be able to access Jack's finances or assets and, eventually, would not have any rights to his estate.

Predatory Marriage: Case Study Analysis

Unfortunately, Jack's story is atypical in two critical ways. First, the existence of multiple victims made it possible for the local District Attorney's office to successfully secure a guilty plea from the perpetrator and some justice for the victim. Often, this is not the case. For example, in *In re Application of Doar v. LS*, an Article 81 guardianship proceeding with a predatory marriage at its center, the court noted that, although the AIP's close friend had reported the suspicious relationship to the District Attorney's office, the investigation had ceased once the perpetrator, a woman nearly 40 years younger than the AIP who had served as his home attendant, had married the AIP.[1]

Second, in Jack's case, an observant professional at his bank took the appropriate precautions and reported the institution's concerns to Adult Protective Services. Ultimately, this action allowed Jack to receive the assistance he needed. There is currently no mandated reporting for financial institutions in New York State. In many cases, privacy or liability concerns prevent financial institutions from making these sorts of reports to institutions like Adult Protective Services. This is true despite the federal interagency guidance issued in 2013 advising financial institutions to make these reports, and indicating that doing so is not a violation of the Gramm-Leach-Bliley Act.[2] Therefore, these predatory marriages are often only discovered when a victim's money is irreparably lost or even after the victim has died.

In one such case, *Campbell v. Thomas*,[3] the court took notice of the fact that New York has no statute which specifically addresses a situation in which a person takes unfair advantage of an individual who clearly lacks the capacity to enter into a marriage.[4] It call[ed] upon the Legislature to reexamine the relevant EPTL and the Domestic Relations Law…to consider whether it might be appropriate to make revisions that would prevent unscrupulous individuals from wielding the law as a tool to exploit the elderly and unjustly enrich themselves at the expense of such victims and their rightful heirs.[5]

NY Domestic Relations Law, Article 2, Section 7, provides that a marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

1. Is under the age of legal consent, which is 18 years, provided that such nonage shall not of itself constitute an absolute right to the annulment of such marriage, but such annulment shall be in the discretion of the court which shall take into consideration all the facts and circumstances surrounding such marriage;
2. Is incapable of consenting to a marriage for want of understanding;
3. Is incapable of entering into the married state from physical cause;
4. Consent to such marriage by reason of force, duress or fraud;
5. Has been incurably mentally ill for a period of five years or more.[6]

It is important to understand that there is a distinction between "void" marriages and "voidable" marriages. Under the Domestic Relations Law, a "void" marriage is one which is defined as incestuous (DRL § 5)[7] or bigamous (DRL §6).[8] A void marriage is considered nonexistent from the beginning. However, a voidable marriage, as defined above, is still considered valid until the point in which a court has declared otherwise.[9] This means that in order to eradicate the marriage, it must have been annulled during the lifetime of the spouses. This is especially problematic because if the marriage was made in secret, it would not likely become known until after the death of the incapacitated spouse. Unfortunately, EPTL § 5-1.2 recognizes the surviving spouse's right to the elective share of the decedent's estate where there has not been pre-death annulment.[10] The court in *Campbell v. Thomas* noted that since the marriage was not declared a nullity until several years after the decedent's death, his surviving spouse "technically had a legal right to her elective share."[11] But since the Supreme Court is one of equity as well as law, it applied the principle that no one has a right to profit from fraudulent activity, and denied the living spouse's petition for an elective share.[12]

Recognizing the gravity of situations where one person is incapable of consenting to a marriage due to lack of capacity, the court in *Campbell v. Thomas* began its opinion with a discussion about elder abuse. Specifically, the court referred to financial exploitation of vulnerable elderly individuals.[13] The court was conscious of the fact that financial exploitation of the elderly most often involves someone who, as in Jack's case, has a relationship with the victim. In that case, the decedent, Howard Nolan Thomas,

had an ongoing relationship with Nidia Campbell that spanned over two decades. Based upon the circumstances evinced, the Court determined that Nidia Campbell had knowledge of the decedent's lack of capacity (even without a judicial determination) and, nonetheless, waited until his primary caregiver was out of town to marry Mr. Thomas. The family was not informed until after the marriage occurred, and thereafter she substantially altered Mr. Thomas's estate plan and present ownership of his assets by creating joint accounts and changing beneficiary designations. The court found that she was entitled to remain as beneficiary on the decedent's retirement account because that designation occurred prior to the marriage.

Citing the seminal case, *Riggs v. Palmer,*[14] which holds that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to fund any claim upon his own iniquity, or to acquire property by his own crime," the court found "ample support" that Ms. Campbell was aware of the decedent's "lack of capacity to consent to the marriage, and took unfair advantage of his condition for her own pecuniary gain…."[15] The court upheld the Supreme Court decision declaring that Nidia Campbell had no rights of a surviving spouse.[16]

Remedy is also available in the context of a guardianship proceeding. Mental Hygiene Law § 81.29(d) provides:

> If the court determines that the person is incapacitated and appoints a guardian, the court may modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, 5-1505, or 5-1506 of the general obligations law or section two thousand nine hundred sixty-five of the public health law, or section two thousand nine hundred eighty-one of the public health law notwithstanding section two thousand nine hundred ninety-two of the public health law, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated or if the court determines that there has been a breach of fiduciary duty by the previously appointed agent. In such event, the court shall require that the agent account to the guardian. The court shall not, however, invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person.[17]

In the case of *In Re Kaminester*, the court reviewed Domestic Relations Law § 7.2 and Mental Hygiene Law § 81.29(d).[18] The court found that, where a guardian has been appointed, the court can make a determination that a marriage entered into by an incapacitated person, which is defined as contract, can be annulled or revoked.[19] In this case (and the numerous related cases, both in the states of New York and Texas), Richard Kaminester was determined by clear and convincing evidence to require a guardian. Inalee Foldes secretly married Richard Kaminester following the appointment of a temporary guardian. Mr. Kaminester died two-and-half months later. One of the issues raised was to disqualify Ms. Foldes from asserting her right of election as a surviving spouse. The marriage was subsequently revoked and voided pursuant to Mental Hygiene Law §81.29(d). In the decision, the court discussed the fact that under DRL §7, a marriage becomes a nullity as of the date it was annulled.

"Although Aldo G. died while the matter was being appealed, the Appellate Court reasoned that 'a guardian's powers and the guardianship court's supervision may continue even after the incapacitated person's death.'"

As seen in the *Campbell v. Thomas* case, the court acknowledged that since there was no pre-death annulment, Ms. Campbell was considered a surviving spouse. Ultimately, however, the court would not allow her to benefit from her fraudulent activities. The court in *In Re Kaminester* pointed out that under Mental Hygiene Law §81.29(d), if there has been a determination of incapacity, a guardian under Article 81 can revoke a marriage and that such revocation is "*void ab initio*." As a result, there can be no legal interest claimed as a surviving spouse.[20] This is the action that was taken in Jack's case to avoid further exploitation during his life, as well as potential estate administration issues.

A court-appointed guardian also retains certain types of authority even after the death of the incapacitated person. In the *In re Dandridge*, the court found it proper to annul the marriage between the incapacitated person and his wife. In this case, the court directed the temporary guardian to investigate the circumstances of the marriage between the alleged incapacitated person and his wife. The alleged incapacitated person, Aldo G., attended his brother's funeral in Georgia during the pendency of the guardianship proceeding, and during that time, he and

Ann G-D, who was Aldo G.'s long-time caregiver, were married. The lower court held that "Aldo G. was incapacitated, lacked the capacity to enter into a marriage, and, as a result, annulled the marriage."[21] Although Aldo G. died while the matter was being appealed, the Appellate Court reasoned that "a guardian's powers and the guardianship court's supervision may continue even after the incapacitated person's death."[22]

Predatory Marriages: A Call to Action

Civil attorneys can play a critical role in identifying and intervening in cases of predatory marriages. Attorneys may see red flags such as: a new relationship that has progressed very quickly, particularly one in which:

- One spouse is significantly younger and/or had been in a paid caregiver role for the older spouse;
- The client seems confused about the nature of the relationship;
- The new spouse seems to be directing a significant change to the client's finances or estate plan;
- Client's family or longtime friends seem possibly unaware of the marriage.

In such cases, attorneys should, prior to executing any documents, meet with the client alone to assess the client's capacity to execute whatever transaction has been requested, the client's understanding of the rights conferred by marriage, and whether the client is being threatened or coerced. The attorney can then proceed with assisting the client based upon the knowledge gained from this interview. Additionally, attorneys should be aware of the court's authority to annul a marriage in the context of a guardianship proceeding.

Predatory marriages are likely to become increasingly common and visible as life expectancy continues to rise. It is appropriate for attorneys to be aware of how to spot predatory marriages and how to investigate them effectively and efficiently.

Endnotes

1. *In re Application of Doar v. LS*, 2013 NY Slip Op. 50988. The facts of this case are significant because the victim, L.S. was still alive when the matter came to light. The IP testified in the guardianship proceeding and demonstrated confusion. He did refer to Vanessa T.S. as his wife, but the court found that he lacked capacity.
2. Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults, 2013, at https://www.fdic.gov/news/news/press/2013/interagency-guidance-on-privacy-laws-and-reporting-financial-abuse-of-older-adults.pdf?source=govdelivery.
3. *Campbell v. Thomas*, 72 A.D.3d 103; 897 N.Y.S.2d 460, 2010 N.Y. App. Div. LEXIS 2031, 2010 Slip Op. 2082.
4. *Campbell v. Thomas*, HN1.
5. *Campbell v. Thomas*, at 1.
6. DRL § 7.2.
7. DRL § 5.
8. DRL § 6.
9. *Campbell v. Thomas*, at 14,15.
10. EPTL § 5-1.2.
11. *Campbell v. Thomas*, at 24.
12. Campbell v. Thomas, citing N.Y. Const. art VI, § 7,[a]; *McCain v. Koch*, 70 NY2d 109, 116, 511 NE2d 62, 517 NYS2d 918 [1987], at 24.
13. *Campbell v. Thomas*, at 4.
14. *Riggs v. Palmer*, 115 NY 506, 511, 22 NE 188, 23 Abb N Cas 452 1889.
15. *Campbell v. Thomas*, at 28.
16. *Campbell v. Thomas*, at 36, citing *Kaminster v. Foldes*, 51 AD3d 528, 529, 859 NYS2d 412 [2008].
17. MHL § 81.26.
18. *In Re Kaminester*, 26 Misc. 3d 227, 888 N.Y.S.2d 385, 2009 N.Y. Misc. LEXIS 2916, 2009 N.Y. Slip Op. 29429.
19. In the related Supreme Court case, *Kaminister v. Foldes*, 51 A.D. 3d 528, 859 N.Y.S.2d 412, 2008 N.Y.App.Div. LEXIS 4315, 2008 NY Slip Op. 4557, the court found that revocations of a marriage contract it a remedy under MHL § 81.29(d) where it has been proven by clear and convincing evidence that the person executing the document (in this case, a marriage license) lacked the requisite mental capacity.
20. *In Re Kaminester,* at 16.
21. *In re Dandridge*, 120 A.D.3d, 1411, 993 N.Y.S.2d 125, 2014 N.Y.App. Div. LEXIS 6272; 2014 NY Slip Op 06311, at 5.
22. *In re Dandridge*, at 7-8. It should be noted that while the Court reviewed the issue of capacity based upon the underlying case, it nevertheless, remanded the matter for a hearing to determine capacity because the appellant, Ann G-D, did not receive proper notice and was therefore, deprived of the opportunity to be heard before the Court annulled the marriage, at 7-8.

The Law Offices of **Deborah S. Ball** is a practice concentrating on elder law issues, matters affecting the developmentally disabled, trust and estate planning options, including will preparation, and estate administration. As a former Assistant District Attorney, Ms. Ball investigated financial exploitation against the elderly community. Ms. Ball is a member of the New York State Bar Association Elder Law Section where she is a member of the executive committee. She is the Co-Chair of the Elder Abuse Committee and serves on the Guardianship Committee, the Mental Health Law Committee and the Committee on Special Needs Planning. She has served on the Committee on Representing Developmentally Disabled Persons for over twenty years; and is a member of the Trusts and Estates Section. She is a member of the Brooklyn Bar Association Elder Law Section. Additionally, Ms. Ball presently serves as a member of the board of the Brandeis Association of Jewish Lawyers. Ms. Ball is also a member of the Attorney's Council of the New York Chapter of Hadassah and served as the co-chair for the Working Mother's Committee of the Women's Bar Association.

Malya Kurzweil Levin, Esq. is the Staff Attorney for the Harry and Jeanette Weinberg Center for Elder Abuse Prevention, the nation's first emergency elder abuse shelter. In this role, she represents clients who are victims of acute abuse and speaks about the legal facets and ramifications of elder abuse to a variety of audiences. Malya received her JD cum laude from Brooklyn Law School in 2012. She has written for a variety of legal publications including the *NAELA Journal* and the *New York State Elder and Special Needs Law Journal*. She is a certified Reiki energy healer.

Pros and Cons of Practicing Guardianship Law

By Stephen Donaldson

You can reach Stephen Donaldson at steve@nypractice.com or 516.385.2061. The Donaldson Law Firm focuses on litigation in the areas of elder abuse, personal injury, and estate contests.

While I was in law school, practicing elder law seemed like a good idea because the size of the aging population meant there would be a large pool of local clients to target. To get started, I took a guardianship course and qualified to act as court evaluator in Mental Hygiene Law Article 81 proceedings. This allowed me to get involved in court proceedings while I was still a student.

That was 2013. Since then, I've been appointed as court evaluator, attorney for alleged incapacitated person (AIP), and guardian. Based on my experience, here are what I see are the advantages and disadvantages of practicing guardianship law.

Advantage Number One—Altruism

I'm yet to meet a judge who appoints a guardian lightly. A guardian is only appointed for a person who is incapacitated and in need of help, and all professionals involved in a typical guardianship proceeding—petitioner, attorney for the incapacitated person, and the court evaluator—are genuinely providing a service for a person who is unable to help him or herself in some form.

When you practice guardianship law, some authentic good is being done. This may allow the attorneys involved to walk away from the proceeding knowing that the incapacitated person is now in a better position than they were before the appointment of a guardian. If an attorney's goal is to leverage the law in a manner that lends to building a career that involves improving the lives of those who can no longer help themselves, guardianship law is a good place to be.

Young Lawyers Corner
For the Newly Admitted Attorney

Advantage Number Two—Opportunity

In all the proceedings in which I've participated, I haven't heard a single judge or court attorney complain of a lack of work due to dwindling Article 81 petitions.

Every well-informed professional with whom I've spoken about the population overall is aware that everyone is getting older because we're living longer than ever before. And assuming an ever-improving state of medicine and medical technology, it feels safe to conclude that this trend is only going to continue. So unless a treatment or cure is developed for dementia,[1] the available work in the realm of guardianship law will only grow.

Advantage Number Three—Ingenuity Trumps Experience

The first Article 81 appointment I received was that of court evaluator and it's been a role I've enjoyed filling since. Evaluators are tasked to investigate for the court.[2] This includes collecting as much information as possible, interviewing all interested parties, the petitioner and the AIP, trying to make sense of it, and then providing the court with a written report and recommendation as to whether the evaluator believes the appointment of a guardian is necessary.

One does not need 10 years of legal experience to excel as an evaluator. Rather, one needs to do two things. First, become familiar with the Mental Hygiene Law statute that lays out an evaluator's role.[3] The statute identifies what information the evaluator should seek out.

Second, try to leave no stone unturned, meaning the more diligent and creative one can be in terms of tracking down information, the more success one will achieve as an evaluator.

And here's one more practical tip. When receiving an appointment to act as evaluator from a judge for whom you've never appeared, call or fax chambers and ask for an example of a recent report that the court received that they felt was above-average. You might end up emp-

This article originally appeared in the Winter 2018 issue of *Elder and Special Needs Law Journal*, a publication of the Elder Law and Special Needs Section of the New York State Bar Association.

ty-handed if the court is busy or can't think of anything recent that they thought stood out as a model example of an evaluator report, but even if you don't get anything, at least the court will know that you're the type of evaluator who is planning on coming to court as prepared as possible.

Now, for the disadvantages of practicing guardianship law.

Disadvantage Number One—The Cap

Not long ago, the Chief Judge of New York State decided that regarding Article 81 appointments—anyone awarded more than $75,000 in fees in a calendar year—shall be ineligible to receive appointments the following calendar year.[4]

In plain English, if you are awarded $75,000.50 between January and December, you can't receive any appointments the next year regardless of whether you collected a single dime.

The rationale for the cap is in regard to a report that was issued years ago where it was found that the majority of court appointments were being awarded to a limited number of attorneys. Our state judiciary's answer was to create the cap to make the appointment process more democratic.

I appreciate the idea behind this, but it overlooks a few realities of receiving appointments, the biggest of which is that the attorneys who do the best work usually get the most appointments.

I hit the cap in 2017. Am I miffed about this? Of course. The judiciary has essentially put their hands in my pockets or, to be more accurate, the chief judge has dictated how big my pockets can be regardless of the quality of my work.

Disadvantage Number Two—Judiciary Discretion

Speaking of people putting their hands in your pockets, Article 81 grants judges the discretion to set the fees of those attorneys involved in guardianship proceedings.[5] This is true even for parties who hire their own attorneys privately: all attorneys who appear must submit affirmations of legal services so the court can set the fees to be paid from the AIP's assets within the final order.

When I think of judicial discretion in relation to fees in Article 81 proceedings, the voice in my head says, *"The Court giveth, and the Court taketh away."* As an attorney who often acts as appointee in guardianship proceedings, the court gives me the opportunity to earn a fee but, after everything is said and done, the court has the opportunity to set my fee as it sees fit. While I don't raise this point as a complaint, I bring it up for the possible guardianship practitioner to be aware of when contemplating taking on Article 81 work. In my experience, depending on the county in which I've been appointed, I usually see 10 percent to 20 percent reduction in the fees I'm awarded compared to the fees requested. And, dear reader, take this for whatever it's worth, but I do *not* inflate my fee requests because I've never been willing to wade into the waters of grievance trouble over two-tenths of an hour in billing. Due to the discretion of the judge assigned to the case, if I do $300 worth of work based on accurate time keeping, it's likely I'll receive a final award of $250, give or take a few bucks.

Disadvantage Number Three—Paper Chase

While in law school, I interned at the Bronx Surrogate's Court. I've never forgotten the conference I sat in during which a personal injury action was being discussed in relation to an estate. The attorney for the plaintiff turned to me and said, "Personal injury is pretty good. You don't have to go chasing after people to get paid."

"Article 81 grants judges the discretion to set the fees of those attorneys involved in guardianship proceedings."

At the time, not having experience with chasing after people to collect fees, I thought little of the comment. As an intern, I spent most of my time considering what area of law I would practice once admitted rather than the practicalities associated with any given specialty.

I get it now, though. The court's final order that appoints a guardian for an incapacitated person is the same document that sets the legal fees for the attorneys involved. After the order is entered, the guardian usually retains a bond, and then receives his or her certified commission. The guardian is then supposed to pay the court-approved fees from the AIP's assets.

There are exceptions, but I've found the general rule is that collecting a court-approved fee takes effort. In my experience, the majority of guardians don't break out the checkbook and start paying the fees. Rather, if I've spent 15 hours working as evaluator, I usually have to spend another 5% to 10% of that time following up with guardians and gently reminding them they've got bills to pay.

To that attorney in Surrogate's Court that day who warned me about having to chase after money? I could not agree with you more.

Disadvantage Number Four—Non-Delegable Duties

When acting as a court appointee, i.e., guardian, evaluator, attorney for the AIP, etc., most of the tasks involved can't be delegated so that the appointee must handle the majority of the work him or herself.

I understand why that's a good idea—the judge who makes the appointment wants the reassurance of knowing who specifically is going to do the work. And the judge wants that same person in his or her courtroom on the return date.

Conversely, two challenges arise. First, each appointee has a limited amount of time in which the work can be performed. More important, there are certain tasks when acting as guardian that are not considered "legal" work. If an attorney acting as guardian usually bills in the realm of $300 per hour for tasks such as drafting and court appearances, that same attorney who spends three hours at the local social security administration office to marshal an AIP's income can't bill that $300 hourly rate because such a task is considered administrative rather than legal.

Why? Because the court examiner who will review the guardian's affirmation of services is going to recommend *against* the Court approving an hourly rate more than $125 or so for such administrative work which, again, the guardian can't delegate to a paralegal or administrative assistant.

Anecdotally, this is why many attorneys will not make themselves available for appointments to act as guardian. Why take on a role where there is not only a layer of judicial discretion over the final fee requested, but there's an interim layer that involves a court examiner recommending that any tasks that are not discretely legal in nature can only be billed at a rate at least half of what the attorney would customarily charge?

Summary

To practice guardianship law or not, that is the question.

I realize that my observations above likely paint a picture of this author as a greedy, money-hungry lawyer. However, dear reader, I respectfully disagree. I present you only with what I've found to be the realities of trying to make a living as a lawyer focused on guardianship law relying somewhat on court appointments as I've gone about trying to build a favorable reputation in the field. Again, the purpose of this writing is not to complain but to provide a brief overview of what I would have found to be resourceful when I was first thinking of targeting guardianship law as a practice area.

Endnotes

1. Based on this author's anecdotal evidence, the bulk of Article 81 petitions are brought due to respondents suffering from some form of dementia.
2. *See* MHL § 81.09(c).
3. *Id*.
4. 22 NYCRR § 36.2(d).
5. *Rucciuti v. Lombardi*, 256 A.D.2d 892 (3d Dep't 1998).

Inside Interview

Miya Owens

Assistant General Counsel
Jewelers Vigilance Committee
Conducted by Maverick James

Miya Owens

Miya Owens is the Assistant General Counsel of the Jewelers Vigilance Committee (JVC). With a sole focus on legal compliance and ethical guidance, the JVC, a 100-year old non-profit trade association, has a record of keeping jewelry industry members out of court and in tune with the law. From advising well-known manufacturers on federal marketing regulations and guidelines, to liaising with federal and state entities, to mediating disputes between consumers and retailers, in her current role, Miya is an excellent example of how in-house attorneys must often wear many different hats in their everyday practice.

Miya earned her Juris Doctor from the Benjamin N. Cardozo School of Law and graduated, *cum laude*, with a Bachelor of Arts degree in Technology and Communication from Baruch College. She is a recent addition to the New York State Bar Association's Corporate Counsel Executive Committee and participates in initiatives targeted at newly minted attorneys.

Q As Assistant General Counsel in a trade association, what is a typical day like for you?

A My role in JVC is unique because I was hired to work with our small legal team, which handles inquiries from our jewelry business members, and work with our non-lawyer mediator, who handles consumer and designer disputes with jewelry businesses. So, I divide my time between legal research/guidance and mediation matters.

On a typical day, I spend a portion of my time answering phone calls and emails from jewelry retailers, manufacturers and designers on a plethora of topics. Advertising law is my primary focus, so I often review different retailers' advertising—online and in print—and advise businesses on how they can bring their advertising into compliance with federal and state regulations and guidelines.

Additionally, I regularly answer jewelry-related consumer complaint calls and emails. When a consumer calls 311 with a jewelry-related complaint, he/she will be automatically transferred to the JVC. While I do not represent consumers or businesses as an attorney in these complaints, I do act as an impartial mediator. I work with both parties to facilitate a reasonable resolution to common disputes so that everyone can hopefully walk away happy and with more money in their pockets than they would have if these disputes were litigated.

Finally, I research emerging topics in the industry daily. JVC sends out "Member Alerts" on hot legal topics and conducts quarterly webinars to teach our membership how to comply with laws related to contracts, marketing, employment, consumer fraud and ethics. I also draft and edit jewelry-related press releases and briefs that are submitted to federal agencies for advice.

Q Why did you decide to go to law school?

A It was my childhood dream. I liked to persuade my siblings and parents to do what I wanted, so my mom encouraged me to become a lawyer. I also participated in my middle school's Mock Court program until budget cuts eliminated the program from my public school. So, my desire to become a lawyer was sparked by the fourth grade and solidified by the seventh grade.

Funny thing is, I majored in accounting for my first three years of college. At the time, law was not offered as a major at Baruch, so I thought it was a good idea to major in another respected profession and perhaps use a Certified Public Accountant license as a lifeline if the law did not work out for me. I interned at two of the "Big Four" accounting firms from freshman year to the summer before my senior year and was extended a post-graduate job offer from one of the firms. I considered working for a few years before applying to law school, but I could not let go of this nagging itch to go straight from college to law school. So, I changed majors, took the LSAT and the rest is history.

Q Does your Technology and Communication degree and experience impact your practice?

A Absolutely. First, in the jewelry industry, concerns about certain topics like cybersecurity, privacy, and fraud

This article originally appeared in the Winter 2017/Spring 2018 issue of *Inside*, a publication of the Corporate Counsel Section of the New York State Bar Association.

are on the rise. Thus, my organization must stay abreast of developments in these areas because our members are looking to us for guidance on a variety of issues. My background in technology lends itself to understanding seminars on these topics and my ability to explain the topics to others. Second, it goes without saying that an education focused on communication lends itself to my practice as an attorney. My organization publishes articles and books on different areas of law. We also regularly interact with businesses, consumers, and government regulators, so my background has fine-tuned my ability to effectively communicate in all mediums, with people from diverse backgrounds.

Q If you weren't a lawyer, what would you be doing?

A I would likely be writing code and designing software. I did very well in my college coding and design classes and have always been interested in a career in software and web design. Also, I grew up with two hardcore gaming brothers. So, I watched the evolution of gaming consoles and the corresponding improvement of gaming graphics and plots and have always thought about how cool it would be to design my own games.

I used to also write short stories, poems, and screenplays. So, I could see myself working as a staff writer for a cool show about millennials in a large city. When I watch shows like "Insecure" and "Broad City", I wish I could be a part of each show's writing staff.

Q As a new lawyer, what perspectives are you bringing to the In-House Counsel role that someone more senior may not? Are there any obstacles that you have faced and have had to overcome?

A My millennial perspective in my current role is interesting. Many retailers are shifting their marketing and campaigns with the goal of appealing more to my generation. So, within my organization and professional circle, I am often asked my professional and personal opinions on different topics. I can't even count the amount of times I have been asked why millennials "are not buying diamonds" or "are not buying gold," and how to change that. Recently, I have been asked to write a monthly millennial column for one of the jewelry industry's well-known blogs. But, I am not sure what I would write about.

Also, because I have grown up in the age of computers, the internet, and the constant innovation of technology, certain things are second-nature to me and not to my more senior colleagues. For example, when a company wants to join my organization, we perform a check of the company's advertising to verify it is compliant with the relevant rules and regulations. When I was tasked with doing these applicant web reviews, I was instructed to visit each applicant's website and make a determination based on this. However, because of my awareness of ads on social media and other non-traditional websites where products are often advertised, I made it the norm in my organization to now also check applicants' Instagram, Facebook and Etsy pages and other hidden ads in paid product reviews. In addition, I check applicant's websites on different browsers. For example, a retailer cannot compliantly advertise to the public that it is selling items at "wholesale" price, and thanks to my dual-browser checks, I have weeded out deceptive advertising by checking a website in both Firefox and Google Chrome—where the browser tabs showed up only in the latter browser.

As for obstacles, being a new lawyer is actually the least of my challenges in the legal and jewelry industries. Put bluntly, I am an outsider in every way. I am black and a woman, so I have experienced both overt and microaggressions in many professional environments. From a senior male in a Fortune 500 company that I visited for a conference waving me over to him to ask if his car was ready (despite my wearing a suit and heels and wearing no clothing that resembled the company's concierge staff) to a group of male litigators openly disparaging a federal judge on an elevator in the Southern District during my time as a judicial extern, and then those same attorneys discussing how I am "probably a cafeteria employee or court reporter," i.e., "nothing to worry about" on my way out of the elevator. So, with these unfortunate experiences in mind (and many more) and the high-tension environment we are currently experiencing in the U.S., I have had to (as the cliché goes) develop a tough skin and pick and choose my battles and stressors. I have been trying my hand at meditation and regularly exercising. I also take every opportunity to participate in dialogue about how to combat biases at CLEs, conferences, and other events. I often volunteer my time at different law schools, with the state and city bars, and with non-profit organizations and try to act as a mentor to students from diverse backgrounds. My hope is that these efforts will eventually reduce the amount of negative experiences of attorneys and other professionals, particularly women and those from non-traditional backgrounds.

Q How do you balance your personal life with your work life?

A I make time for myself and my social life. If a work task can wait until Monday, I try my best not to obsess over the task during the weekend. Also, if I know I have a dinner with my mother on Friday night and have a million work tasks to accomplish on Friday, I will simply start working earlier so I can make sure I'm out of the door in time for dinner, rather than stress over not getting everything done during normal business hours. I have family members and friends who give me regular reminders to chill out and with whom I can enjoy the occasional

cocktail. And, if my budget permits, I treat myself to the occasional massage and vacation—both can really break up a hectic week or months of work stressors.

I also try my best to reduce or eliminate unnecessary stressors and irritants and advise others to do the same. If you experience pain from sitting all day, consider asking your job for a standing desk. If your job is causing your hair to fall out, consider finding a new job. If your spouse is not supportive of you, dump him/her! If you are not fitting into your clothes, don't stress over this—instead, buy some new clothes and work on your diet. Simple fixes like these have really allowed me to maintain a decent mood and work/life balance most days.

Q What motivates you to serve the community through your pro-bono initiatives with Volunteer Lawyers of the Arts and Legal Services NYC?

A Altruism. Like many 1Ls, I failed to obtain a firm internship my first summer in law school. So, I summered with Brooklyn Legal Services and assisted indigent people with obtaining Social Security benefits. Despite my initial disdain for working free of charge for a non-profit organization, I very quickly grew to love the organization and the type of work I was doing. So, since graduating, I have made it a point to continue to help people in need with pro bono work.

In addition to my normal litigation work in my first firm, I worked as pro bono counsel to Legal Services NYC on several occasions. I represented a disabled woman in Social Security hearings and successfully obtained a favorable settlement in a federal lawsuit brought by a restaurant worker seeking unpaid wages under state and federal labor laws. I have also worked with Volunteer Lawyers for the Arts to help artists navigate the complexities of licensing agreements, defamation lawsuits and settlement negotiations.

Working on these pro bono cases has provided me with a sense of pride. Helping others is a huge mood booster, and the work has not been thankless. From an award for outstanding service from Legal Services to holiday cards from former clients to a Netflix movie credit, I have been fortunate to receive a ton of unexpected recognition for work I did altruistically.

Q How did you get involved with NYSBA? What are the benefits of doing so?

A Liz Shampnoi poached me. In all seriousness, I met Liz during my first year out of law school. We kept in touch and she encouraged me to join the Corporate Counsel section as soon as I went in-house. I was reluctant at first, but after a few enjoyable events I attended with Liz, I was sold!

There are many benefits to joining NYSBA. I have met professionals from every industry at NYSBA events and my interactions have been refreshing and beneficial. At a recent event, a group of professionals and I agreed to attend a comedy show together, as our conversation somehow turned to who we think are the best comedians. I have also become acquainted with judges, run into old coworkers, and been able to introduce law student mentees of mine to professionals I met at NYSBA events.

Q As someone who recently passed the bar, what advice do you have for law graduates who received their results this year?

A Congratulations if you passed! Congratulations again if you are working or have a job lined up. If you are unemployed and have nothing lined up, it is time to use your network. Interested in a job? Look on LinkedIn to see if you have any mutual connections with anyone at any prospective companies. Interested in a particular area of law? Go to the NYSBA and other bar association CLEs on topics in the area of your interest and align yourself with leaders in those areas if you can. There is no shame in asking someone to coffee or lunch and asking that person to provide you with insight on how she has attained success.

If you did not pass, you will live to take the test again! Now is the time for self-reflection. Shift your focus to new, creative ways you can market yourself if you are unemployed or if your results will result in a loss of employment. Stay in touch with old employers. One of your old firms may need you as a law clerk or doc reviewer, for example. I know quite a few people who did not pass on their first or second try but are quite successful in their careers; some are working in the law and some are not.

Also, if you have the luxury of time and sufficient finances, look into volunteer/unpaid experiences. I met a woman at a NYSBA event who did not pass the exam and was unemployed at the time of her results, but she later accepted a volunteer law clerk position with a state judge whose clerk was out on maternity leave. By the time she received her second set of bar results, she had a recommendation from a respected judge and several job offers. If you have bills to pay and cannot afford to work for free, take up doc review and temporary legal placement jobs through a variety of companies you can easily search for online.

This interview was conducted by Maverick James. Maverick is a second-year student attending New York Law School. He is interested in studying the impact of technological developments on contemporary legal practice. He is honing his practice in privacy, internet, and corporate law and is constantly searching for new opportunities to use his skills in a variety of fields. Maverick can be contacted via email at Maverick.James@law.nyls.edu.

Acts Like a Lawyer, Talks Like a Lawyer…Non-Lawyer Advocates Representing Parties in Dispute Resolution

By Professor Elayne E. Greenberg

The Ethical Issue:

What are the ethical implications for lawyer mediators, arbitrators and dispute resolution providers when the lines between the roles of lawyers and the non-lawyers who are representing clients in dispute resolution become blurry? Traditionally, non-lawyer advocates (hereinafter NARs) have represented clients in the negotiations, mediation and arbitration of legal matters without cause for concern. Yes, labor union representatives, sports agents, and special education advocates are three familiar examples of non-lawyers who represent clients in negotiations, mediations and arbitrations, informing clients of their legal rights. Routinely, the lawyers and neutrals presiding over the dispute resolution procedure have warmly welcomed these non-lawyers, viewing these non-lawyers as valued participants who provide their clients beneficial subject matter expertise to help resolve the legal dispute at hand. However, that welcome has now turned tepid and tentative as FINRA and its neutrals question the ethics of some of those non-lawyers who are representing clients in FINRA arbitration.

The Immediate Problem That Re-ignited the Controversy

The FINRA Codes of Arbitration and Mediation Procedures provides in relevant part that parties in securities arbitrations and mediations may be represented by NAR so long as such representation does not conflict with state law proscribing such representation.[1] Thus, pursuant to the FINRA code, aggrieved investors have opted to be represented in their settlement talks and dispute resolution procedures not only by lawyers but also by family, friends, law school clinics and NAR firms. NAR firms have proliferated, ostensibly to offer public investors an alternative representation to lawyers in FINRA securities mediations and arbitration.

However, FINRA had been receiving complaints from lawyers and neutrals who question the ethics of a small number of these NAR firms and have requested that FINRA take steps to address these concerns.[2] Included among the complaints of unethical behavior were allegations that some NAR firms required the aggrieved investor to sign a retainer agreement to pay the firm a $25,000 non-refundable fee for representation; some NAR firms advocated frivolous or stale claims as leverage to elicit settlements; some NAR firms have misused FINRA dispute resolution procedures by "employing inappropriate business practices," and some NAR firms posted photos of settlement checks in violation of confidentiality agreement to help market the firm's value.[3]

Professor Elayne E. Greenberg is Assistant Dean for Dispute Resolution, Professor of Legal Practice and Director of the Hugh L. Carey Center for Dispute Resolution at St. John's School of Law. Please send your comments to her about this topic at greenbee@stjohns.edu.

In response to these complaints, on October 18, 2017 FINRA issued regulatory notice 17–34 inviting FINRA forum users to comment on their experiences with NAR firms.[4] In this notice, FINRA acknowledged that although some NAR firms offer a valuable service to some aggrieved investors, NAR firms are unregulated.[5] FINRA also recognized the impact of any restrictions on NAR firms will ultimately have a cost and benefit to investors.[6] For example, although the implementation of practice restriction on NAR firms might serve to protect aggrieved investors from the cost of NAR firms' misconduct, these restrictions might also serve to incentivize aggrieved investors to instead retain lawyers at an additional expense.[7]

The Broader Ethical Issue

The FINRA-NAR issue is actually a reflection of a broader problem: How do we ensure access to justice for all? For many, the escalating costs of retaining lawyers presents a barrier in their quest to access justice. In lieu of lawyers, some are seeking a more affordable alternative and are turning to NARs. As one familiar example, the New York Unified Court System provides funding to Community Mediation Centers who use NARs to provide

This article originally appeared in the Spring 2018 issue of *New York Dispute Resolution Lawyer,* a publication of the Dispute Resolution Section of the New York State Bar Association.

those unrepresented with legal advice.[8] Some embrace the use of NARs in this context while others argue that NARs are just providing basement justice for the have-nots.

Adding to the challenge of this problem, there is no consensus on whether lawyer representation as opposed to representation by NARs will actually provide individuals with a better outcome. It may be a fantasy that any lawyer will provide the client with a better outcome than a NAR. Our respected colleague Jean Sternlight states that whether legal representation is actually a benefit compared to NAR representation is not easily proven by the research.[9] Sternlight notes, and this author agrees, that all legal counsel is not alike. While we have great pride in observing skilled lawyers advance their clients' interests, we have also cringed when observing lawyers who do not know the law and misguide their clients to unfortunate outcomes.

Another respected colleague, Sarah Cole, looks at the access to justice issue from a different vantage point and provokes us to consider whether there are some types of cases where NAR representation is actually the unauthorized practice of law and should not be allowed.[10] Cole explains that during the past three decades arbitration practice has evolved and is now used to resolve an increasing number of statutory claims.[11] While arbitration was initially created to resolve routine contractual business disputes by applying business customs and norms, now arbitration is also used to resolve statutory claims by applying the law.[12] Cole asserts that whether or not we classify the representation clients by non-lawyers in statutory arbitrations as the unauthorized practice of law, clients need lawyers to represent them in the arbitration of these statutory claims to protect these clients from harm.[13]

The Ethical Codes Maintain the Blurry Lines

How should lawyer arbitrators and mediators ethically respond to non-lawyer advocates who represent parties in mediation or arbitration? Lawyer mediators and arbitrators may turn to both the New York Rules of Professional Conduct and the relevant neutral ethical codes for guidance and still remain unsure of how to proceed ethically. These ethical codes don't explicitly clarify what constitutes the unethical practice of law, or advise neutrals about what to do when a neutral believes that a NAR has crossed the blurry line into the unauthorized practice of law. For example, the ethical codes for mediators[14] and arbitrators[15] explicitly advise that neutrals should uphold the integrity of their respective dispute resolution procedures. Are arbitrators and mediators upholding the integrity of the process if they encourage or discourage the participation of NAR? Should NAR participation be permitted in some disputes and not others?

We could also look at New York Rule 5.5 that addresses unauthorized practice of law. Rule 5.5 explicitly provides that:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction. (b) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.[16]

However Rule 5.5 does not help the lawyer mediator and arbitrator differentiate between permitted subject matter support and the unauthorized practice of law.

For this writer, New York Rule 2.4, Lawyer Serving as Third-Party Neutral reinforces a practice boundary that may be tested when there is a NAR supporting a party in mediation or arbitration. Explicitly Rule 2.4 provides that:

> (a) A lawyer serves as a "third-party neutral" when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter. (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

This rule recognizes the mistaken belief held by many unrepresented participants that their arbitrator or mediator who is also a lawyer, despite statements to the contrary, will protect the unrepresented participant from legal harm or mistakes. Two for the price of one.

This rule also reminds lawyers serving as a neutral of their ethical obligation to remain anchored in their neutral role, and not be pulled to take a more legal representational role by providing legal advice to an unrepresented party. However, practicing lawyer mediators and arbitrators often confess how challenging it is not to correct an unrepresented parties' faulty legal reasoning. Moreover, lawyer arbitrators and mediators find themselves in an ethical quagmire when lawyers representing parties just got the relevant law wrong. Might this challenge for lawyer mediators and arbitrators be exacerbated when parties are represented by NARs? Depending on the lawyer mediator and arbitrator, the neutral might feel even more pulled to provide legal advice if the neutral doesn't consider NAR as a representative or if the NAR gets the law wrong.

Some readers may be more dizzied after reading these rules and remain unsure about how to proceed if a NAR

is engaging in the unauthorized practice of law in a dispute resolution procedure in which you are a neutral. You are not alone. However, we can always take solace in the knowledge that neutrals always retain the right to withdraw from a dispute resolution procedure if the neutral does not believe they can carry on their neutral role. For some, the right to withdraw is a welcome escape hatch. For others, the right to withdraw is a punt that fails to address the more nuanced issue: how should neutrals ethically proceed when a party is represented by a NAR?

Conclusion

As I write this column, I am coming to the sobering reality that this problem raises questions with no simple answers. This topic calls into question whether we truly believe in the clients' right to self-determination in which they are free to choose their own representative when participating in a dispute resolution procedure or whether we adopt a more maternalistic stance, believing clients need to be protected when selecting a representative. We are also forced to confront the limitations of access to justice for all and the remedies we are willing to support to right this egregious wrong. Yes, this problem is also entrenched in the politics of maintaining the exclusivity of the legal profession. Ultimately, however, this issue forces us to personally consider as lawyer mediators and arbitrators what it means to us to maintain a dispute resolution procedure of integrity.

Endnotes

1. *See* http://www.finra.org/sites/default/files/Regulatory-Notice-17-34.pdf.
2. *Id.*
3. *Id.*
4. *Id.* The deadline for the comment period was December 18, 2017.
5. *Id.*
6. *Id.*
7. *Id.*
8. https://www.nycourts.gov/ip/adr/cdrc.shtml.
9. Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm,* 37 Fordham Urban L. J. at 391 (2009).
10. Sarah Rudolph Cole, *Blurred Lines: Are Non-Attorneys Who Represent Parties in Arbitrations Involving Statutory Claims Practicing Law?,* 48 U. of Calif. Davis 921 (2015).
11. *Id.* at 925.
12. *Id.*
13. *Id.* at 960.
14. https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf.
15. https://www.americanbar.org/content/dam/aba/migrated/dispute/commercial_disputes.authcheckdam.pdf.
16. NY Rules of Professional Conduct Rule 5.5 (2017) at http://www.nycourts.gov/rules/jointappellate/ny-rules-prof-conduct-1200.pdf.

Business Essentials for Neutrals: Starting, Growing, and Sustaining Your Practice

By Reginald A. Holmes and Merriann M. Panarella

Introduction:

Congratulations! You are or have decided to consider a career as a neutral. And whether you are or intending to ply your trade in the commercial world or in the community, pro bono or non-profit space, the felicitation stands. Few professions provide such a consistently rich platform for pursuing a life of Tikkun Olam.[1] However, unless you master the business essentials necessary for a financially successful neutral practice, you will likely stumble over obstacles that will derail all your lofty 'better the world' goals.

Fortunately, a knowledge of the business essentials that will permit you to pursue your desire to do all of the good you wish to do as a neutral and still do well enough to support yourself and your family are not deep dark, mysterious, or indecipherable secrets. Indeed, the approaches, strategies, and tactics best calculated to establish a financially successful neutral practice are well known to savvy legal services marketers, DR service providers, and successful neutrals. The authors, independent and successful neutrals in their own right, have distilled these approaches, strategies, and tactics, updated them for the current industry landscape, and combined all of that with their decades of professional observations, experiences and knowledge. The results of those efforts are summarized and shared in this article. The objective of this article is to better equip you with the perspectives, education, and skills you will need to successfully start, grow, and sustain your neutral practice and of course to aid you in doing all of the good you are called to do. Our earnest desire is to help you do well while doing good.

Let's start our journey through this material with the definition of a few terms. First, let's describe the "DR industry." The DR industry is a multi-billion dollar industry consisting of any private entity or person that provides services focused on the resolution of disputes outside of the public courts. The field is broad enough to encompass not just arbitrators, mediators and the like but also service providers, professional and trade associations, educators, settlement counsel, and law firms and suppliers.

This article will utilize the term "neutral" to refer to any person who works or engages a process to resolve disputes, conflicts, or disagreements between parties without representing either of the parties and while acting impartially. Neutrals who offer their services for money and adhere to a professional code of conduct are the focus of this article. While the reader should ideally have some basic knowledge and work experience in the DR field, anyone looking to enter the profession will also benefit greatly from the insights presented here.

Our arc through this material will begin with a discussion of the business realities that should be considered by any prospective neutral before entering the profession. We will then discuss the business essentials and the practical considerations that should be a part of any practitioner's plan for business success.

After that, we provide insight, strategies, and best practices for starting, marketing, and growing your neutral practice. We will also touch upon servicing your caseload and sustaining your earned success. Additionally, we will explore the unique considerations, concerns, obstacles, and opportunities that often confront diverse neutrals. Penultimately, we will discuss the quality of life factors for neutral. Finally, we offer our observations about the future of the DR industry. Will it be bright and growing or dark and declining?

The Business Realities of Being a Neutral

Anyone exposed to the lengthy, expensive, and inflexible court system often thinks that there has to be a better way to resolve disputes. After some experience with DR processes, many are hooked and start seriously considering whether being a neutral is something they could either do full time or when they retire. If you are one of these people, before jumping in it's good to have a sense of the business realities neutrals face including the basics of supply and demand, what work is out there and how many are hoping to obtain it?

Both anecdotally and statistically, mediation work is growing. Mediation work increases as litigation grows. According to U. S. District Court statistics, total cases filed

Reginald A. Holmes is an arbitrator/mediator with a multinational practice in the IP, employment and international areas. He has offices in Los Angeles, Chicago and New York. You may connect with him at rholmes@theholmeslawfirm.com, 646.416.8141 or at www.theholmeslawfirm.com. **Merriann M. Panarella** is an arbitrator and mediator with offices in Boston and New York. She is a Fellow of the CIArb, a member of the AAA, CPR, WIPO and other DR panels, and on the Silicon Valley Arbitration and Mediation Tech List. You may connect with her at mpanarella@panarellaADR.com or at www.panarellaADR.com.

This article originally appeared in the Spring 2018 issue of *New York Dispute Resolution Lawyer,* a publication of the Dispute Resolution Section of the New York State Bar Association.

from 2015-2016 rose 4.6 percent.[2] In 2016, parties filed 291,851 complaints in U.S. District Courts. According to this barometer, disputes for potential mediations exist and are growing in many areas.

Moreover, corporations have embraced mediation as a way of controlling costs and resolving matters expeditiously. A 2011 study stated:, "today corporate experience with mediation is virtually universal. Ninety-eight percent of respondents indicated that their company had used mediation at least once in the prior three years, a ten percent jump from the 1997 figure."[3] Although recent accredited studies are difficult to locate, anecdotal reports and observations by the AAA, CPR and IMI suggest that the use of mediation has continued to grow at a similar pace though 2017. Gone are the days when a suggestion to try mediation in stalled negotiations is deemed a sign of a weak case by opposing counsel.

Given these statistics, the number of potential mediations should be growing. Courts also encourage the parties to mediate, which is admirable, However, many jurisdictions offer mediation to the parties for free, thus decreasing the cases available for professional mediators. For example, the Ninth Circuit provides free mediation to litigants because the process helps resolve disputes quickly and efficiently; the Circuit has eight paid full-time mediators on its staff for this purpose.[4] In the U. S. District Court in Boston, the Magistrate Judges have taken over the mediation program so there is no cost to the parties. Many other courts also offer court-connected mediation of one type or another, so knowing what programs are available at the local, state, and federal level will provide more information on the demand side.

On the supply side, as mediation has caught on, many lawyers find it an appealing process for dispute resolution. From semi-retired lawyers and judges who merely desire to keep their toe in the legal waters, to those who aspire to build a practice, more people seek to mediate disputes than there are disputes. Again, case availability may well depend on whether there are court-connected matters in the local jurisdiction that funnel cases to a volunteer court-connected panel or to a panel of pre-qualified mediators.

Domestic commercial arbitration has not fared quite as well. According to the 2011 study referenced above, while companies recounted using mediation for nearly all kinds of disputes, fewer are using arbitration in key categories; "[s]ubstantial drops were reported in the number of companies reporting arbitration usage in commercial/contract disputes (from 85% in 1997 to 62.3% in 2011)…."[5] As was the case with mediation, more recent validated studies on the growth of the use of arbitration are difficult to locate. However, anecdotal reports and observations from the AAA, the world's largest provider of arbitration services, and others suggest that the use and demand for domestic commercial arbitration services has remained relatively flat through 2017. Arbitration, which historically has been an efficient, cost-effective, and flexible adjudication process, may have suffered from an importation of litigation processes in recent years. Most service providers have revised their rules and encouraged arbitrators on their panels to manage their matters as cost-effectively as possible, with the hope that arbitration will again become a preferred adjudicatory method for the resolution of business disputes.

On the other hand, international arbitrations appear to be on the rise and are likely to continue to grow as global commerce increases. Also, parties are attracted to international arbitration because the awards are generally enforceable under the New York Convention. In the American Arbitration Association's B2B Dispute Resolution Impact Report, in 2015, 8,360 domestic *and* international business cases were filed with transportation, commercial insurance, entertainment/media, and pharma/biotech cases significantly up over 2014.[6]

As with mediation, it appears that there are more arbitrators than disputes. Arbitrators have tended to be homogeneous and primarily white, male and older individuals. Efforts are under way by most service providers to encourage parties to choose diverse and women neutrals. Research the panels you are able to join in your jurisdiction, the number of arbitrators on those panels and the number of cases available so you can plan accordingly.

Preliminary Preparation

To become a competent neutral, your preparatory steps should include taking a self-inventory, engaging in necessary training and then advanced and specialty training, affiliating with relevant organizations, and exploring apprenticeship and mentoring opportunities.

Why conduct a self-inventory? Earning a living as a neutral is nuanced and starting a full-time practice will be challenging. Before investing the necessary time and energy to develop a practice, it is useful to consider your professional objectives, background and experience, temperament, and perspective.

Regarding professional goals, is this a full-time endeavor, a part-time exploration, or an avocation? Be clear on both the time and energy you are willing to devote to your practice and what you expect to achieve professionally. A consideration of relevant background and experience up front will help direct both your training and later marketing efforts. You don't need to be a lawyer to be a mediator or arbitrator in many fields, but you do need to be known and respected in your industry. While neutrals vary in their substantive areas of expertise, to practice at the highest level a neutral should have the right temperament for the task at hand. For most neutral activities, this means the ability to actively listen, be patient, withhold quick judgments, and have a high emotional IQ. Former litigators need to leave advocacy behind, and retired judges need to recognize that mediation and arbitration

are flexible processes determined by the parties' needs, not theirs. Finally, a neutral, by definition, must, in fact, be neutral and impartial to their very core.

Prospective neutrals should ask two fundamental questions: 1) Am I right for the neutral profession? and 2) Is the neutral profession right for me? If you answer one question in the negative, save yourself a lot of time, money, and heartache and consider another line of professional work. However, if you answer yes to both, apply the principles and suggestions in this article and move forward with the establishment of your practice.

Generally, there are no state or federal requirements for mediation training although you should check the law of the state where you want to practice. In Massachusetts, for example, while there's no '"formal" training requirement, in order to enjoy the statutory protection of confidentiality accorded a mediator, you must have at least 30 hours of training in addition to other requirements.[7] Also, most panels that you seek to join do have basic training requirements. For example, the AAA requires "the completion of at least 24 total hours of training in mediation process skills…."And, in New York, mediators who wish to serve on court rosters must have taken at least 40 hours of mediation training.[8] The safest course is to take one of the many 40-hour mediation programs offered by law schools, bar associations, private practitioners, and service providers.[9] The ABA maintains on its website a list of ADR Training Providers organized by state.[10]

Regarding arbitration, there are again, generally, no state or federal licensing or training requirements. Basic training in arbitration case management is highly recommended, especially for those with little experience in arbitration. Arbitration, while adjudicatory, is not litigation. Attending courses will also increase your chances of getting on prestigious panels as you will be asked on panel applications to list your DR training. Again, arbitration courses are widely offered by law schools, bar associations, private practitioners, and service providers.

Advanced and specialty training helps sharpen your skills, enhance your credentials, and demonstrates your expertise in substantive areas. The World Intellectual Property Organization (WIPO) offers a Workshop for Mediators in Intellectual Property Disputes as well as arbitration training, and the American Health Lawyers Association offers both mediation and arbitration training tailored to health law disputes. Depending on your area of concentration, you will be able to find advanced courses. Also, after you have received "basic" training, attending an "advanced institute" not only satisfies CLE requirements but introduces you to new ways to resolve issues.

Affiliation with professional organizations and bar associations provides opportunities to further enhance your expertise as well as network with colleagues. Regarding bar associations, many have robust dispute resolution sections with active committees in different types of dispute resolution as well as specialty areas. For example, the ABA has a Dispute Resolution Section that hosts an annual conference and has committees that focus on mediation, arbitration, conciliation and ombuds, as well as employment, health, international and intellectual property, among others. Similar the NYSBA has an active Dispute Resolution Section with excellent programs, webinars, and conferences. The list of potential professional associations is limited only by your desired subject matter focus and imagination. A few that you might consider joining include the American Intellectual Property Law Association, the American Health Lawyers Association, the National Employment Lawyers Association and, if applicable, the Association of Corporate Counsel. In the international sphere, you might consider the Chartered Institute of Arbitrators, which provides both training and credentialing, and the International Bar Association.

Finally, an apprenticeship or mentor can provide enormous assistance when starting out. Several organizations have apprenticeship opportunities such as the AAA's Higginbotham Program, and the ICC's Young Arbitrator's Forum for those under 40 years old. Many court-connected mediation programs offer training, observation, and apprenticeship opportunities as well. If you are able, we strongly encourage you to find an experienced DR practitioner who is willing to mentor you and allow you to observe mediations or arbitrations. Such experience would be invaluable.

Starting Your Practice

Once you have affirmatively answered all the gateway questions and completed the preliminary work to become a neutral, you have set the stage to start your practice. What do you do next? First, determine whether you intend to pursue your neutral career as an avocation, a business, or a calling. Your answer will have important implications as to how you start your practice.

If for example, you want to pursue "neutraling" as an avocation, you can achieve that objective by creating a relationship with a service provider that will give you occasional cases. If you choose this route your capital, time commitment, and marketing effort requirement should be minimal. The business essential here for you is to focus on finding, defining, and forging a satisfactory relationship with a source of cases. Thereafter, to sustain that relationship you must service those cases promptly, cost-effectively, and fairly with due regard for the financial interest of your service provider. This option is appropriate for and popular with (and sometimes uniquely available to) retired judges.

If, on the other hand, you are pursuing your neutral practice as a business that will be used to support you

and/or your family, you must ask and answer a few more preliminary questions. Among them are these:

1) Are you financially prepared for the likely initial (and sometimes permanent) drop in income that often occasions the start-up of a neutral practice?

2) Do you possess the passion, drive, and willingness to commit the copious amounts of energy required to power up a new neutral practice in today's climate?

3) Will your physical and mental health permit you to do what you must do to have a successful practice?

4) Do you possess or can you develop the necessary reputation for being successful in your area of focus? A solid reputation is a crucial characteristic of financially successful neutrals.

If and only if the above questions are answered in the affirmative should you proceed to start your practice with the possibility that you will be able to earn a full-time income from it.

If you are pursuing your neutral practice in response to a calling (as is the case with the authors) you will have even more in-depth questions to ask. Is this really what you want to do or is it just a potential escape from the demands of your current professional focus? In what ways do you feel that being a neutral will provide the satisfying work you are called to do? Proceed to start your practice when you have a realistic sense of your attraction to the profession. Can you add this to your other legal work rather than jump in to an exclusive practice?

Whether you approach starting your practice as an avocation, business, or calling, you will be well served to conceive, structure, and write out a business plan as to how you intend to achieve your goals. Creating a written business plan for your prospective neutral practice is a critical factor that should not be ignored. See it as the roadmap to take you from where you are to the successful neutral practice that you are seeking to establish. Your journey may be long, complicated, and difficult. Don't leave home without your map.

What should be in your business plan? Consider addressing areas including finances, basic business start-up necessities, and panel affiliations. Among the financial matters you will want to reflect on are hourly/daily rates, billing practices, anticipated expenses, and cash flow. When you start to think about what you want to charge, you should research the going rates in your region for those with experience commensurate to yours. Often, neutrals beginning a practice believe that if they price their services lower relative to others, they will attract more business. Paradoxically, this strategy may backfire as DR users may view the lower rate as indicative of a lower level of quality. Once you establish your pricing structure, determine what billing practices you plan on using. Some neutrals use tools such as Clio.com while others just create timesheet and invoice templates which they use to bill clients on a monthly basis. Whatever you decide to do, record the time you spend on your matters on a daily basis to ensure accuracy and completeness.

There are potentially endless expenses when starting a DR practice, so your business plan should reflect your view of what you need to do and your priorities. Budget for necessary training, conferences, subscription agreements, panel and bar association fees, office or virtual office expenses, website creation and maintenance, and public relations, marketing, or other consultants. In the beginning, your expenses will likely exceed your income, so consider your cash flow needs over a comfortable period of time for you.

Your business plan should also include basic start-up necessities such as creating a new resume, and bio, obtaining business cards, using social media, and developing a contact list. As you begin, take a look at what past experience you can leverage to create a DR resume. Spend time and thought on this exercise as it will inform both your website, your LinkedIn account should you choose to have one, and the short bios you use for speaking and writing. Also, obtain business cards early on. Many vendors offer inexpensive options such as Vistaprint and Staples. Moo claims to offer "Uniquely premium Business Cards for everyone." So have fun with the look of what you will present to the people that you meet.

A website is no longer a luxury for practitioners, it is a necessity. To get started, research the websites of neutrals you know and neutrals whose practices you seek to emulate. Ask other neutrals or sole practitioners what web designers they used. Consider whether you want or need a search engine optimization consultant to maximize your exposure. Find a professional photographer for your headshot and aim for a picture that reflects confidence, as well as your personality. Consider whether you want a blog associated with your website for posting your own newsletters or a discussion of recent cases. And, strive to keep your website updated. As you speak, write, teach, and gain experience, it should all be reflected on your website.

While a website is essential, there is a divergence of opinion on the use of other forms of social media. The use of Facebook, for example, raises the question of whether your "friends" might create conflicts if they are related to the parties or counsel in an arbitration before you.

Many neutrals do maintain a LinkedIn page which allows them to post links to articles they have written as well as provide notice of presentations they are planning. However, they neither solicit nor accept endorsements to avoid creating a future conflict.

In leveraging your prior experience in your new DR endeavor, use your former contact list to keep in touch

with colleagues and acquaintances. And, as you engage in the DR community, keep your contact list up to date.

Your business plan should also include your research on the service provider panels with which you seek to associate yourself. These panels, especially in the case of arbitration, can be an important source of cases. On the mediation front, look for local panels including court-connected rosters. While the latter may require volunteer services for all or part of mediations, they are often an excellent opportunity to gain experience. If you can find the opportunity, mediate with others. As an arbitrator, look into the panels available for your level of experience. FINRA, the Financial Industry Regulatory Authority, has an arbitration panel with relatively low barriers to entry and provides free online training, an online exam, and distributes arbitrators names to potential parties by random computer allocation. Other panels such as the AAA and CPR require substantially more experience and credentials. If you aspire to be on a panel, understand their requirements and plan accordingly.

Writing out a business plan, whether detailed or simple, will help you organize your thoughts, drill down on your finances, and prioritize your approach to starting your practice.

Marketing Your Practice

Now that you have the start of a business plan, the next component of your plan will be a written marketing strategy. Depending on your style, a written marketing plan may include publicizing your new focus, pitching your business, choosing a marketing approach, increasing and maintaining your DR visibility, joining organizations relevant to your marketing approach, volunteering, marketing with others, and ethical considerations. Diverse and women neutrals may have unique issues that also should be addressed.

After all the work you've done, now is NOT the time to be shy and retiring. Announce your new DR focus enthusiastically to you contact list. Consider writing a short article to include with your announcement. Decide how you want to pitch your business—what makes you uniquely situated to be the parties' best choice for their dispute?

Most experienced neutrals are process management experts. Many believe that expertise in the subject matter of the mediation or arbitration before them is not as important as their process management skills. However, it's better to go narrow and deep rather than shallow and wide. While you may be able to handle a variety of disputes, and may over time, start with a niche that results organically from your experience and background. You can choose a specialty practice such as employment, health, intellectual property, environmental or family law. One well-respected mediator focuses on disputes involving animals. Also decide on what services within the DR field you will be offering: mediation, arbitration, conciliation, special discovery master, eDiscovery master, etc. Finally, think about where you will focus your practice geographically. While sticking to the deep/narrow initial focus, look at where your work is likely to come from and plan accordingly.

Visibility is critical to any successful marketing effort. Many bar associations publish newsletters and welcome articles so submit a paper in your chosen area of expertise. DR presentations also offer opportunities for people to hear you talk authoritatively. Consider organizing and moderating a panel on a subject and inviting others with more experience to speak. Indicate your willingness to make presentations, whether in person or by webinar, and seek opportunities to do so. Use social media including, as mentioned earlier, a website which you keep updated, and a LinkedIn account on which you post your speaking engagements and links to your articles. Once you have decided upon the organization affiliations that make sense given your focus, get out and attend meetings and network with others in your chosen field. The idea is for people to think of you when an appropriate case comes their way. Let your light shine brightly. Finally, try to leverage what you do. Can you turn a paper you researched into a presentation? How can you repurpose your efforts to maximize your results?

At the outset, you may want to consider volunteering to gain experience. Many regional courts have court-connected mediation programs that provide mediators to parties at no cost. Volunteering can help hone your skills, introduce you to other local mediators or arbitrators, and provide references for you down the road.

Marketing with others is not only useful but fun and provides each of you with an opportunity to tout the other's accomplishments. Find a presentation partner or someone with whom you can co-author an article, with the result that you both have the marketing visibility but half of the work otherwise involved. Everyone appreciates being recognized, so look for opportunities to reward colleagues, to recommend other neutrals when appropriate, and to work to increase the number of cases available to all.

Marketing a neutral practice presents a bit of a conundrum and a few ethical considerations. As a neutral, you have disclosure responsibilities to the parties to ensure your impartiality. As an arbitrator, it is particularly important that your "conflict awareness radar" is up and running at all times. The viability of your award depends on avoidance of partiality or even the appearance of it. If you market your neutral services to a law firm and shortly after that are chosen by that firm as an arbitrator, you will need to disclose the contacts that you had. Avoid situations, to the extent that you can, that will create conflicts or disclosable events.

While everyone wants to promote themselves in the best possible light, be careful to honestly describe your experience and background. Parties and counsel are more closely scrutinizing the experience and background claims of neutrals and there are indications that they are increasingly willing to take action or even sue when misrepresentations are discovered or suspected.[11] Such claims of misrepresentation could be devastating, if not fatal, to any effort to develop a neutral practice. Honesty and integrity are not only essential components of a personal marketing plan but are also critical to maintaining the public's trust in the neutral profession.

Here are a few considerations for diverse and women neutral in marketing their practices. Diverse/women neutrals may undervalue their skill set and services, believe that they need far more experience than is required, and set their rates at too low a level. Underestimating one's services or skill set may lead to overdoing pro bono work. Diverse/women neutrals may also experience being viewed as either overly aggressive or too timid. Awareness and humor can dispel any awkward encounters. Finally, rather than divisive competition, diverse/women neutrals will gain much by working together to expand the use of ADR and shared opportunities in the field. A rising diverse tide lifts all diverse boats.

With active patience, persistence and the artful use of technology, marketing your neutral practice can be both energizing, satisfying, and rewarding.

Servicing and Supporting Your Caseload

Once you are up and running, how can you best service and maintain your caseload? To begin with, continue to work closely with service providers. Service providers and case managers can be instrumental for a smoothly functioning arbitration. A mutually respectful relationship with a case manager will inure to your benefit. Case managers often have an early read on counsel; they are service provider insiders and experts, and can, while not affecting your ultimate responsibility as the arbitrator, help you look good. In addition, sometimes case managers help decide who will be on lists provided to parties. Be aware that the way that you treat them has a direct bearing on your success.

Next, use technology to maximize your efficiency. You will need a robust conflicts program that includes not only the parties but also the lawyers and experts. Create a file management system that will allow you to organize and find documents relevant to your arbitration or mediation matter quickly. For example, you may want to create a folder for each arbitration and include within that folder subfolders for pleadings, orders, exhibits, time sheets, and invoices. You may also have a folder with arbitration templates containing a preliminary hearing checklist, a pre-hearing order, confidentiality agreements, subpoenas, time sheets or other documents you find yourself using regularly. If you choose to maintain your files electronically, which most do, be sure to back up your system with cloud storage such as Backblaze, Carbonite, or iDrive.

Many arbitrators use iPads or tablets to maintain files, take notes, and otherwise manage arbitrations. Tools such as Documents by Riddle allow you to keep all your documents in one place by accessing Drop Box, Google Drive files, Box, or other cloud storage. PDF Expert allows you to edit PDFs as text documents. One Note by Microsoft offers note taking capabilities as does GoodNotes 4, which provides searchable notes. Depending on your style and priorities, there are many more tools to help you service and maintain your caseload.

For arbitrators, service providers can act as a buffer between the arbitrator and counsel as well as provide financial case management services, handle administrative matters, and resolve arbitrator challenges. If parties contact you directly with an ad hoc matter, consider informing them that it is your preference to work with the AAA or CPR. In the event the parties opt not to have an administered arbitration, the AAA, for example, offers À La Carte Services, which allows the parties and arbitrators to choose the services needed, including Case Financial Administrative Services and Arbitrator Challenge Review Procedures, among others.

Growing and Sustaining Your Practice

While starting and growing a neutral practice may be difficult**,** sustaining your success may be even harder. If starting and building your practice is comparable to an airplane taking off and reaching cruising altitude, then maintaining your practice can be compared to maintaining a stable altitude. The key to achieving a sustained practice is finding a pace that provides the level of income and satisfaction that you seek while demanding no more energy and expenses then you wish to expend.

Here are the keys to sustaining a successful practice:

1) Stabilize your organizational structure—Lock in the personnel structure that helped you achieve your prior success. Maintain your service provider relationships as well as other relationships that provide your pipeline of cases and assist you in the servicing your cases. Never take any relationship for granted, always express gratitude for the values that both of you bring to your joint enterprise.

2) Service all of your cases to the best of your abilities. Exceed the standard expectations of all stakeholders (parties, attorneys, case managers, witnesses, etc). Make working with you an exceptional professional experience. Measure your success by whether and how often those with cases return to you.

3) Maintain your visibility to the people, organizations, and professional associations that are sources of your work. Be disciplined (and kind) about weeding out of your professional life those associations that drain your time, energy, morale, resources and provide you little in return. Writing, speaking, and service engagements with organizations can be useful (and sometimes fun ways) of maintaining your visibility.

4) Continue to engage and use social and virtual media. They provide excellent platforms for generating visibility that work even when you are sleeping. But caution is in order. Injudicious use of social media can create conflicts, or the appearance of conflicts, by demonstrating or suggesting relationships that will bar you from or complicate your ability to take cases.

5) Continue to engage in professional and personal activity that gives you joy. Action that lifts your spirits or gives you energy and a sense of satisfaction and fulfillment will provide the necessary fuel to power you forward in achieving all of your life's mission (including your professional ones). After all, sustaining yourself is the *sine qua non* of supporting your practice.

The Future of the DR Industry

Dispute resolution's future likely includes both growth in the number of cases and an evolution of processes to catch disputes before they arise and to resolve those matters that do happen at the earliest possible time. DR practitioners are likely to continue to grow in numbers as well with increased emphasis on encouraging the parties to use diverse and women neutrals. It remains to be seen whether the growth in the number of neutrals and the size and importance of cases being committed to DR will lead to any licensing and/or certification requirements.

The industry is expected to continue to evolve both incorporating older practices with "twists" like med-arb[12] or arb-med[13] and settlement negotiations or variations on these themes and creating new approaches to satisfy the parties' needs.

Regarding newer approaches, neutrals and parties are working to use DR processes that work in one industry, such as alliance managers in the pharmaceutical industry who work to spot problems before they lead to project failure, to other industries. The AAA offers Judicial Settlement Conferences mirroring those offered by federal and state courts. Neutrals offer deal facilitation services for negotiations that have hit a wall. And, a promising new development is the Arbitration Settlement Conference[14] in which the arbitrators, with deep knowledge of the dispute before them and consent of the parties, conduct settlement conferences.

Conclusion

Achieving business success as a neutral involves taking a dispassionate look at a passionate vocation. Once you have decided that this is the profession for you, dive on in. Do your research regarding necessary training, and associate yourself with organizations that will both support your practice, allow you to meet other neutrals, and provide cutting edge programs. Work on creating the best business plan that you can, with an eye toward not only the business essentials but also how you work and what you need to thrive. Take every opportunity to market your practice and increase your visibility while having your conflict radar awareness engaged. Use all the resources at your disposal to service your caseload as efficiently as possible and ultimately to grow and sustain your practice. And don't forget to enjoy your practice and your life; in other words, have fun!

Endnotes

1. Tikkun Olam is an ancient Hebrew term which in contemporary use refers to the duty of each human to work for universal justice, peace and the betterment of the world. The authors use the term here for its secular richness and not in its strict religious meaning.
2. *See* Table C-2A U.S. District Courts-Civil Cases Commenced by Nature of Suit; http://www.uscourts.gov/sites/default/files/data_tables/jb_c2a_0930.2016.pdf.
3. *See* Thomas J Stipanawich and J. Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 Harvard Neg. Law Rev. 1, 41.
4. *See* https://www.ca9.uscourts.gov/mediation/.
5. Stipanawich and Lamare, *supra* note 3, at 46.
6. *See* American Arbitration Association," B2B Dispute Resolution Impact Report, Key Statistics," p. 3.
7. See M.G.L. c. 233 Sec. 23c.
8. *See* Part 146 of the Rules of the Chief Administrative Judge, NyCourts.gov.
9. For example, the Program on Negotiation at Harvard Law School offers a five-day course on mediating disputes as well as advanced mediation training. And the Straus Institute for Dispute Resolution of Pepperdine School of Law offers many mediation trainings both for those starting out and for those seeking specialized training.
10. https://www.americanbar.org/groups/dispute_resolution/resources/adr_training_providers.html.
11. *JAMS, Inc. v. Superior Court of San Diego (Kensella)*, No.D069862 — Cal.RPtr.3d —, 2016 WL4014068 (Ct. App. Jul 27, 2017).
12. A process in which a mediator serves as an arbitrator if the matter is not settled.
13. *See* Edna Sussman, *Developing an Effective Med-Arb/Arb-Med Process*, NYSBA New York Dispute Resolution Lawyer, Spring 2009, Vol. 2, No. 1.
14. A process in which an arbitrator attempts to settle a matter before her.

A Field Guide to New York's "Recreational Use Statute" General Obligations Law § 9–103

By V. Christopher Potenza and James Maswick

With offices in upstate New York, including Buffalo, Albany, and Lake Placid, we see a fair share of claims against property owners for injuries from snowmobiles, mountain bikes, cross-country skiing, motor bikes, hiking, fishing, and all sorts of other recreational activities on property. General Obligations Law § 9–103, New York's "Recreational Use Statute," is intended to limit a property owner's liability for such claims and entice property owners to allow use of their properties for certain delineated recreational or sporting activities by limiting those property owner's risk of suit for negligence claims arising out of the listed uses. The statute provides that an owner, lessee or occupant of the premises **owes no duty** to keep the premises safe for entry or use by others for hunting, fishing, organized gleaning, canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes or training of dogs, or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes ("organized gleaning," of course, is "the harvest of an agricultural crop that has been donated by an owner, lessee, or occupant of premises or occupant of a farm by persons who are sponsored by a charitable not-for-profit organization" as defined by New York Agriculture & Markets Law § 71-y.).[1]

The statute further provides that the owner, lessee or occupant of the premises who gives permission to another to pursue any such activities upon such premises does not thereby extend any assurance that the premises are safe for such purpose, or constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted. A plaintiff can overcome a GOL § 9-103 defense if he or she can show the property owner engaged in a willful or malicious failure to warn or guard against a dangerous condition, where consideration was paid to the land owner in exchange for the recreational use of the property, or when a permissive user injures another to whom duties are owed by the property owner. *Morales v. Coram Materials Corp.*, 51 A.D.3d 86, 90-91 (2nd Dep't 2008).

The purpose of the law is admirable as the Legislature wanted to make it easier for owners of real property to open up their property to the general public and let them get some fun, exercise and make use of the property without the risk that the property owner, who was generous enough to permit his or her property to be used free of charge, would be sued.[2] Of course, if a fee is charged to a property user, a higher standard of care is owed to those who utilize the property. It is a win-win for all involved parties, and happens frequently in trail systems around the state.[3]

V. Christiopher Potenza

James Maswick

"If you allow someone to snowmobile on your property without charging a fee to do so, you are not liable when he or she eventually crashes into a tree."

Now this all seems pretty straightforward. If you allow someone to snowmobile on your property without charging a fee to do so, you are not liable when he or she eventually crashes into a tree. However, it's never that simple.

V. Christopher Potenza, Esq. is a Member of Hurwitz & Fine, P.C., and leads the firm's state wide Toxic Tort and Environmental litigation team and serves as the Vice-Chair of the Toxic Tort Committee of the Torts, Insurance and Compensation Law Section of the New York State Bar Association. **James L. Maswick**, Esq. is an Associate of Hurwitz & Fine, P.C., in its Lake Placid office and regularly handles litigation and premises liability cases.

This article originally appeared in the Spring 2018 *Torts, Insurance & Compensation Law Section Journal*, a publication of the Torts, Insurance & Compensation Law Section of the New York State Bar Association.

The breadth of this statute was tested in *Iannotti v. Consolidated Rail Corporation*, 74 N.Y.2d 39 (1989), in which the Court of Appeals reversed the Third Department and granted summary judgment to the defendant property owner. The plaintiff alleged that he was injured while riding his motorized trail bike within the City of Amsterdam along a stone and dirt right-of-way 20 to 25 feet wide adjacent to defendant's railroad tracks. The right-of-way, which had once formed the bed of a track, since abandoned, was used occasionally by railroad workmen as an access road for purposes of maintaining the tracks. The Appellate Division had concluded that the statute did not cover defendant's property because it was maintained and used for the commercial operation of a railroad, and was not the type of property the Legislature intended to encourage landowners to open up for public recreational use by enacting General Obligations Law § 9–103. The Court of Appeals disagreed, finding no basis to make a categorical exception from the scope of General Obligations Law § 9–103 for properties that are in active commercial use. Commercial property may be well suited to public use for several of the enumerated activities (e.g., hiking, cross-country skiing, and horseback riding) and yet still be in active use for its commercial purpose. The question is whether it is a type of property that is not only physically conducive to the particular activity or sport but is also a type that would be appropriate for public use in pursuing the activity as recreation? If it is, application of General Obligations Law § 9–103 to such property as an inducement to the owner to make it available to the public would further the statutory purpose.

The Court of Appeals again addressed the scope of this statue in *Bragg v. Genesee Valley Agricultural Society, et al.*, 84 N.Y.2d 544 (1994), which affirmed the Fourth Department's dismissal of the claim against the land owner based on General Obligations Law § 9–103. The defendant, Genesee County Agricultural Society, was the owner of an abandoned railway bed that runs from Batavia to Lockport. An agreement was made with a trucking company to excavate gravel from the railbed. Despite being aware that off-road vehicles used the property, the contractor was not instructed to post warning signs or barriers in the area. At the time this accident occurred, the contractor's activities had left an opening in the railbed that was 10 feet deep and dropped from the trail at an angle of approximately 80 degrees. Plaintiff was injured while traveling on the railbed when he drove his motorbike into the excavation.

Plaintiff argued that the defendants were not entitled to the protection afforded by the statute because the property was not suitable for motorbiking after the intervening excavating activity had altered the property. The defendants maintained that the statute applied because the property was suitable for motorbiking as measured by its general characteristics, not by the presence of a dangerous condition that made the property unsuitable at some specific time. The issue addressed by the Court was whether the inquiry into the suitability of the property should focus exclusively on the condition of the land at the time when plaintiff's accident occurred. The Court reasoned that since the statute explicitly removes any obligation on the landowner to keep the premises safe or to give warning of any hazardous condition, suitability must be judged by viewing the property as it generally exists, not portions of it at some given time. Any test that required the owner to inspect the land, to correct temporary conditions or locate and warn of isolated hazards as they exist on a specific day, would vitiate the statute by reimposing on the owner the common-law duty of care to inspect and correct hazards on the land.

Recently the Fourth Department addressed the subject in *Cummings v. Manville*, 153 A.D.3d 58 (4th Dep't 2017). Plaintiff was injured when he struck a pothole and crashed while riding a four-wheel all-terrain vehicle on a gravel road located on property owned by the defendant. The issue addressed by the Court was whether the property was conducive to this recreational activity. The road where the accident occurred was the sole means of access to three homes. While located in a rural area, the two-lane private road was used for residential purposes, including at times for school bus access. The Fourth Department found that the physical characteristics of the road were residential, as opposed to recreational in nature, and thus the defendant could not rely on the General Obligations Law § 9–103 defense.

"As you can see, while well intentioned, there are many pitfalls to a GOL § 9-103 defense."

One of the exceptions to the statute insulating landowners is if consideration has been paid to the landowner by the user. What constitutes consideration? In *Ferland v. GMO Renewable Resources LLC*, 105 A.D.3d 1158 (3rd Dep't 2013), plaintiff brought an action on behalf of her husband, who died when his snowmobile struck a tractor-trailer carrying a load of logs on a private logging road. The road was also used by defendant Fund 6 Domestic LLC and other entities for logging and by the St. Lawrence County Snowmobile Association, Inc. (SLCSA) and two snowmobile clubs as a snowmobile trail, which the three groups maintained.

Plaintiff, amongst other things, appealed the ruling that the defendant Fund 6, the SLCSA and the clubs were entitled to immunity under GOL § 9-103, arguing they accepted consideration. For our purposes, the Court found that the SLCSA's user agreement, which required the landowner to be named as an additional insured on the SLCSA's trail insurance policy, was not consideration

"Even if a court determines that the 'Recreational Use Statute' is not a proper defense in a particular instance, general negligence principles still apply to the case, meaning that plaintiff will still need to prove that defendant was negligent and the negligence was a proximate cause of the alleged injury."

which destroyed the immunity for the club or landowner. The Third Department noted that to treat this as consideration would otherwise eliminate the statutory immunity for those who permitted use of their property and obstruct the very point of the statute.

In *Powderly v. Colgate University*, 248 A.D.2d 365 (2d Dep't 1998), the plaintiff, a student at Colgate, was injured sledding down a hill on school property. The court found that with sledding one of the recreational activities provided for under GOL § 9-103, and with the hill suitable for sledding, plaintiff had to prove one of the exceptions to the statute applied to overcome summary judgment. The plaintiff's arguments that payment of his "student activity fee" and/or tuition to the university was "consideration" under GOL § 9-103 for purposes of establishing an exception to the insulating statute was rejected.

As you can see, while well intentioned, there are many pitfalls to a GOL § 9-103 defense. Courts weigh the intent of the statute to encourage recreational use of private property versus the actual use of the property so as not to expand the scope of this defense to non-recreational uses.

Even if a court determines that the "Recreational Use Statute" is not a proper defense in a particular instance, general negligence principles still apply to the case, meaning that plaintiff will still need to prove that defendant was negligent and the negligence was a proximate cause of the alleged injury. New York's primary assumption of risk doctrine may also apply in these types of cases, which provides a defendant with a full defense and holds that a voluntary and/or willing participant in a sporting activity is presumed to have assumed the risks inherent in that activity. See, e.g., *Turcotte v. Fell*, 68 N.Y.2d 432 (1986); *Maddox v. City of New York*, 66 N.Y.2d 270 (1985).

Happy trails!

Endnotes

1. Okay, we admit we had to look up what "Organized Gleaning" consisted of and how one practiced it.
2. The Court in *Morles v. Coram Materials Corp.*, 51 A.D.3d 86 (2d Dep't 2008) stated: "The overall purpose of GOL § 9-103 recognizes the value and importance to New Yorkers of pursuing recreational activities, so that a statute immunizing landowners from liability arising from recreational activities will result in more properties being made available for such uses."
3. Around our Lake Placid office, for instance, an organization called the Barkeater Trails Alliance (BETA), a registered 501(c)(3) entity, regularly utilizes and references this statute to help it expand mountain bike and ski trails onto private property of willing land owners.

Facebook Is Open to Discovery

By David A. Glazer and Melissa Persaud

To say there has been a proliferation of social media use in this country over the last decade would be a serious understatement. The percentage of Americans with a social media profile has jumped from 24 percent in 2008 to 81 percent in 2017.[1] A recent ReportLinker survey shows that out of the 46 percent of Americans who check their smartphones as soon as they wake up, 30 percent of the respondents say they immediately check their social media apps.[2] Facebook, being the world's most popular social network, has an American audience of over 214 million.[3] As social media becomes increasingly popular and integral to the way people communicate, courts across the country have had to grapple with finding the balance between the admissibility of evidence from an individual's social media accounts and that individual's right to privacy.

Until recently, New York courts have struggled to articulate a consistent standard for the discoverability of contents within social media profiles. However, on February 13, 2018, the Court of Appeals in *Forman v. Henkin* announced that the scope of social media discovery is governed by New York's "well-established rules."[4] New York's highest court noted that "disclosure in civil actions is generally governed by CPLR 3101(a), which directs: 'full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof.'"[5] This general principle of discovery, the court stated, is equally applicable to the context of social media materials.[6] In ruling this way, the court upheld New York's liberal discovery standard and squashed any debate that judges have the authority to apply a heightened standard for production of social media content.[7]

This ruling is long overdue as lower courts have narrowly interpreted CPLR 3101(a) as it applies to social media profiles, specifically the private portions of those accounts. This has led some courts to condition the discoverability of the private portion on "whether the party seeking disclosure demonstrated there was material in the 'public' portion that tended to contradict the injured party's allegations in some respect."[8]

For instance, courts in personal injury actions such as *Fawcett v. Altieri* and *Tapp v. New York State Urban Dev. Corp.* outlined this exact standard for the discoverability of social media profiles.[9] There the courts attempted to strike a balance between the liberal interpretation of the words "material and necessary" under CPLR 3101(a) disclosures and a party's right to be free of unreasonable or burdensome discovery requests.[10] These courts reasoned that though a party cannot use the privacy settings of Facebook to shield materials from discovery, the party seeking those materials still bears the burden of proving that the private content is relevant to the litigation.[11] Following this reasoning, the courts concluded that the party seeking to compel discovery of private social media content must show "with some credible facts that the adversary subscriber has posted [public] information or photographs that are relevant to the facts of the case at hand."[12] If the demanding party can demonstrate that this public information "contradicts or conflicts with plaintiff's alleged restrictions, disabilities, and losses, and other claims," only then it may be justified for the court to compel disclosure of private portions of the user's profile.[13]

It was this standard that the Appellate Division in the *Forman* case articulated in order to modify the trial court's broad grant of defendant's motion to compel.[14] In the underlying action, plaintiff alleged that she suffered serious and permanent injuries when she fell from a horse owned by defendant.[15] She claimed that before the accident, she posted "a lot" of photographs to her Facebook account that showcased her active lifestyle.[16] Six months after the accident, however, she testified that she was forced to deactivate her account.[17] She became a recluse and found it difficult to compose coherent messages, both of which she blamed on the accident and her related injuries.[18] In hopes of discrediting her story, defendant requested unlimited access to plaintiff's Facebook account, arguing that under CPLR 3101(a) he was entitled to all photographs and postings that would be "material and necessary" to his defense.[19] The trial court granted his motion to compel production of private pre-accident photos that plaintiff intended to introduce at trial, all private post-accident photos that did not include nudity or romantic relations, and Facebook records that indicated when plaintiff posted private messages after the accident and the number of characters of those messages.[20] Only plaintiff appealed the decision.[21]

Turning to *Tapp* for precedent, the Appellate Division stated that "vague and generalized assertions that information in the plaintiff's social media sites might contradict the plaintiff's claims were not a proper basis for disclosure" and amounted to nothing more than a "fishing expedition."[22] Defendant, instead, needed to "establish a factual predicate" that materials from a party's private social media account "would result in disclosure of relevant evidence or would be reasonably calculated to lead to discovery of information bearing on the claim."[23] In its decision to only allow disclosure of photos that plaintiff intended to introduce at trial, the Appellate Division maintained that it was not upholding a heightened standard for social media-related discovery; the court insisted that

This article originally appeared in the Spring 2018 *Torts, Insurance & Compensation Law Section Journal*, a publication of the Torts, Insurance & Compensation Law Section of the New York State Bar Association.

"[t]he discovery standard [it] applied in the social media context is the same as in all other situations."[24]

Neither the dissent nor the Court of Appeals was convinced that the Appellate Division was using the established threshold for social media discovery.[25] In reversing the Appellate Division's holding, the Court of Appeals recognized that if the party seeking disclosure is forced to rely on the public portion of the user's account in order to establish a factual predicate for the disclosure of the private portion, then the account holder would be permitted to "unilaterally obstruct disclosure merely by manipulating 'privacy' settings or curating the materials on the public portion."[26] Rejecting the notion that the scope of discovery depends on the "privacy" setting of an account, the court reiterated the fact that the purpose of discovery is indeed to discover whether material may be relevant to a claim or defense.[27] For example, medical records enjoy a high level of privacy but may still be subject to discovery if a mental or physical condition is at issue.[28]

The Court, nevertheless, acknowledged that litigants should be protected from unnecessary and burdensome discovery requests.[29] In other words, despite the liberal standard established in New York, the party seeking disclosure does not have unlimited access to a person's social media accounts.[30] Instead the court must first determine "whether relevant material is *likely* to be found on the Facebook account."[31] If so, then the court must tailor the discovery order, bearing in mind the privacy concerns of the account holder, in order to avoid disclosing non-relevant materials.[32] In the case at hand, the court suggested temporal limitations on disclosures and exemptions for "sensitive or embarrassing materials" to protect the privacy of plaintiff.[33] In its conclusion, the court determined that the defendant "more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence."[34] The plaintiff asserted in her deposition that her lifestyle, including her use of Facebook, changed significantly after the accident.[35] Therefore, disclosure of her pre- and post-accident Facebook activity would be germane not only for the defendant's defense, but also to corroborate plaintiff's own credibility.

With the explosion of social media usage, most people recognize that any information posted to the internet, even information in private portions of their accounts, may not remain private. The question becomes how much of this private information should be discoverable to attorneys and the court? Although the Appellate Division was merely following precedent regarding social media discovery, it failed to recognize that the heightened standard they articulated has no basis in traditional paper discovery.[36]

Nowhere in the rules governing traditional discovery does it require a requesting party to first find publicaly available information that is relevant to the case before gaining access to a broader scope of discovery.[37] True, it is important to prevent discovery from becoming a "fishing expedition," but as the Court of Appeals stated, it is possible to tailor discovery even in the context of social media in order to find a harmonious balance between liberal disclosure and the user's right to privacy.[38] With these guidelines now in place, the lower courts now can tailor discovery of social media requests appropriately.

Endnotes

1. *Percentage of U.S. population with a social media profile from 2008 to 2017*, Statista, https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile/ (last visited Apr. 2, 2018).
2. *For Most Smartphone Users, It's a 'Round-the-Clock' Connection*, ReportLinker (Jan. 26, 2017), https://www.reportlinker.com/insight/smartphone-connection.html.
3. *Number of Facebook users by age in the U.S as of January 2018 (in millions)*, Statista, https://www.statista.com/statistics/398136/us-facebook-user-age-groups/ (last visited Apr. 2, 2018).
4. See *Forman v. Henkin*, 30 N.Y.3d 656, 665, 70 N.Y.S.3d 157 (2018).
5. *Id.* at 661 (quoting N.Y. C.P.L.R. 3101(a) (McKinney 2014)).
6. *Id.* at 662.
7. *Id.* at 665.
8. *Id.* at 663.
9. *See Fawcett v. Altieri*, 38 Misc. 3d 1022, 960 N.Y.S.2d 592 (Sup. Ct. 2013); *see also Tapp v. New York State Urban Dev. Corp.*, 102 A.D.3d 620, 958 N.Y.S.2d 392 (2013).
10. *Fawcett*, 38 Misc. 3d at 1024.
11. *Id.* at 1026-27.
12. *Id.* at 1027-28.
13. *Tapp*, 102 A.D.3d at 620.
14. *See Forman v. Henkin*, 134 A.D.3d 529, 531, 22 N.Y.S.3d 178, 180 (N.Y. App. Div. 2015), *rev'd*, 30 N.Y.3d 656, 70 N.Y.S.3d 157 (2018) (allowing defendant's request for photos plaintiff intended to introduce at trial, but denying request for post-accident messages).
15. *Forman*, 30 N.Y.3d at 659.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *See Forman v. Henkin*, 2014 WL 1162201 (N.Y.Sup.).
21. *Forman*, 134 A.D.3d at 530.
22. *Id.* at 530-31.
23. *Id.* at 531.
24. *Id.* at 532.
25. *See Forman*, 134 A.D.3d at 539 (Saxe, J., dissenting); *see also Forman*, 30 N.Y.3d at 665.
26. *Forman*, 30 N.Y.3d at 664.
27. *Id.*
28. *Id.* at 666.
29. *Id.* at 664-65.
30. *Id.*
31. *Id.* at 665 (emphasis added).
32. *Id.*
33. *Id.*
34. *Id.* at 666.
35. *Id.* at 666-67.
36. *Forman*, 134 A.D.3d at 542 (Saxe, J., dissenting).
37. *Id.*
38. *Forman*, 30 N.Y.3d at 665.

New York State Bar Association Committee on Professional Ethics

Opinion 1149 (4/10/2018)

Topic: Conflicts of interest: Agency shop lawyer who represents the government against union members

Digest: A lawyer who is an agency shop member of a union may represent a government employer agency in disciplinary matters against union-represented employees, unless, in a particular circumstance, a reasonable lawyer would conclude that a significant risk exists that the lawyer's professional judgment on behalf of the government employer might be adversely affected by the lawyer's agency shop membership. If in a particular matter, a lawyer concludes that a conflict may exist, then the lawyer may undertake the representation if the lawyer reasonably believes that the lawyer can provide competent and diligent representation and the government agency gives its informed consent, confirmed in writing.

Rules: 1.0(q), 1.7(a) & (b).

FACTS

1. The inquiring lawyer is admitted to practice in New York and an employee of the State. The inquirer at times represents an agency of New York State in disciplinary proceedings initiated against union-represented employees. The inquirer was once a member of the particular union, but subsequently resigned membership, after which the lawyer became an agency shop member. As an agency shop member, the inquirer is required to pay union dues, but is excluded from membership benefits of the union and is unable to participate in union elections.

QUESTIONS

2. Does a lawyer who is employed by a state government agency and pays union dues as an agency shop member, but is not a union member, have a conflict in representing the government agency in disciplinary cases against members of the union and, if a conflict exists, may the conflict be waived?

OPINION

3. Rule 1.7(a) of the New York Rules of Professional Conduct (the "Rules") says in relevant part that, "[e]xcept as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude" that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." See Rule 1.7, Cmt. [10] (a lawyer's own "financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client."). Rule 1.0(q) defines "reasonable lawyer" to be "a lawyer acting from the perspective of a reasonable prudent and competent lawyer who is personally disinterested in commencing or continuing the representation."

4. In N.Y. State 578 (1986), we concluded that, under the New York State Code of Professional Responsibility (the "Code"), the predecessor of the Rules, a lawyer who was a member of a union and subject to the same collective bargaining agreement as an employee involved in a disciplinary proceeding had a conflict in undertaking the representation of the employer in that proceeding. We added, however, that, "if the lawyer is simply an agency shop member, or if the collective bargaining agreement involved is not one to which the lawyer is subject, these concerns are not present to the same degree. Therefore, such a lawyer is not specifically prohibited from representing the State in a disciplinary proceeding brought under a collective bargaining agreement, except where the lawyer finds that he or she is unable to exercise independent professional judgment." Otherwise put, when a lawyer is not a union member, the disabling interests that might trigger Rule 1.7(a)(2) do not exist to the same extent that union membership entails Although we later modified N.Y. State 578 on other grounds (on which more below), we remain of the view that an agency shop member is in a different position than a union member for the purpose of conflicts analysis.

5. More recent opinions under the Rules presented questions in analogous situations in which we adopted similar themes. For instance, in N.Y. State 1119 ¶ 6 (2017), we considered whether a onetime associate district attorney could ethically represent defendants in prosecutions brought by the lawyer's former superior. To us, the issue rested on whether a reasonable lawyer would conclude that the inquirer's prior personal relationship with the district attorney created a "significant risk" that the lawyer's prior relationship with district attorney would adversely affect the independent professional judgment of the inquirer in pursuing a defense. Similarly, in N.Y. State 1122 ¶ 8 (2017), when considering whether a foster parent could maintain a practice as an Attorney for Children in Family Court proceedings, we said the conflict posed by an inquirer's status as a foster parent might well be "theoretical and remote," and that, were there "no 'significant risk' of an adverse effect [on the lawyer's professional judgment], objectively determined, an attorney who is a foster parent may undertake and continue representation of" parties in a Family Court proceeding without the need to obtain informed client consent." *See generally* N.Y. State 968 ¶ 17 (2013) (discussing personal considerations giving

rise to a "significant risk" that the professional judgment of a government lawyer defending claims of colleagues subject to a government furlough would be adversely affected where the furlough program was also applicable to the inquiring lawyer).

6. Accordingly, each time the lawyer is asked to represent the agency in disciplinary actions against employees represented by the union, the lawyer must determine whether a reasonable lawyer would conclude that the lawyer's former union membership and/or current agency shop member status creates a significant risk that his representation of the State against union members would adversely affect the inquirer's independent professional judgment on behalf of the client (the government agency). On the facts presented to us, we do not believe that a reasonable lawyer would conclude that there is such a significant risk.

7. If in a particular situation, the inquirer reasonably believes that there is a significant risk that the lawyer's professional judgment would be adversely affected, then a curing mechanism appears in Rule 1.7(b), the exception to which Rule 1.7(a) refers. Rule 1.7(b) says that, notwithstanding a conflict under Rule 1.7(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.

8. In N.Y. State 578, we stuck to the position, first set out in pre-Code N.Y. State 40 (1966), that a government could not give informed consent to a conflict. We abandoned that position in N.Y. State 629 (1992)—hence the foregoing reference to modification of N.Y. State 578—and have since consistently said that a government may provide informed consent. *See* N.Y. State 1130 ¶ 15 (2017); N.Y. State 968 ¶ 22; N.Y. State 770 (2003). Thus, if the inquirer were to conclude that a conflict exists, the conflict is subject to waiver by the State.

CONCLUSION

9. An agency shop member of a union of State employees union may represent a State agency in disciplinary matters against union-represented employees if the lawyer reasonably believes that no significant risk exists that the lawyer's professional judgment on behalf of the State agency will be adversely affected by the lawyer's personal interests. If in a particular circumstance a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf of the government employer might be adversely affected by the lawyer's agency-shop membership, then the lawyer may undertake the representation if the lawyer reasonably concludes that the lawyer can provide competent and diligent representation and the agency gives its informed consent, confirmed in writing.

(39-17)

Opinion 1150 (4/30/2018)

Topic: Solicitations and Referrals: Spouses in Related Businesses

Digest: A lawyer's spouse engaged in a non-legal business related to the lawyer's practice area may for ethics purposes be equated to the lawyer in certain circumstances. Thus, a real estate lawyer whose spouse is a real estate broker may receive referrals from the broker/spouse only if the broker/spouse is not involved in the real estate transaction and the broker/spouse fully complies with the rules governing lawyer solicitations. A real estate lawyer may refer clients to a broker spouse only if the lawyer is not involved in the real estate transaction and may be required, in some instances, to obtain informed consent from the referred client, confirmed in writing.

Rules: 1.7(a)(2); 1.7(b), 1.8(e), 1.8(i), 7.3(a)(1); 7.3(b), 8.4(a).

FACTS

1. The inquirer is a transactional real estate attorney whose spouse is a real estate broker. The couple wishes to refer matters to each other. In some circumstances, the inquirer would refer clients to the spouse as a broker; in others, the broker/spouse would recommend the inquirer to represent a party in the closing of a real estate transaction. The inquirer understands that the inquirer and broker/spouse may not participate in their respective roles in the same real estate transaction.

QUESTIONS

2. The inquirer poses three questions:

(a) May a real estate attorney accept referrals from a broker/spouse who has no personal involvement in the real estate transaction?

(b) May a real estate attorney refer business to a broker/spouse if the attorney does not represent any party in the real estate transaction?

(c) May a real estate attorney representing a client in the sale of property refer the selling client to the broker/spouse in connection with the client's rental of an apartment in which the real estate attorney does not represent the selling client?

OPINION

3. The inquirer recognizes that a lawyer may not represent a party to a real estate transaction if the attorney's spouse is involved in the transaction. This is consistent with a view we have long held. *See* N.Y. State 493 (1978); N.Y. State 340 (1974); N.Y. State 244 (1972), *modified on other grounds* in N.Y. State 340. Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules") provides that a lawyer may not represent a client if a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." The reach of a "lawyer's own financial, business, property or other personal interests" extends to the "financial, business, property or other personal interests" of the lawyer's spouse.

4. Such is the teaching of N.Y. State 855 (2011). There, the issue was whether a personal injury lawyer could permissibly refer a client to a litigation financing company in which the lawyer's spouse owned a controlling financial interest. We concluded that a lawyer could not ethically do so. We reasoned that a lawyer is not allowed (with exceptions inapplicable there) to subsidize a client's litigation, Rule 1.8(e), nor permitted to acquire a proprietary interest in a litigation, Rule 1.8(i). *Id*. ¶¶ 4-7. Thus, we said, under the Rules, the lawyer could not personally own an interest in the litigation financing company to which the lawyer referred clients for funding. *Id*. ¶ 5; *see* N.Y. State 1145 ¶¶ 13-20 (2018) (a lawyer may not refer clients to a litigation funding firm in which the lawyer is a direct and substantial investor). The unifying interest that marriage entails persuaded us that, if the lawyer could not directly violate Rules 1.8(e) and 1.8(i), then the lawyer could do not so indirectly with a an entity owned by a spouse. Accordingly, in interpreting Rule 1.7(a)(2), we consider any referral relationship between a lawyer and a lawyer's spouse to implicate the lawyer's own "financial, business, property or other personal interests." *See* N.Y. State 855 ¶¶ 11-12.

5. N.Y. State 855 relied, as we do here, on Rule 8.4(a), which forbids a lawyer "to violate or attempt to violate" a Rule "through the acts of another." N.Y. State 855 ¶ 12. Rule 8.4(a) is of particular importance on the subject of the inquirer's first question—the proposed broker/spouse's referral of parties to the inquiring lawyer.

6. Rule 7.3 regulates solicitation and recommendation of professional employment. Rule 7.3(b) defines "solicitation" to mean, in part, "any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients," the "primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain." Rule 7.3(a)(1) specifically forbids a solicitation "by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client." In any outreach by the broker/spouse initiated by or on behalf of the lawyer/spouse, the broker/spouse recommending the inquirer as a lawyer in a real estate transaction stands in the shoes of the inquirer as if the inquirer were personally making the outreach. Thus, for instance, the exception for persons who may be contacted in person or in real time—such as former or existing clients—refers to the inquirer's former or existing clients, not those of the broker/spouse. Likewise, Rule 7.3 sets forth other provisions on solicitations—such as recordkeeping and filing—for which the lawyer/spouse must assure compliance. By reason of Rules 1.7(a) and 8.4(a), these regulations apply to the actions of the broker/spouse as if done by the lawyer/spouse.

Rule 7.3(a)(1) specifically forbids a solicitation "by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client."

7. Whether a particular advertisement is a regulated solicitation "initiated by or on behalf of a lawyer" turns on the facts and circumstances of the communication. Rule 7.3(b) "makes an important distinction between communications initiated by the lawyer and those initiated by a potential client." N.Y. State 1049 ¶ 8 (2015); *see* Rule 7.3, Cmt. [2] ("A 'solicitation' means any advertisement" that is "initiated by a lawyer or law firm (as opposed to a communication made in response to any inquiry initiated by a potential client)"). A spectrum exists, on one end, between an unprompted question by a person on whether the broker/spouse knows any real estate lawyers, and, on the other, the broker/spouse's unprompted recommendation of the lawyer/spouse as a lawyer to handle a real estate transaction. *See* N.Y. State 1049 ¶ 17 (a web posting "directed to, or intended to be of interest only to, individuals" referring to a particular incident "would constitute a solicitation under the Rules"); N.Y. State 1014 ¶¶ 8, 10 (2014) (a current client's recommendation of a lawyer to a person in need of legal services, made without the lawyer's participation or knowledge, is not a solicitation "initiated by or on behalf of the lawyer").

8. The inquirer's second and third questions are really the same: May a lawyer refer a client to the lawyer's broker/spouse to act in a real estate transaction in which the lawyer is not representing the referred client? The Rules set forth no categorical ban on the lawyer making such a referral. Nevertheless, the lawyer owes ongoing duties of

care and loyalty to an existing client, including the duty to exercise independent professional judgment on the client's behalf. Not every client request for a referral, no matter how unrelated to the subject of the lawyer's representation of the client, invariably occasions these duties of care and loyalty. Rather, in our view, whether a lawyer's referral of an existing client to a non-lawyer service provider implicates these duties depends on the circumstances. If, for example, a meaningful relationship is present between the subject matter of the lawyer's representation of the client in a particular matter and the nature of the referral the client seeks, then we believe that the client has a reasonable right to expect that, in making the referral, the lawyer will exercise independent professional judgment on the client's behalf. It follows that the duty to exercise independent professional judgment requires an assessment whether any conflict of interest may burden that judgment.

9. In the current inquiry, we believe that the client could reasonably believe that the subject matter of the lawyer's representation of the client and the client's referral request are not so attenuated as to release the lawyer from the duties of care and loyalty to the client. In our view, a reasonable lawyer could well conclude that referring a client to a broker/spouse creates a significant risk that the lawyer's own "financial, business, property or other personal interests" will adversely affect the exercise of professional judgment in making the referral. We believe, however, that this conflict is subject to waiver by the referred client upon informed consent, confirmed in writing, pursuant to Rule 1.7(b). The requirement of consent is not onerous. The lawyer needs to disclose, at a minimum, the marital relationship with the broker/spouse, and the possibility that, if retained, any commission the broker/spouse earns in the matter could benefit the referring lawyer. This disclosure may be oral. The requirement that consent be "confirmed in writing" —which may be written by either the lawyer or the client, by email or other form of written communication—need acknowledge only that, pursuant to the requisite disclosures, the client agrees to waive any conflict.

CONCLUSION

10. A lawyer who is engaged in a transactional real estate practice and whose spouse is a real estate broker may receive client referrals from the lawyer's spouse provided that the broker/spouse is not involved in the real estate transaction and the lawyer assures that the broker/spouse fully complies with rules governing solicitation by lawyers. A real estate lawyer may refer a client to a broker/spouse provided that the lawyer does not represent the client in the real estate transaction and, if the circumstances suggest a conflict, the lawyer obtains the informed consent of the referred client, confirmed in writing.

(40-17)

Opinion 1151 (5/1/2018)

Topic: Restrictive Covenants on Lawyers

Digest: A lawyer may not enter into an agreement with an employer restricting the lawyer's right to practice law following termination of employment, even when the employment does not involve the practice of law, but a lawyer may agree to a post-employment restriction expressly made subject to applicable ethical rules.

Rules: 5.6(a)

FACTS

1. The inquirer, admitted to practice law in New York, is currently employed by an organization that does not render legal services. As an employee, the inquirer does not practice law, does not render legal advice to the organization or any of its constituents, and does not hold herself out as an attorney.

2. The organization's standard procedure is to ask its employees to sign an agreement with various provisions which the organization considers protective of its business interests. The contract, in nine single-spaced pages, deals with many matters, including, among other things, confidential information (meaning data the organization regards as proprietary as defined in the contract); ownership of intellectual property; business conflicts; and interactions with the organization's customers and contractors. Of particular relevance here is a provision—headed "Agreement Not to Solicit" —which says, in part, that an employee signatory "may not, directly or indirectly," communicate with or provide services to any current or prospective customer of the organization "relating in any way" to "any services related to the business" of the organization. The contract provides that this prohibition applies during the signatory's employment and for 18 months following the end of employment.

3. The inquirer wishes to retain the option, at such time as her current employment ends, to engage in the practice of law. She is concerned that the post-employment 18-month tail on the "Agreement Not to Solicit" is so broad as to permit an interpretation imposing a restrictive covenant on her right to practice. In view of this concern, her employer offered to include a proviso that the clause is enforceable only "to the extent not inconsistent" with applicable ethical rules.

QUESTIONS

4. May a lawyer enter into an agreement with an employer stipulating that, during the course of employment and for a stated period thereafter, the lawyer may not provide any services relating to the business of the employer when the employer is not engaged in, and the lawyer's employment does not involve, the rendition of legal services?

OPINION

5. Rule 5.6(a)(1) of the New York Rules of Professional Conduct (the "Rules") says that a "lawyer shall not participate in offering or making" any "partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of the lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement." "The main purposes of Rule 5.6(a)(1) are to protect the ability of clients to choose their counsel freely and to protect the ability of counsel to choose their clients freely." N.Y. State 858 ¶ 7 (2011); *see* Rule 5.6, Cmt. [1] ("An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer."). Agreements prohibited by Rule 5.6(a)(1) limit the pool of available attorneys, a client's choice of legal counsel, and a lawyer's autonomy in accepting new engagements.

6. Rule 5.6(a)(1) applies no matter whether the employment agreement engages the lawyer to practice law. We have not previously had a chance to address this precise issue. Our prior opinions on Rule 5.6(a)(1) —including those issued under its substantially identical predecessor, DR 2-108 of the New York Code of Professional Responsibility (the "Code")—as well as the New York case law applying the ban on restrictive covenants, involve law partnership agreements, or agreements between practicing lawyers and their clients. *See, e.g.*, N.Y. State 858 (confidentiality clauses in agreements with members of an in-house legal department may not extend so beyond a lawyer's duty to maintain confidential information as to restrict a lawyer's post-employment right to practice law); *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989) (striking down non-compete restrictions in a law partnership agreement). Nevertheless, the unambiguous language of Rule 5.6(a)(1), and the purposes it promotes, supply no basis to distinguish between a contract with a non-client employer (or any other party) restricting a lawyer's right to practice law after the relationship is ended. In each circumstance, the lawyer would be making or participating in the making of an agreement that, by restraining the lawyer's ability to practice law, constricts the freedom of the client to choose a lawyer and the lawyer to accept an engagement.

7. Hence, if the language set forth in the "Agreement Not to Solicit" clause "restricts the right of the lawyer to practice law after termination of" the inquirer's employment, then Rule 5.6(a)(1) forbids the lawyer to agree to that language. Whether contractual language amounts to such a restriction—a separate issue—is a fact-intensive inquiry that customary canons of contract construction control. Although arguments may exist that the employment agreement at issue here is not intended to restrict the inquirer's post-employment right to practice law, the inquirer believes, and we think reasonably so, that the sweeping language of the "Agreement Not To Solicit" clause is sufficiently broad to restrain the lawyer from engaging in the practice of law following termination of her employment. Accordingly, in these circumstances, we conclude that the inquirer may not enter into the employment contract as currently written.

8. Here, though, the inquirer has another option, which is to accept the employer's offer to include language in the agreement to the effect that the "Agreement Not to Solicit" clause is enforceable, and may be invoked, only to the extent that the language is consistent with Rule 5.6(a)(1) or other applicable Rule. This added language, in our view, would remove any doubt about whether the clause impermissibly impinges on the lawyer's right to practice law following the end of employment.

CONCLUSION

9. A lawyer may not enter into an employment agreement that restricts the lawyer's right to practice law following termination of employment, even when the employment itself does not involve the practice of law, but a lawyer my agree to a post-employment restriction that is expressly made subject to applicable ethical rules.

(3-18)

Opinion 1152 (5/17/2018)

Topic: Law Firm Name: Use of Lawyer's First Name as Firm Name

Digest: A lawyer may not use only a first name as the sole name of the lawyer's firm.

Rules: 7.1, 7.5(b), 8.4(c).

FACTS

1. The inquirer is a New York lawyer who practices in both New York and other jurisdictions. The inquirer's surname, we are told, is shared by a number of other firms in New York and other places where the inquirer practices. To distinguish the inquirer's firm from these other firms, the inquirer proposes to use only the inquirer's first name—say, John or Jane—as the sole name of the firm, as in John's Law Offices LLC or The Jane Law Firm LLC. The inquirer asserts that this nomenclature would not only serve to differentiate the firm from others bearing the inquirer's surname but also effect efficiencies—such as how the staff answers telephone calls—with existing or prospective clients. The inquirer assures us that the inquirer's first name is the first name by which the inquirer is admitted to practice in New York.

QUESTION

2. May lawyer use only the lawyer's first name as the name of the lawyer's firm?

OPINION

3. The answer is no—that lawyer may not use solely the lawyer's first name as the name of a law firm under the New York Rules of Professional Conduct (the "Rules").

4. Rule 7.5(b) provides, in pertinent part, that a "lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm." "The prohibition against trade names is broad, permitting use of little beyond the names of lawyers presently or previously associated with the firm." N.Y. State 869 (2011) (lawyer may not use practice area in the name of the law firm). This Rule "serves to protect the public from being deceived about the identity, responsibility or status of the individuals using the name." N.Y. State 920 ¶ 3 (2012); *accord*, N.Y. State 732 (2000) (applying prohibition on trade names in DR 2-102(B) of the New York Code of Professional Responsibility (the "Code"), the predecessor of the Rules). "Using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a 'trade name' within the meaning of the predecessor to Rule 7.5(b)." N.Y. State 740 (2001) (applying the Code). "This broad prohibition has been applied to disallow firm names adding even limited terms to the names of the lawyers in the firm." N.Y. State 869.

5. We recognize that here, the inquirer proposes to use the inquirer's real first name to identify the inquirer's firm. We have not previously had occasion to address this precise issue, nor can we find any other authority that has done so. Nevertheless, although the term "trade name" is not defined by the Rules, we have written numerous opinions that provide useful guidance in interpreting the meaning of that term. N.Y. State 948 ¶ 3 (2012) (so noting). In N.Y. State 948, for example, we concluded that a "law firm name may not include a variant on the lawyer's name that is created by conjoining the lawyer's initials with an abbreviation of the lawyer's surname." *Id*. ¶ 7. In N.Y. State 920 ¶ 5, we opined that a lawyer may not use a firm name comprised only of the lawyer's initials. In N.Y. State 861 ¶ 4 (2011), we considered the inclusion in a firm name of initials signifying the firm's practice area to constitute an impermissible trade name. In N.Y. State 740, decided under the identical language in the Code, we said that a lawyer may not insert an arbitrary letter in the firm name unconnected to the names of lawyers who practiced there. Most recently, in N.Y. State 1138 ¶ 7 (2017), we regarded the English translation of the inquirer's actual surname "more than a slight deviation from the inquirer's actual surname" and hence impermissible. *See* N.Y. County 677 (1990) (firm name may not include first name of one partner and contraction of surname of another partner, as such a name would violate requirement that lawyers practice only under names of lawyers in the firm).

6. Common to all these opinions—and to all the opinions we can locate on the meaning of "trade name" —is the presumption that, in requiring the use of only a lawyer's name in the name of a law firm, the Rules intend to refer to the lawyer's (or lawyers') surname(s). In our view, Rule 7.5(b) embeds an understanding that a law firm's name consists of surnames of lawyers who either practice there or once did. We are unaware of any authority or precedent that breaks from this pattern, and it cannot be denied that, at the time the Rules and their predecessors were adopted, the universal practice in this State was to confine the names of law firms to the surnames of its current or former lawyers. We cannot ignore this context in interpreting the meaning of "trade name." Rather, customary usage teaches us that the public in general and the legal profession in particular expect that the name of a law firm reflects the surnames of lawyers currently or formerly associated with the law firm. *Cf*. N.Y. State 148 (1970) (under the pre-Code Canon of Ethics, relying on local custom to determine that a firm may continue use of deceased partners in a firm name); N.Y. State 70 (1968) (to the same effect); N.Y. State 45 (1967) (same); *see also* N.Y. State 622 n.3 (1991) (citing the foregoing to reach the same result under the Code).

7. To disrupt that expectation would, in our view, undermine Rule 7.5(b) and therefore be misleading because of the universal convention on the use of surnames in the names of law firms. *See* Rule 7.1(a); Rule 8.4(c). To us, any firm name that does not include the surname(s) of lawyer(s) who either practice at the firm—or, "if otherwise lawful," as Rule 7.5(b) says, "the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession" —is inherently misleading. This does not preclude the inclusion of the inquirer's first name in the name of the firm, provided the surname appears there as well. *See* N.Y. State 1003 ¶ 9 (2014) (if not misleading, a lawyer may "drop his first name to formulate a firm name that includes his middle initials and legal surname").

8. We note that our conclusion refers only to the name of the inquirer's law firm. Subject to the advertising regulations of Rule 7.1, nothing in the Rules prohibits the inquirer from using the inquirer's first name as a motto, a means of branding, or other advertising. Thus, the inquirer may use only the inquirer's first name in branding the inquirer's law firm on websites and other media to create a distinct identity, provided always that the inquirer complies with Rule 7.1 and any other Rule regulating a lawyer's communications with the public. Rule 7.5, Cmt. [2]; Rule 7.1, Cmt. [8] (permissible to heighten brand awareness); *see In re Von Wiegen*, 63 N.Y.2d 163, 176-77 (1984) (allowing lawyer to accompany firm name with the logo "The Country Lawyer"); N.Y. State 1017 ¶ 8 (2014) (use of the firm's initials in sponsoring a local sports team did not constitute an impermissible use of a trade name); N.Y. State 937 ¶ 3 (2012) (firm may use firm logo on promotional gifts). We likewise find no obligation in

the Rules that a law firm's staff must use the firm's full name in responding to telephone calls. N.Y. State 1017 ¶ 8 (allowing use of the firm's initials in answering telephone calls). There are, in short, various ways for the inquirer to establish a unique identity for the inquirer's law firm and to differentiate the law firm from others that may contain the same surname as the inquirer's. Our point here is that the use of a trade name, that is, one omitting the lawyer's surname, is neither consistent with Rule 7.5(b) nor long-standing expectations about law firm names.

CONCLUSION

9. A lawyer may not use only the lawyer's first name as the name of the lawyer's firm but may use a first name, together with the lawyer's surname, in the name of the firm. A lawyer may use only the lawyer's first name in promoting the lawyer's practice as a motto or branding element consistent with the rules governing lawyer advertising.

2-18

Opinion 1153 (5/24/2018)

Topic: Conflicts of Interest: County attorney's service on the board of a county-sponsored community college

Digest: Whether a county attorney may also serve on the board of a county-sponsored community college may raise legal issues that overtake ethical concerns. If such dual service is legally permissible, then a lawyer occupying these roles must assess, in each instance when the interests of the county and community college overlap, whether a reasonable lawyer would conclude that the two positions create a significant risk that the lawyer's duty to one will adversely affect the lawyer's duty to the other. If the lawyer determines that such a condition exists, then the lawyer must decide whether the conflict is subject to waiver and, if so, whether the affected client(s) may give informed consent, either for the lawyer or another lawyer in the county attorney's office. In all events, the lawyer must assure that the affected client(s) is or are aware of the potential risk to evidentiary privileges that the lawyer's dual roles occasion.

Rules: 1.0(f), (h), (j), (q) & (r); 1.6(a) & (b); 1.7(a) & (b); 1.10(a) & (d).

FACTS

1. A county legislature in New York appointed the inquiring lawyer, who is admitted in New York, as county attorney. In this particular county, the county attorney is a full-time position overseeing a staff of assistant county attorneys. Section 501 of the County Law provides that a county attorney "shall be the legal advisor to the board of supervisors [or legislature] and every officer whose compensation is paid from county funds in all matters involving an official act of a civil nature. The county attorney shall prosecute and defend all civil actions and proceedings brought by or against the county, the board of supervisors [or legislature] and any officer whose compensation is paid from county funds for any official act, except as otherwise provided by this chapter or other law." These duties engage the county attorney in representing the county, its officials, its agencies, and its personnel in litigated matters and administrative proceedings; preparing contracts between the county and others; drafting legislation; and generally acting as legal advisor to the county, its officers, its legislature, and its agencies. The county legislature sets the compensation of the county attorney.

2. The inquiring attorney also serves as a member of the board of trustees of the county-sponsored community college and currently chairs that board. Section 6306.1 of the Education Law says that a community college "shall be administered by a board of trustees" consisting, with exceptions not applicable here, of nine members serving seven-year terms, five of whom the legislature names, which may include one member of that body; and four of whom the governor names from among county residents. (A tenth member must be a student, elected by the student body for a one-year term.) Trustees receive no compensation for their service as such. Community college personnel are paid, at least in part, out of county funds.

3. Section 6306.2 of the Education Law directs the community college board to appoint a college president and to adopt curricula, in each case "subject to approval by the state university trustees." The board must also prepare an annual budget, which must be submitted to the local legislative body for adoption, and must discharge such other duties as may be appropriate under the "general supervision of the state university trustees." Section 6306.4 of the Education Law authorizes the community college board, among other things, to acquire by deed or lease any real or personal property to carry out the purposes of the college, subject to county legislative appropriation, and apply any proceeds to college purposes subject to the regulations of the state university trustees. Under the same section, title to personal property thus acquired vests in the board of trustees, while title to any real property vests in the sponsoring county. The county and the community college may be parties to other college-related contracts, either between each other or, together or separately, with third parties. The county legislature has the right to audit the community college's expenditures.

4. As the statutory arrangement evinces, the governance of a community college is triangular. Although a county (or, in less-populated areas, a group of counties) sponsors a community college, the county does so in coordination with and only upon approval of the state university system. Section 355 of the Education Law prescribes that the state university trustees shall provide standards and regulations for the organization and operation of com-

munity colleges, which the state university trustees have done (*see* 8 N.Y.C.R.R. §§ 600 *et seq*.). Sections 202 and 207 of the New York State Education Law repose ultimate authority over state and community college programs in the New York Board of Regents. By law, then, the county, the community college, and the state university system each plays a role in running the community college.

5. We are told that, in any litigation involving the community college, its board, or its staff, the county attorney's office represents the community college and its constituents, either through the office's own staff attorneys or by selecting outside counsel. The county attorney's office supplies other legal services to the community college as well.

6. The inquirer's appointment as county attorney post-dated the inquirer's appointment to the community college board and election as its chair. The inquirer wishes to know whether ethical issues arise from remaining on the community college's board of trustees while acting as county attorney.

QUESTIONS PRESENTED

7. Does a conflict of interest arise when an attorney simultaneously serves as a county attorney and as a member of the board of trustees of a county-sponsored community college and, if so, is the conflict subject to waiver by informed consent? What other considerations must a lawyer in these two roles take into account in discharging the lawyer's ethical obligations to each?

OPINION

Introduction

8. The jurisdiction of this Committee is limited to interpreting the New York Rules of Professional Conduct (the "Rules"). We do not opine on issues of law. The current inquiry potentially raises legal issues under, among others, the County Law, the Education Law, the Public Officers Law, the Rules and Regulations of the New York State University Trustees, the Governance Rules of the Board of Regents, the County Ethics Code, and any ethics regulations of the community college. We note, too, that the so-called "doctrine of incompatibility"—in brief summary, disallowing dual public offices when the holder of one government position has a right to interfere with or subject to audit and review the holder of another government position—is embedded not only in specific statutes, *see, e.g.*, N.Y. County Law § 411 (elected county officer may not serve in any other elected county or municipal office or as county supervisor); N.Y. General City Law § 3 (member of common council may not hold appointed city office), and but also more generally in the common law, *see, e.g., People ex rel. Ryan v. Green*, 58 N.Y. 295, 304-05 (1874) (state legislator could not serve as court clerk); *Dupras v. County of Clinton*, 213 A.D.2d 952, 953 (3d Dep't 1995) (county legislator could not serve as senior clerk on board of elections); *Held v. Hall*, 191 Misc.2d 427, 432 (Supreme Ct., Westchester Co. 2002) (county legislator could not serve as police chief); Informal Op. 1039, 1999 N.Y. AG 45 (1999) (under common law, Town Supervisor could not serve as Town Librarian). Questions concerning the effect of any of these or other legal issues on the proposed conduct is best directed to persons with the statutory authority to render advice on such matters, such as the Attorney General of New York or the New York Joint Commission on Public Ethics. If the inquirer's proposed action does not comply with an applicable law or regulation, then the question to this Committee is moot because applicable laws or regulations take precedence over the Rules. *See* Rule 1.7(b)(2) (disallowing a representation prohibited by law when a concurrent conflict of interest is present). Here, we address solely whether the inquirer's proposed action gives rise to a conflict of interest or other concerns under the Rules.

9. Considerable literature exists on the wisdom of lawyers serving simultaneously as counsel for a corporate entity and as a member of the entity's governing board. *See, e.g., Okray, Lawyers as Corporate Board Members: A Paradigm Shift*, Fed.Lwy. 12 (Mar 2013); Litov, Sepe & Whitehead, *Lawyers and Fools: Lawyer-Directors in Public Corporations*, (Feb. 25, 2013) (available at ssrn.com/abstract=2218855); Frievogel, *An Ethics Primer for Business Lawyers* 8-9 (June 2009) (available at apps.americanbar.org/buslaw/newsletter/0085/materials/ethics.pdf); C. Wolfram, Modern Legal Ethics 738-40 (1986). Although debate on the wisdom of such service is robust, nothing in the Rules, in the ABA Model Rules of Professional Conduct (the "Model Rules"), or, as best we can determine, in any state ethics rules, prohibits the practice. *See* Restatement (Third) of the Law Governing Lawyers §135, Cmts. d and e (Am. Law. Inst. 1998). Nevertheless, common to all analyses is an acknowledgement that conflicts and confidentiality issues in here in the occupation of two roles that implicate the lawyer/director's duties of care and loyalty to the organization.

10. In N.Y. State 589 (1988), we examined these issues under the predecessor of the Rules, the New York Code of Professional Responsibility (the "Code"). There, consistent with opinions from other jurisdictions we cited, this Committee said that no *per se* bar exists to concurrent service as a lawyer for an organization and service as a member of its board. We then identified three principal concerns, one of which—that a lawyer may not use board membership improperly to solicit matters for the lawyer's firm—is inapposite here in the context of a full-time government lawyer heading an office the purpose of which is to represent the organization. The other two concerns are applicable here, namely, the risk to the lawyer's exercise of independent professional judgment arising out of the lawyer's role as a director, a risk heightened, we said, when the lawyer serves as board chair; and the risk of loss of evidentiary privileges, in particular the attorney-client

privilege. *See* ABA 98-410 (1998) (stating similar concerns under the Model Rules).

Conflicts of Interest

11. N.Y. State 589 was decided under DR 5-105 of the Code, which is the forerunner of Rule 1.7(a). The language of DR 5-105 differs somewhat from Rule 1.7(a), but we do not regard the differences as meaningful to our analysis. Rule 1.7(a) says in part that, subject to Rule 1.7(b), "a lawyer shall not represent a client if a reasonable lawyer would conclude either" that the representation "involves the lawyer in representing differing interests" or that the representation poses 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." Rule 1.0(f) defines "differing interests" to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer a client, whether it be a conflicting, inconsistent, diverse, or other interest." Here, the inquirer's position on the community college board, acting solely in the capacity as trustee, is a personal interest that may differ from or adversely affect the inquirer's legal representation of the county and the county's constituents.

12. A Comment accompanying Rule 1.7 describes the potential conflicts arising from the dual roles of lawyer and director:

> A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the trustees. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations.

Rule 1.7, Cmt. [35].

13. We can envision a variety of circumstances when a reasonable lawyer (on which more below) would conclude that "differing interests" may be involved in the lawyer's dual roles or that a "significant risk" may exist that the county attorney's obligations to the county, its board, and its officials will be adversely affected by the inquirer's personal interests as a member of the community college board. By way of illustration, the community college board must submit any proposed acquisition or leasing of real property to the county board. As a fiduciary of the community college, the inquirer owes a duty to the community college to promote the real estate plan as adopted by the community college board the inquirer chairs, while at the same time owing the county a fiduciary duty to exercise professional judgment in advising the county on that same matter. Whether the terms of any real estate transaction, in which the community college board chair presumably plays an active part in negotiating, accords with the county's interests, with title being vested in the county, is an issue on which the county is entitled to uncompromised independent judgment. The circumstances become more problematic if, as a board member, the inquirer opposed the transaction, yet as board chair must defend a decision to the county board which the inquirer personally disfavors. We have no difficulty determining that, in circumstances like these, a reasonable lawyer would conclude that a significant risk is present that the lawyer's interests as a community college board member imperils the lawyer's independence as attorney for the county.

14. The inquirer must make this determination in each instance in which the interests of the county and the community college intersect. The exercise is necessarily a case-by-case analysis, including, but not limited to, budget matters, audits, contract matters in which the two entities are co-parties or counter-parties, state-directed mandates, or in the event that the inquirer is personally named in any litigation or other proceeding against the community college trustees. This last event may create special tension: When the subject is the potential liability of the college board or one or more of its members, the lawyer must assure that the lawyer can render independent professional judgment, free of overt or subtle influences that the lawyer's own potential exposure or the lawyer's collegial relationships with other board members may incite.

15. In any circumstance, if the lawyer determines that the conditions of Rule 1.7(a) appear, then the lawyer must decide whether, in the particular instance involved, the conflict is subject to waiver by informed consent under Rule 1.7(b), which says that, 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 represent 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 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.

Waiver of Conflicts

16. "The requirements of informed consent are set forth in Rule 1.0(j)." N.Y. State 1055 ¶ 12 (2015). We have previously opined that a lawyer may accept "consent by a government entity if he or she is reasonably certain that

the entity is legally authorized to waive a conflict of interest and the process by which the consent was granted was sufficient to preclude any reasonable perception that the consent was provided in a manner inconsistent with the public trust." *Id.*; N.Y. State 629 (1992). The inquirer should not participate in the decision whether to consent or advise the county or community college on this issue of consent. *See* N.Y. City 1988-5 (1988) (an attorney who is a member of a cooperative apartment board may not participate in "any decision of the [board] that will reasonably affect the lawyer's own personal" interests as counsel to the board).

17. There remain the other three elements of Rule 1.7(b). As we have said, if the law prohibits the representation under Rule 1.7(b)(2), then no ethics issue need be considered, for the law transcends the Rules. If no law erects a barrier to the representation, then, under Rule 1.7(b)(1), the lawyer must reasonably believe, that is, both subjectively and objectively, that the lawyer is able "to provide competent and diligent representation to each affected client." *See* Rule 1.0(r) (defining reasonable belief); Rule 1.0(q) ("When used in the context of conflict of interest determinations, 'reasonable lawyer' denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation."); N.Y. State 1048 ¶ 20 (2015) (Rule 1.7(b)(1) "has both a subjective and an objective component"). Situations may occur in which, despite the existence of a disqualifying "significant risk" under Rule 1.7(a), a disinterested lawyer could well conclude that the lawyer is able to provide the representation that Rule 1.7(b)(1) requires. In other instances, the facts may preclude such a conclusion, in which event the remedy of informed consent is unavailable.

18. In the latter instance, the question arises whether a lawyer in the county attorney's office other than the county attorney may represent the county or community college in the matter in which a conflict prevents involvement of the county attorney. Rule 1.0(h) includes a "government law office" as a "law firm" within the meaning of the Rules. Rule 1.10(a) says that, while lawyers are associated in a law firm, "none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so" by, among other things, Rule 1.7. Thus, if Rule 1.7 disqualifies the county attorney based on a conflict, then the conflict is imputed to all other lawyers in the county attorney's office who are aware of the conflict. Rule 1.10(d), however, says that a "disqualification prescribed by this Rule [1.10(a)] may be waived by the affected client" under the conditions set forth in Rule 1.7. This means that, though the disqualification of the county attorney is imputed to the entire county attorney's office, the applicable entity (whether the county, the community college, or, more likely, both) may consent to representation by another attorney in that office notwithstanding that attorney's knowledge of the conflict. N.Y. State 968 ¶ 25 (2013). Otherwise put, if that other attorney reasonably believes that the attorney may "provide competent and diligent represent to each affected client," then the attorney may proceed with the informed consent of the affected client(s), confirmed in writing.

19. One situation may not allow informed consent no matter the foregoing. Rule 1.7(b)(3) forbids a lawyer to represent a client in "the assertion of a claim by one client against another represented by the lawyer in the same litigation or other proceeding before a tribunal." A county and a community college may find themselves in litigation opposed to each other. We leave for a later resolution, on concrete facts, whether circumstances may exist in which the county attorney or a member of the county attorney's may appear with informed consent in such a dispute or whether the parties would have no recourse but to retain separate independent counsel. *See* N.Y. State 968 ¶ 28 (leaving open the question whether consent is possible in comparable circumstances).

Protection of Confidential Information

20. The other major risk identified in N.Y. State 589 is the preservation of a client's evidentiary privileges, especially the attorney-client privilege. The county attorney acts as counsel to the county and to the community college, but does not represent the community college merely by reason of membership on the college board. Although evidentiary privileges are questions of law beyond our purview, N.Y. State 789 ¶ 4 (2005), Rule 1.6(a) forbids a lawyer to reveal "confidential information" —the definition of which in that Rule includes information "protected by the attorney-client privilege" —unless the client gives informed consent, the disclosure is impliedly authorized, or the disclosure is permitted by Rule 1.6(b), the elements of which need not detain us here. Our concern—one resonant in the literature to which we alluded at the outset—is that the multiple roles may create confusion about, and threaten the ability to assert, the attorney-client privilege.

21. The Comment to Rule 1.7 is again instructive:

> The lawyer should advise the other members of the board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity of trustee might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a trustee or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Rule 1.7, Cmt. [35].

22. We do not trespass the limits of our jurisdiction to recognize that, ordinarily, an attorney's confidential communications with a client in pursuit of legal advice are subject to a claim of attorney-client privilege, whereas communications by one board member with fellow

board members on matters of corporate policy are not. When the board member communicating on matters of organizational policy is also the lawyer for that organization, the communication is pregnant with potentially perplexing privilege problems—that is, whether the lawyer is communicating as a lawyer to a client or to fellow policymakers as a board member. The consequence is that, when the attorney is also serving as a board member, a danger exists that the attorney-client privilege may not protect the attorney's communications with the board on legal matters. This may be so even if the lawyer is explicit in distinguishing between the lawyer's provision of legal advice and business advice as a board member, because others (such as courts) may disagree.

23. Juggling the competing responsibilities and overlapping roles of government lawyer and board member thus demands acute alertness to the capacity in which the lawyer is acting in a particular setting and to the audience's understanding of the lawyer's communications. Among other things, the lawyer should advise the other members of the community college board that, in some circumstances, matters discussed at board meetings while the lawyer is present in the capacity as trustee might not be protected by the attorney-client privilege, and a parallel disclosure is required when the lawyer is acting as county attorney before county officials in matters involving the community college. At every meeting and during every discussion, clarity is essential on whether the lawyer is participating as counsel or as a board member. That the inquirer is chair of the board enhances this need. As we said in N.Y. State 589, owing to "the chair's more extensive involvement in decision-making concerning the management of the organization," it is possible "if not, indeed, more likely that the responsibilities of the two roles will conflict more frequently than in the case of a mere director." Hence, when the lawyer is participating as counsel, the lawyer must assure that precautions are taken to protect the client's privilege, including safeguards against public disclosure of privileged communications in board minutes or the presence of third parties whose knowledge of the communication might endanger the privilege.

CONCLUSION

24. If no law or regulation prohibits the dual roles, an attorney may serve as both county attorney and chair of a county-sponsored community college to which the county attorney's office provides legal services if, in each circumstance when the interests of the county and the community college overlap, a reasonable lawyer would conclude that the dual roles do not involve a significant risk that the lawyer's interests as a board member would adversely affect the discharge of the lawyer's independent professional judgment on behalf of the county. If the lawyer cannot so conclude, then the lawyer may seek a waiver of the conflict from each the county and the community college if the lawyer reasonably believes that the lawyer may provide competent and diligent representation to the county and the lawyer obtains informed consent, confirmed in writing. Absent such a reasonable belief and accompanying informed consent, another lawyer in the county attorney's office may generally act for the affected client upon informed consent confirmed in writing that the other attorney in the office may provide the requisite representation. In all events, the county attorney must take special precautions to assure the protection of evidentiary privileges that the lawyer's dual roles might imperil.

(6-18)

Opinion 1154 (6/5/18)

Topic: Third-Party Payor: Duty to communicate with client of insurance-assigned counsel

Digest: An attorney assigned by insurance carrier to represent an insured owes a duty of loyalty to the insured, and may not restrict or limit communications to the insured concerning the representation, notwithstanding attorney's concerns that insured may use such information adversely to financial interests of insurance carrier.

Rules: 1.2(a), 1.4; 1.6; 1.7(a)(2); Rule 1.7(b), Rule 1.8(f).

FACTS

1. The inquirer is a New York attorney whom an insurance carrier chose to defend an indemnification counterclaim stemming from a fatal car collision.

2. The automobile accident killed the driver husband and passenger wife. The Surrogate's Court appointed one of the couple's children as Executor of the Husband's Estate and the Wife's Estate. The Executor retained both an Estate Counsel and a Litigation Counsel. The Litigation Counsel commenced a wrongful death action on behalf of the Executor, acting for the Estates, as well as the Executor and the couple's other children in their individual capacities and as Beneficiaries of the Estates. Defendants in the wrongful death action are the owner and driver of the other vehicle involved in the collision. The wrongful death action seeks compensatory damages on behalf of the Beneficiaries, comprising lost monetary support, and survival damages on behalf of the Estates, consisting of physical and emotional pain and suffering of the decedents prior to death. The Beneficiaries of both Estates are the same.

3. In answer to the wrongful death complaint, defendants have asserted an affirmative defense of comparative fault that the husband's negligence in operating the vehicle was the sole, or at least a contributing, cause of the accident. Defendants have also asserted a counterclaim solely against the Husband's Estate for indemnification. Neither the affirmative defense nor the counterclaim would reduce the recoveries by the other plaintiffs in the wrongful death action, but a successful affirmative defense

could reduce any damages awarded to the Husband's Estate and a successful indemnification claim could result in the Husband's Estate reducing the exposure of defendants to damages awarded plaintiffs. Litigation Counsel represents the Executor of each Estate and the Beneficiaries in opposing the comparative fault affirmative defense. The Wife's Estate and the Beneficiaries have interposed no direct claim against the Husband's Estate.

4. The inquirer is the attorney assigned by the husband's insurance carrier to defend the Husband's Estate against the indemnification counterclaim. The inquirer believes that the insurance coverage may not be adequate to satisfy an award entered on the counterclaim. Although limiting the husband's culpability for the accident is in the interest of all plaintiffs in the wrongful death action, the inquirer believes that tension exists between the interests of the Husband's Estate, on the one hand, and the Wife's Estate and the Beneficiaries, on the other hand, with respect to the wrongful death damages each allegedly sustained. On the inquirer's view, the Executor, acting on behalf of the Husband's Estate in defense of the counterclaim, should seek to minimize the wrongful death damages to reduce the exposure of the Husband's Estate to indemnify defendants, but, acting on behalf of the Wife's Estate and the Beneficiaries, the Executor should seek to maximize the wrongful death damages allegedly due them.

5. The Executor has directed the inquirer to communicate solely with Estate Counsel about the defense of the indemnification counterclaim. The inquirer is concerned, however, that confidential information received by the Estate Counsel from the inquirer will be shared by the Estate Counsel or by the Executor with Litigation Counsel. That confidential information would ordinarily concern, among other things, the inquirer's strategy for addressing the husband's allegedly culpable conduct and the compensatory wrongful death damages sustained by the Wife's Estate and the survival damages sustained by the Beneficiaries. For this reason, the inquirer wishes to circumscribe the communications to the Estate Counsel, because the inquirer believes that unrestricted communications may adversely affect the insurance company's exposure on the indemnification counterclaim.

QUESTION

6. May an insurer-assigned counsel for an insured limit communications to the counsel's client based on a belief that the client may use the communications to the financial detriment of the insurance company?

OPINION

7. The answer is no. Our opinions address solely the ethics issues that an inquirer poses about the inquirer's own prospective conduct; we do not opine on the conduct of others. Thus, we offer no opinion here on whether Litigation Counsel has a conflict of interest in representing all plaintiffs in the wrongful death action. Our focus is confined to the inquirer's duties to the inquirer's client, the Executor of the Husband's Estate, under the New York Rules of Professional Conduct (the "Rules"). The Rules make clear that the inquirer's obligations are to serve the interests of the Executor as the Executor defines them.

8. Rule 1.8(f) prohibits a lawyer from accepting compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

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

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

9. Rule 1.8(f) makes clear that, no matter the source of the lawyer's compensation for representing a client, the lawyer's duty is to the client, not to the one paying the lawyer's fees.

10. Comment 11 to Rule 1.8(f) elaborates:

> Lawyers are frequently asked to represent clients under circumstances in which a third person will compensate them, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company)…. Third-party payers frequently have interests that may differ from those of the client. A lawyer is therefore prohibited from accepting or continuing such a representation unless the lawyer determines that there will be no interference with the lawyer's professional judgment and there is informed consent from the client.

Rule 1.8, Cmt. [11]; *see Feliberty v. Damon*, 72 N.Y.2d 112, 120 (1988) ("[T]he paramount interest independent counsel represents is that of the insured, not the insurer."); N.Y. State 1102, ¶ 3 (2016) ("When the insurance company designates counsel for the assured, whether the designated counsel is inside or outside counsel, the lawyer's client is the insured and not the insurance company."); N.Y. State 716 (1999) (the lawyer's primary allegiance is to the client, the insured); N.Y. State 73 (1968) (attorney employed by carrier has superior duty to assured, the client).

11. An insurer-compensated lawyer thus owes the same duties to a client as if the client were paying the lawyer's fees. Rule 1.2(a) provides that "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 to be pursued."

12. Rule 1.4 imposes obligations on attorneys, among other things, promptly to inform the client of material developments in the matter, Rule 1.4(a)(1)(iii); reasonably to consult about the means by which the client's objectives are to be achieved, Rule 1.4(a)(2); to keep the client reasonably informed about the matter, Rule 1.4(a)(3); promptly to comply with the client's reasonable requests for information, Rule 1.4(a)(4); and to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation, Rule 1.4(b).

13. It may be that the inquirer's counterclaim defense litigation strategy, if freely reviewed and discussed with the Executor or Estate Counsel in conformance with inquirer's obligations under Rules 1.2(a) and 1.4, and subsequently disclosed to Litigation Counsel, might harm the interests of the insurance carrier, but consideration of the insurer's interests in discharging the lawyer's obligations under Rules 1.2(a) and 1.4 would constitute interference with the inquirer's attorney-client relationship with the client Executor that Rule 1.8(f) forbids. *See Feliberty*, 72 N.Y.2d at 120 ("[t]he insurer is precluded from interference with counsel's independent professional judgments in the conduct of the litigation on behalf of its client") (citations omitted). Any strategy for opposing and defeating the comparative fault affirmative defense and the indemnification counterclaim is just one element of the larger picture that the Executor must consider, a picture which also presumably takes account of the limited coverage that the insurance carrier provides for the counterclaim. Accordingly, the inquirer's communications with the Executor, or with the Estate Counsel at the direction of the Executor, should be free and unrestricted, guided by the requirements of Rules 1.2(a) and 1.4. The use to which the Executor or Estate Counsel choose to make of those communications, in what they determine to be the overall best interests of the Estates and the Beneficiaries, is for the Executor or Estate Counsel to decide, not the inquirer.

14. The inquirer should take one other consideration into account, an issue we raise owing solely to the inquirer's desire to limit communications to the inquirer's client based on the inquirer's concern about the Husband's Estate's insurer.

15. The inquirer may rely on repeat business from the insurance carrier, whether through a longstanding business relationship between the carrier and the inquirer's law firm, personal relationships with claims agents or other carrier employees, or otherwise. We are mindful, for example, that insurance companies often maintain lists of approved counsel to represent their insureds in particular types of matters. Being so listed is obviously in the financial and business interests of the law firm. We recognize, too, that the interests of the insurer and the insured are not always perfectly aligned. Although each has an interest in minimizing a claimant's recovery, an insured may have other interests in seeking a resolution of a matter that the insurer regards as excessive in light of the insurer's more narrow interests—a situation that this inquiry potentially poses.

16. If a lawyer depends on an insurance carrier for a regular flow of business, and the lawyer believes that the lawyer's insured client is pursuing a course of action that the lawyer considers potentially injurious to the insurance carrier, then the lawyer must determine whether, under Rule 1.7(a), a reasonable lawyer would conclude that a "significant risk" exists "that the lawyer's professional judgment on behalf" of the insured client "will be adversely affected by the lawyer's own financial, business, property or other personal interests." If the lawyer determines that such a "significant risk" is present, then, consistent with Rule 1.7(b), the lawyer must assess whether the lawyer nevertheless reasonably believes that the lawyer "will be able to provide competent and diligent representation" to the insured client and obtain the insured client's informed consent, confirmed in writing, to continuing the representation. In that circumstance, the inquirer should disclose the inquirer's relationship with the insurer and, if able to provide the requisite representation, obtain the Executor's consent to continuing the representation.

CONCLUSION

17. An insurer-assigned lawyer may not limit or restrict communications to the lawyer's client even if the possibility exists that the client may share the communications with others whose interests may be in conflict with those of the insurer.

(5-18)

General Practice Section Committees and Chairpersons

Business Law
Lewis F. Tesser
Tesser, Ryan, & Rochman, LLP
509 Madison Avenue, 10th Floor
New York, NY 10022
ltesser@tesserryan.com

Election Law and Government Affairs
Jeffrey T. Buley
Brown & Weinraub LLC
50 State Street, 4th Floor
Albany, NY 12207
jeffbuley@hotmail.com

Steven H. Richman
Board of Elections, City of New York
32 Broadway, 7th Floor
New York, NY 10004-1609
srichman@boe.nyc.ny.us

Membership and Member Service Issues
Lynne S. Hilowitz-DaSilva
DaSilva & Hilowitz LLP
120 N. Main Street
New City, NY 10956
dhm11@verizon.net

John J. Roe III
Egan & Golden LLP
96 South Ocean Avenue
Patchogue, NY 11772
pauline.mcternan@gmail.com

Publications
Martin Minkowitz
Stroock & Stroock & Lavan LLP
180 Maiden Lane
New York, NY 10038-4982
mminkowitz@stroock.com

Solo and Small Firm Practice
Domenick Napoletano
351 Court Street
Brooklyn, NY 11231-4384
domenick@napoletanolaw.com

Trusts and Estates Law
Paul J. O'Neill Jr.
Law Office of Paul J. O'Neill, Jr.
1065 Lexington Avenue
New York, NY 10021
pauljoneilljr@msn.com

Lynne S. Hilowitz-DaSilva
DaSilva & Hilowitz LLP
120 N. Main Street
New City, NY 10956
dhm11@verizon.net

ONEONONE

This *Newsletter* is published for members of the General Practice Section of the New York State Bar Association.

Members of the Section receive a subscription to *One on One* without charge. The views expressed in articles in the Newsletter represent only the authors' viewpoints and not necessarily the views of the Editors, Editorial Board or Section Officers.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

Subscriptions
Subscriptions to *One on One* are available to non-attorneys, universities and other interested organizations. The 2018 subscription rate is $165.00. Please contact the Section Publications Department, New York State Bar Association, One Elk Street, Albany, NY 12207 or call (518/487-5671/5672) for more information.

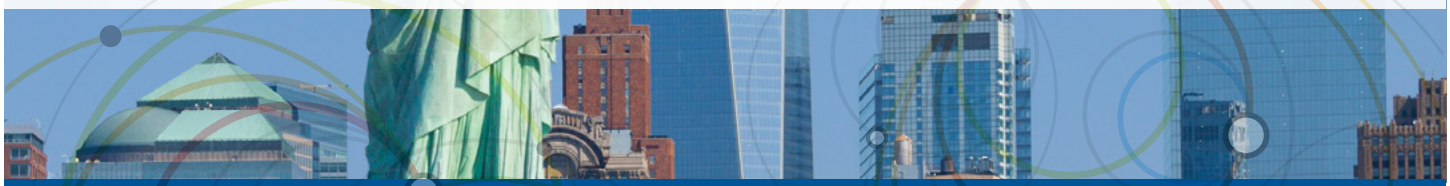
ISSN 0733-639X (print) ISSN 1933-8422 (online)

NEW YORK STATE BAR ASSOCIATION
GENERAL PRACTICE SECTION
One Elk Street, Albany, New York 12207-1002

ANNUAL MEETING 2019

JANUARY 14–18

NEW YORK CITY | NEW YORK HILTON MIDTOWN



REGISTRATION COMING SOON.
www.nysba.org/am2019