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ONEONONE

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of the New York State Bar Association

A Message from the Chair

As we celebrate the demise of Bin Laden and the start of summer, our legal world is undergoing some profound changes. The economy is not good. Many of our clients have lost their jobs or their businesses. Real estate values are barely above outstanding mortgages. There are many foreclosures and the banks are not making realistic attempts to enter into workout agreements. New York's budgetary crunch will materially affect the operation of the courts. Massive layoffs and retirements of judicial staff have begun. The courts will be understaffed and the wheels of justice will turn slower. There are no more JHOs to preside over the parts that move cases to trial. It will take longer to receive decisions on motions. The processing of judgments and other papers will take longer. Those of us who have been in practice since the 1970s and 1980s have seen these budgetary crunches before. Justice delayed is justice denied.

Meanwhile, technology will continue to play a greater part in our practice. The courts are headed in the direction of mandatory e-filing. The federal courts are already there and the state supreme courts are headed there. It is imperative for all lawyers to become computer literate. Legal research has been online for many years. Not many of us still use books to do our research. Law libraries are less important in our practice. We can no longer avoid technology. We all have to learn something about computer law. Original signatures on documents are no longer necessary. Contracts and stipulations are signed by facsimile transmission and email. We must learn about the validity of such signatures. Contracts are now made by email. Remember contracts by correspondence from law school? How enforceable is a contract made by emails back and forth? Social media and the law is now a hot topic.

The general practice of law may be one of the fastest growing areas of law. Young attorneys who cannot find a job or who have been laid off are starting their own practice. Financial problems breed family problems. People need help with matrimonial problems, foreclosure problems, elderly parents, wills, trusts and estates, real estate purchases and sales and business

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Inside

NYSBA

From the Co-Editors

Richard Klass

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

Alternative Dispute Resolutions: In light of the recent budget cuts to the State's judicial branch, various methods of alternative dispute resolution are being considered with great zeal. The former Chief Judge of the United States District Court for the Northern District of Ohio, Thomas D. Lambros, writes in the article entitled "The Summary Jury Trial and Other Hybrid Forms of ADR" that the Summary Jury Trial is considered "trial science." Judge Lambros has found, through his extensive experience, that Summary Jury Trials are very accurate predictors of the ultimate result after a full-blown trial. More importantly, the vast majority of cases that venture through this form of ADR are settled. The article also outlines other forms of ADR, including the (i) mock trial; (ii) mini trial; (iii) shadow jury; and (iv) virtual jury study.

Grandparent Visitation: Unfortunately, the realities of families today include various issues relating to custody and visitation of not only parents but grandparents. Family law practitioner Debra L. Rubin analyzes the rights of grandparents to obtain visitation rights concerning minor children, considering the relevant statute (Domestic Relations Law Section 72) and recent case law, namely: the United States Supreme Court decision in *Troxel v. Granville*. The article delves into the circumstances in which a grandparent will have standing to seek visitation rights and the constitutional rights afforded to the parents of the child.

Instant Replay in Baseball: Now that we are well into the baseball season, we have the article entitled "Play It Again Bud: Baseball and Instant Replays" by Bennett Liebman. Mr. Liebman previously served as a member of the New York State Racing and Wagering Board. The phenomenon in all sports of instant replay was recently adopted as a rule in baseball (in limited circumstances). Aside from instant replay, there are various review issues, such as when the call of an umpire may be overruled by the Baseball Commissioner. There is discussion of recent reviews and what potential effects it would have on the sport.

Martin Minkowitz

Fee-Splitting in Arbitration: In an article by Dayna B. Tann, she opens up the analysis of fee-splitting provisions in employment contracts by setting forth two situations in which prospective employees are presented with employment agreements, one for a low-level, entry position and one for an experienced securities broker. The article discusses the Arbitration Fairness Act and case law, including the decision of *Brady v Williams Capital Group*. There are different viewpoints on the issue as to whether to force employees to bear the cost of arbitration of claims with their employers, including whether it is fair; whether it reduces claims of bias of the arbitrator; and whether it is against public policy.

Defective Foreclosure Documents: All of the recent news about rampant foreclosures around the country, such as the packaging and securitization of loans, robo-signing of affidavits, and missing documents raises serious concerns about foreclosure law in general. In a very topical article by Marvin N. Bagwell and Robert F. Bedford, counsel for Old Republic National Title Insurance Company entitled "What Is the Probable Effect of Defective Foreclosure Documents Under New York Law?" they pose an interesting question—what are the possibilities that many homeowners will try to reclaim title to properties lost to foreclosure? The article considers the various provisions of law that set up defenses to homeowners' claims, including the statute of limitations and motions to vacate default judgments. The risks of title insurers and purchasers at foreclosure auctions and REO (real estate owned) sales are considered.

Estate litigation: One of the most common issues that arises in estate proceedings is contesting the admission of a decedent's Last Will and Testament to probate. In "Summary Judgment Motion in a Will Contest: An Updated Proponent's Perspective," Gary E. Bashian, a partner in Bashian & Farber LLP, discusses the procedural advantages of the probate practitioner in defeating an objectant's bid to contest a Will. The article reviews the laws concerning Due Execution of a Will; Testamentary Capacity; Undue Influence; Fraud; and

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A Message from the Chair

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problems. The members of the General Practice Section can play an important role in assisting younger lawyers and the public at large. The Section maintains a listserve that enables attorneys to exchanges ideas and obtain guidance from more experienced attorneys. We urge you to visit the listserve when you can and contribute to the community.

We are always looking to expand the membership of the Section and diversify. We invite the members to contribute ideas about how to do it. We need more members under 35 years old, more minority members and more women members. Tell your attorney friends about the Section. It will help them improve their practice. We are exploring using social media to aid us in increasing membership.

Martin S. Kera

From the Co-Editors

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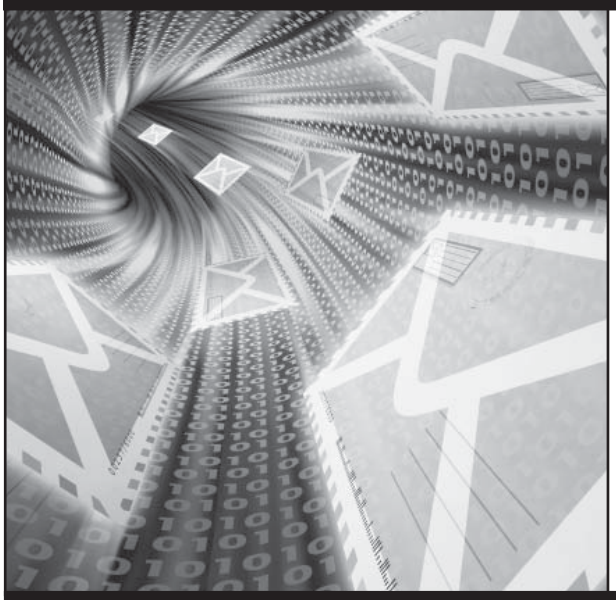
Standing. The author concludes that objectants have a very heavy burden in defeating the admission of a Will.

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

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

Sincerely,
Martin Minkowitz
Richard Klass
Co-Editors

Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact the *One on One* Editor:

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Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.

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New York State Construction Industry Fair Play Act and Independent Contractors

By Martin Minkowitz

A new statute in New York has important meaning for the Workers' Compensation Law. For the first time New York is defining, although for a limited group of workers, an independent contractor. The statute enacted last year stated that the construction industry in New York was experiencing dangerous levels of misclassification of its employees for workers' compensation coverage. The legislature found that employers were intentionally reporting that some employees were independent contractors or keeping them off the books, and not listing them as employees for workers' compensation coverage purposes. Under New York Law this is a fraud and it was estimated that 25% of the contractor workforce was being subjected to it. These contractors who engaged in this practice would have an unfair competitive advantage to those who properly reported and paid for coverage, since their cost of doing business would be lower.

The new statute, known as the "New York State Construction Industry Fair Play Act," requires that any person who works for a contractor is an employee unless that person is a separate "business entity" and meets the definition in the statute of an independent contractor. In order to qualify as an independent contractor the statute lists the following:

1. The individual is free from control and direction in performing the job, both under his or her contract and in fact;
2. The service must be performed outside the usual course of business for which the service is performed; and
3. The individual is customarily engaged in an independently established trade, occupation, profession, or business that is similar to the service at issue.

To qualify as a "business entity" the independent contractor is required to meet all of the following elements:

1. The business entity is performing the service free from the direction or control over the means and manner of providing the service, subject only to the right of the contractor for whom the service is provided to specify the desired result;
2. The business entity is not subject to cancellation or destruction upon severance of the relationship with the contractor;
3. The business entity has a substantial investment of capital in the business entity beyond ordinary tools and equipment and a personal vehicle;
4. The business entity owns the capital goods and gains the profits and bears the losses of the business entity;
5. The business entity makes its services available to the general public or the business community on a continuing basis;
6. The business entity includes services rendered on a Federal Income Tax Schedule as an independent business or profession;
7. The business entity performs services for the contractor under the business entity's name;
8. When the services being provided require a license or permit, the business entity obtains and pays for the license or permit in the business entity's name;
9. The business entity furnishes the tools and equipment necessary to provide the service;
10. If necessary, the business entity hires its own employees without contractor approval, pays the employees without reimbursement from the contractor and reports the employees' income to the Internal Revenue Service;
11. The contractor does not represent the business entity as an employee of the contractor to its customers; and
12. The business entity has the right to perform similar services for others on whatever basis and whenever it chooses.

Since this is the first time the legislature has addressed the definition of an independent contractor for entitlement for workers' compensation benefits, this may have broader application than merely applying to construction workers. It is likely that Workers' Compensation Law Judges could use the terms outlined by the legislature here for their interpretation of an independent contractor in other types of injured worker situations.

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The Summary Jury Trial and Other Hybrid Forms of ADR

By Thomas D. Lambros

When I first became a lawyer 58 years ago (at the tender age of 22), and then as a young judge (at the age of 30), I had dreams of enhancing the system of justice in this great nation of ours, by helping litigants not only to achieve the justice they desired, but also to actually help them solve their problems. I recognized that taking a case to trial was, and still is, a strict, formal, extraordinarily costly and risky process, and that many times, the benefits of forgoing those costs and risks through an early settlement was outweighed by the litigants' desire to have their day in court. I was driven to find a better way to achieve justice for all, and sought assistance from my colleagues, who were older, established judges. However, I quickly became discouraged when I realized that they were stuck in the ways of the past, and it seemed they had no interest in doing anything other than simply administering the time-honored process of the jury trial. It was from my colleagues' lack of vision regarding a stagnant process and my goal of establishing a better way to achieve justice and solve the problems of the litigants who appeared before me that I created the Summary Jury Trial.[1]

The Summary Jury Trial is a hybrid ADR process that I consider to be a "trial science," as it is a method for predicting the outcome of litigation that regularly and reliably produces trustworthy results. In other words, the Summary Jury Trial converts our adversarial system of litigation from what is usually an imprecise art, involving a great deal of guesswork, to a predictable process. It permits the participants to predict the outcome of a jury trial in any type of case without going through the significant expense of preparing for, and putting on, a full-blown trial[2] by presenting a significantly shortened version of their case to a real jury and receiving a non-binding verdict. In a Summary Jury Trial, the parties have the opportunity to see and hear how their case is presented, how their opponent's case is presented, how a random cross-section of the community reacts to the presentation of each side's case, and how a typical jury ultimately decides the issues. While this article focuses on Summary Jury Trials, Summary Bench Trials can be used in a similar manner for cases that will be tried before the judge instead of a jury.

The Summary Jury Trial is the most advanced mode of ADR, the purpose of which is not to supplant the jury trial, but to encourage a fair and informed settlement among the parties by demonstrating the strengths and weaknesses of each side's position, permitting them to assess the merits of the claims and defenses of the case as a whole, and allowing them to mutually place a realistic settlement value on the case. Thus, the Summary Jury Trial allows the litigants to have their day in court while simultaneously avoiding the expense of a trial by reaching a fair settlement that is based upon an informed assessment of the case.

"The Summary Jury Trial…is a method for predicting the outcome of litigation that regularly and reliably produces trustworthy results."

In a Summary Jury Trial, a jury is summoned and selected in the same manner as in a jury trial. The lawyers for each side present a one- to two-hour summary of their case, consisting of opening statements, reference to exhibits, recitation of pertinent documents, and deposition testimony; the "judge" or "magistrate" reads a brief jury charge; the jurors are left to deliberate and, if a verdict is reached, it is read to all participants. Whether or not a verdict is reached, after the jury has finished deliberations, the judge, attorneys, and parties are given time to engage in a dialogue with the jury to explore their views on the case and how they reached the decision they did. The entire process takes only one day.

Typically, the subject of the Summary Jury Trial is broached at the final pre-trial, when all prior settlement negotiations have failed, and the judge asks the attorneys and parties whether they wish to participate in one last effort to resolve the case short of trial. At this time, a majority of discovery has been completed, such that the parties have a full grasp of the evidence in the case, but extensive trial preparation has not yet begun. However, lawyers and litigants who would prefer to cut to the chase need not wait for the final pre-trial, but may instead agree to engage in limited, voluntary discovery and proceed to a Summary Jury Trial long before the case generates any longevity of its own, with the consequent expense and disruption to the parties, and settle it early.

In most circumstances, the Summary Jury Trial is non-binding, as the judges in this process are without the power or authority to order the outcome to bind the parties. Occasionally, however, in cases in which settlement negotiations have resulted in an impasse, the parties may agree to be bound by the outcome of

a Summary Jury Trial in connection with a "high-low" agreement. For example, if the verdict is for the defense or less than the low, the plaintiff will agree to accept the low; if the verdict is greater than the high, the plaintiff will agree to accept the high; and for any verdicts in between, the parties will be bound by the jury's verdict. In this regard, a smart and versatile mediator can effectively resolve the impasse by integrating the hybrid Summary Jury Trial into the mediation process. When the dialogue shifts to a Summary Jury Trial, the parties can either agree to participate in a binding Summary Jury Trial, or at the very least, the discussion serves to provide momentum for the dialogue and a settlement results.

Moreover, recently there has been an increasing use of the unilateral Summary Jury Trial, which is often called an "advisory proceeding," in which one party presents both sides of a case to a jury that has been selected by a facilitator in a private courtroom or conference room. While this type of advisory proceeding does not allow both parties to hear a neutral assessment of the case for purposes of reaching a settlement that is deemed fair by both sides, it certainly assists a party that needs or desires a neutral assessment of the strengths and weaknesses of each party's case so that it may better evaluate its own settlement position.

In my experience, Summary Jury Trials work. I have presided over 80 Summary Jury Trials, and of those, all but seven cases settled following the Summary Jury Trial. Of the seven cases that did not settle, but instead proceeded to trial, five of the verdicts were virtually identical to the verdicts rendered in the Summary Jury Trial; only two trials resulted differently. By way of example, in one construction case, the jury in the Summary Jury Trial found in favor of the defendant after deliberating for only thirty minutes. When the parties failed to settle, and the case proceeded to a jury trial, the jury returned a verdict in favor of the defendant after deliberating for only twenty minutes. Similarly, in one antitrust case, the jury in the Summary Jury Trial returned an award of $27 million for the plaintiff. When the parties failed to settle, and the case proceeded to a jury trial, the jury returned an award of $25 million for the plaintiff. Thus, in my experience, the Summary Jury Trial accurately predicts the ultimate outcome of a jury trial in a cost-effective manner which allows the parties to reach a fair and informed resolution while saving the expense of preparing for and participating in an actual trial ***and*** still having a version of their day in court.

I am not alone. The Judicial Conference of the United States endorsed the experimental use of Summary Jury Trials as a potentially effective means of promoting the fair and equitable settlement of civil jury cases in September of 1984. Also, the Federal Judicial Center reached the tentative conclusion that "summary jury trial worked well in settling cases that might have gone on to full trials had they not been assigned to such a procedure."[3]

While I am certainly partial to the Summary Jury Trial, I would be remiss if I did not at least briefly mention several additional hybrid ADR processes. The first is the mock trial, which is, in essence, an enactment of the trial in which each of the parties presents a shortened version of their case, including opening and closing statements and rebuttals and witness examinations, over a two- to three-day period, after which a mock jury deliberates and renders a verdict. Afterwards, the lawyers listen while the mock jury is "debriefed" by the "judge," who is often a forensic expert, and then have the opportunity to discuss the strengths and weaknesses of the case with the mock jury. One downfall of this particular ADR process is that often nearly as much preparation is put into the mock trial as would be put into the actual trial, thus not saving the litigants a great deal of legal fees.

A second hybrid ADR process is the mini trial, which is most often used in business disputes. In a mini trial, the attorneys for each party present their side of the case to a neutral advisor, sometimes a retired judge, and to the high-level representatives of the parties, particularly those who have settlement authority. Key witnesses or experts may be called to testify if necessary, but the rules of evidence do not apply. During the mini trial, this neutral advisor and the party representatives may ask questions to probe the strength of each side's case. Afterwards, the party representatives meet to discuss potential settlement. If no settlement can be reached based on this discussion alone, the neutral advisor may be asked to give his or her opinion as to the likely outcome at trial. The mini trial is not a trial in the real sense of the word, but is rather an enhanced and intensive settlement dialogue which utilizes the evidentiary components of a trial, including actual witnesses in a process that is moderated by a neutral.[4]

A third hybrid ADR process is the shadow jury, which is a select number of individuals who are retained by one party to watch the jury trial as it is being presented to the actual jury and provide feedback to the attorneys throughout the trial. There are several drawbacks to this option, the primary one being that it does not save the parties any of the expense that goes into preparing for trial, the secondary one being that the information is only given to one side such that it does not assist in reaching a mutual resolution.

A fourth hybrid ADR process is known as the virtual jury study, in which jurors are recruited online by forensic experts and are provided with written material prepared by the attorneys for each party consisting of

introductory remarks, an outline of the case, and each side's presentation. After the jurors have read the materials, they participate in a chatroom with the forensic experts, who ask them questions and engage in a dialogue with them regarding their thoughts on the case. One forensic expert, Dr. Robert Gordon of the Wilmington Institute, who was the first to use virtual jury studies, plants a "provocateur" in the chatroom to stir up the jury's reactions. Dr. Gordon's creation of this online virtual trial may be proven to be the most cost-effective way to conduct a jury study.[5]

*"…*all *hybrid forms of ADR are important to litigants in that they allow the parties to predict the outcome of trial and thus enhance the quality of settlements."*

Finally, the reach of the hybrid ADR processes is limitless—the only limit is one's imaginative and creative abilities. This is the most fascinating aspect of using different dispute resolution mechanisms as part of the adversarial process, for it permits us to experiment with new ways and methods and to modify existing means of predicting outcomes, all with the objective of providing people with opportunities to achieve more informed settlement decisions. This type of forensic science is not tampering with an established system, but is merely fine-tuning it and making due process a modern day reality rather than an old-fashioned list of stagnant imperatives. We must remember this: with or without ADR, most cases settle. The Supreme Court, the appellate courts, and the trial courts handle to conclusion and decision a relatively small number of cases. Thus, if most cases settle, and settlement is the staple of the adversarial industry, we should keep working on making it better.

As the Summary Jury Trial—at least in my opinion—is the best method for predicting the outcome of a jury trial without having to go through the time and expense of actually preparing for trial, I strongly recommend that all practitioners take this route if they have reached the final pre-trial stage and settlement negotiations have reached an impasse. Not only will the attorneys be spared the stress, headaches, and sleepless nights that often go hand-in-hand with trial preparation, but the litigants themselves will be spared the stress and expense for that preparation while achieving the same outcome—all while having their day in court. However, whether or not the Summary Jury Trial is utilized, it should be remembered that ***all*** hybrid forms of ADR are important to litigants in that they allow the parties to predict the outcome of trial and thus enhance the quality of settlements.

Endnotes

1. Some commentators and practitioners refer to Summary Jury Trials as "mock trials." I believe that this characterization discredits the process, as it is a real trial with a real jury reaching a real decision based upon real facts and evidence, the difference being that in most circumstances the result is not binding.
2. In my experience, trial preparation and attendance (for attorneys and lay and expert witnesses) typically comprises approximately 40% of all legal fees.
3. Stephen B. Goldberg, et al., Dispute Resolution 282-283 (1985) *quoting* M. Daniel Jacoubovitch & Carl M. Moore, *Summary Jury Trials in the Northern District of Ohio*, Federal Judicial Center 7 (1982).
4. *See* Stephen B. Goldberg, et al., Dispute Resolution 271-279 (1985).
5. *See* David Berg, The Trial Lawyer: What it Takes to Win 56-57 (2003).

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With thanks and sincere appreciation to Kelly H. Rogers, Esq. for assisting in the drafting of this article.

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Arbitration Fee-Splitting Provisions: Do the Benefits Outweigh the Disadvantages?

By Dayna B. Tann

Introduction

Fresh out of high school, Henry finally landed his first job. Quickly glancing over his thick employment contract, Henry shrugs as he scribbles his signature. After all, if he wants the job, he does not have much of a choice. Buried in the contract is an arbitration provision mandating that the parties share the costs of arbitration. On this same day, Margaret, an experienced securities broker, is presented with an updated employee manual. Having seen similar agreements before, Margaret flips through the manual and reads the fee-splitting provision. Margaret ponders over the provision and signs the agreement assuming that she will never need to dispute a claim.

By signing their respective agreements, Henry and Margaret have waived their rights to litigate a claim in court. The factual differences between Henry's and Margaret's circumstances help explain the arguments for and against mandatory arbitration clauses in employment contracts. Proponents of mandatory arbitration argue that sophisticated individuals like Margaret, who freely enter into an agreement, should not be able to invalidate a mandatory arbitration clause based on the freedom of contract.[1] In contrast, opponents of mandatory arbitration argue that such provisions are inherently unfair because an employee in Henry's position has little choice but to sign anything presented to him.[2] The Supreme Court has weighed in on this debate and ruled in favor of mandatory arbitration on the principle that upholding the validity of such agreements "merely provide[s] for a change of forum and not a loss of substantive rights."[3] However, given that Henry's and Margaret's particular contracts contain fee-splitting provisions, their contracts raise another issue the Supreme Court has not yet addressed: whether fee-splitting clauses in mandatory arbitration provisions are enforceable.

Recently, in *Brady v. Williams Capital Group, L.P.,*[4] the First Department severed a fee-splitting provision in an arbitration agreement on the basis that it violated public policy.[5] The court upheld the parties' agreement to split the arbitrator's fee rather than the American Arbitration Association's ("AAA") "employer pays" rule but nevertheless rendered the fee-splitting provision invalid because the high cost of the arbitrator's fee prevented the claimant from effectively vindicating her statutory cause of action in an arbitral forum.[6] This past March, the Court of Appeals affirmed the decision but remanded the case to the Supreme Court, New York County, to determine whether the claimant is financially able to share the costs of arbitration.[7]

Brady analyzes the case history examining the enforceability of a fee-splitting arbitration provision in an employment contract, discusses the enforceability of a negotiated agreement between two parties and evaluates the costs of arbitration in comparison to the costs incurred in litigation. Thus, *Brady* is an excellent avenue to discuss the issues confronting the enforceability of fee-splitting provisions. Part I of this article analyzes *Brady v. Williams Capital Group, L.P.* and the case history regarding the enforceability of fee-splitting provisions in arbitration. Part II examines the policy arguments for and against fee-splitting clauses in mandatory arbitration provisions and evaluates the debate concerning the passage of the Arbitration Fairness Act of 2009. Finally, Part III looks at claimant prevailing rates and the costs incurred by arbitration in comparison to litigation and argues that the benefits of enforcing fee-splitting provisions outweigh its disadvantages.

Part I: *Brady v. Williams* and the History of Fee-Splitting Provisions

A. The Case History of Fee-Splitting Provisions

The Supreme Court has never directly addressed whether a fee-splitting provision in an arbitration agreement is enforceable.[8] As a result, there is no uniform standard to measure the enforceability of such provisions, resulting in many different court interpretations. At first, many courts refused to uphold mandatory fee-splitting provisions. For example, in *Cole v. Burns International Security Services*,[9] the D.C. Circuit held that an arbitration agreement requiring an employee to pay half of the arbitrator's fee was *per se* unenforceable.[10] In *Paladino v. Avnet Computer Technologies, Inc.*,[11] the Eleventh Circuit "went a step further and held that a fee-splitting provision imposing steep filing fees upon an employee was a *per-se* basis for non-enforcement."[12] In contrast to this *per se* rule, the First, Fifth and Seventh Circuits apply a case-by-case test to determine the enforceability of fee-splitting provisions.[13] "These courts focus more on the certainty that a given plaintiff will incur prohibitive costs than the philosophical idea that a party [should not] have to pay for a judge when vindicating statutory rights."[14]

In response to the split among the circuits, the Supreme Court attempted to resolve the issue in *Green Tree Financial Corp. v. Randolph.*[15] Recognizing that ex-

cessive costs of arbitration could preclude a claimant from vindicating her statutory rights, the Court nevertheless placed the burden on the claimant to prove that such costs are prohibitively expensive.[16] By leaving the burden on the claimant, the Court "cas[t] doubt on the continuing viability of earlier circuit court decisions that propose[d] a *per se* rule against enforcement of fee-splitting arrangements."[17] However, *Green Tree* hardly resolved the controversy as the decision provides little direction on how much proof is required to invalidate a fee-splitting provision.[18] Accordingly, despite the *Green Tree* decision, the debate between the circuits persisted as some circuits continued to enforce a *per se* approach while others adhered to *Green Tree's* "burden of proof standard."[19]

In *Bradford v. Rockwell Semiconductor Systems, Inc.*,[20] the Fourth Circuit attempted to refine *Green Tree*'s burden of proof standard by implementing a three-part test to determine whether a claimant is financially able to share the costs of arbitration.[21] The Fourth Circuit's burden- shifting analysis focused on (a) "the claimant's ability to pay the arbitration fees and costs, (b) the expected cost differential between arbitration and litigation in court, and (c) whether that cost differential is so substantial as to deter the bringing of claims."[22] Recently, as demonstrated in *Brady v. Williams Capital Group, L.P.,* there has been a move towards applying *Bradford's* case-by-case analysis rather than *Cole's per se* rule of unenforceability.[23]

B. *Brady v. Williams Capital Group, L.P.*

Lorraine C. Brady was hired to sell fixed income securities at Williams Capital Group, L.P. ("Williams"), an investment bank and broker-dealer.[24] One year after hiring Brady, Williams produced a new employee manual and required Brady and all of its employees to agree to its provisions as a condition of continued employment.[25] The manual contained a mandatory arbitration clause with a provision requiring the parties to equally share the costs of the arbitrator.[26] At the time of the agreement, this fee-splitting provision was consistent with the current rules under the AAA.[27]

When Brady was terminated five years later, she commenced an arbitration proceeding with the AAA for discriminatory termination.[28] By this time, the AAA adopted an "employer pays" rule in which the employer is required to pay the arbitrator's fee.[29] Pursuant to this rule, the AAA sent Williams a bill for the total cost of the arbitrator.[30] Williams refused to pay, demanding that Brady must pay half of the fee pursuant to their agreement.[31] The AAA waited several months for the fee and eventually cancelled the arbitration.[32] Brady then filed suit to compel Williams to arbitrate and pay for the costs of arbitration, but the Supreme Court dismissed her suit holding that the parties' agreement to share the arbitrator's fee equally applied.[33]

The Appellate Division reversed in a 3-2 decision.[34] The court addressed two questions: (1) whether the AAA's "employer pays" rule should supplant the fee-splitting provision of the parties' arbitration agreement, and (2) whether the fee-splitting provision should be rendered unenforceable as against public policy.[35] The court answered the first question in the negative, asserting that "'arbitration is a creature of contract, and it has long been the policy of the State to 'interfere as little as possible with the freedom of consenting parties.'"[36] The court therefore refused to rewrite the contract holding that reading the "employer pays" rule into the agreement would modify the terms and force Williams to arbitrate "in a manner contrary to [its] agreement."[37]

The court nevertheless held that it would be unconscionable to enforce the fee-splitting provision on these particular facts.[38] Recognizing that large arbitration costs could preclude a litigant from vindicating her statutory cause of action,[39] the court held that Brady met her burden in proving that the costs of arbitration are significantly prohibitive given that Brady's upfront $21,150 fee excludes additional costs that may be incurred.[40] Additionally, the majority argued that Brady's 18 months of unemployment following her termination adds further credence to her argument that sharing the costs of the arbitrator is prohibitively expensive.[41]

In contrast to these surmounting arbitration costs, the majority argued that the filing costs associated with litigation are minimal.[42] The majority pointed out that an employee may be able to secure an attorney willing to take the case on a contingency basis and may also prevail in obtaining attorneys' fees.[43] The court thus concluded that the proper remedy is to sever the improper provision rather than void the entire agreement.[44]

In a vigorous dissent, Justice McGuire argued that the majority's assertion that Brady would incur prohibitive costs was "pure ipse dixit."[45] Citing Brady's six-figure salary, the dissent argued that Brady did not even attempt to prove that she lacked the financial wherewithal to pay the arbitrator's fee and therefore failed to meet her burden in proving the arbitration fees were debilitating.[46] In the alternative, the dissent argued that even if Brady did meet her burden, invalidating the fee-splitting provision would effectively "authorize the court to do what they otherwise cannot do: fundamentally modify the terms of the parties' contract and force [one party] to arbitrate in a manner contrary to the agreement to which it has assented."[47] The dissent concluded that the proper remedy is not to rewrite the arbitration agreement but to permit the party to litigate its claims in court.[48]

The Court of Appeals affirmed the decision of the Appellate Division as modified by its opinion.[49] The

Court of Appeals determined that the lower courts were correct in upholding the terms of the parties' arbitration agreement rather than the AAA's "employer pays" rule but agreed with the dissent in the Appellate Division that Brady made an "inadequate showing" that she was unable to pay her share of the arbitrator's fee.[50] As a result, the Court held that the lower courts erred by failing to apply all the criteria the Court deemed relevant to determine whether a claimant is financially able to share the costs of arbitration and remanded the case to the Supreme Court.[51] Looking towards *Bradford* and other federal courts for guidance, the Court of Appeals adopted a three-prong standard to assess a litigant's ability to share the costs of the arbitrator's fee.[52] The Court held that, on remand, the New York County Supreme Court should "at minimum" consider "(1) whether the litigant can pay the arbitration fees and costs; (2) what is the expected cost differential between arbitration and litigation in court; and (3) whether the cost differential is so substantial as to deter the bringing of claims in the arbitral forum."[53] The Court of Appeals did not decide what the proper remedy should be if the "equal share" provision is found unenforceable but instead left it to the Supreme Court to decide.[54] Offering no guidance as to how the Supreme Court should determine whether to render a fee-splitting provision unenforceable, the Court of Appeals concluded that the Supreme Court should determine, "in the first instance, whether to sever the clause and enforce the rest of the Arbitration Agreement, or to offer petitioner a choice between accepting the equal share provision or bringing a lawsuit in court."[55]

Part II: The Issues Confronting the Enforceability of Fee-Splitting Provisions

A. Policy Arguments for and Against Fee-Splitting Provisions

As demonstrated in the passionate discussion between the majority and dissent in *Brady*,[56] the extent to which a party must prove that a fee-splitting provision is prohibitively expensive is a hotly contested debate. At the crux of the dispute is the fairness of such provisions as scholars debate whether the costs of arbitration exceed the costs in litigation and whether claimants are more likely to prevail in one forum over the other.

Proponents of fee-splitting clauses argue that such provisions are overall more fair and a cheaper alternative to litigation. Accordingly, for the same reasons they argue to uphold mandatory arbitration provisions in general, these proponents argue that arbitration reduces the number of cases on the court's docket, lowers the cost and speed for a claimant to bring a claim, "increase[s] access to a system of dispute resolution for lower-income employees,"[57] and provides "a need for closure."[58] Advocates argue that these clauses should be upheld because parties are free to negotiate their own terms based on the freedom of contract.[59] Therefore, because the parties negotiated for an agreement to split arbitration costs—that bargained for agreement should be enforced. Those in favor of fee-splitting provisions also argue that such provisions reduce the risk of arbitrator bias as no single party is responsible for paying the arbitrator's entire fee.[60] Requiring the employer to pay *all* the costs could lead to bias in which the arbitrator curries favor to the employer in order to secure repeat business.[61]

Critics of fee-splitting clauses argue that such agreements are inherently unfair because they are provided on a take-it-or-leave-it basis and are drafted to favor employers.[62] Accordingly, they argue that the employee did not have any other choice but to sign the fee-splitting provision. In response to the argument that fee-splitting provisions limit arbitrator bias, these critics argue that there is little proven arbitrator bias in favor of an employer.[63] Adamant to protect consumers and employees who are subject to contracts of adhesion, these critics lobbied hard to propose the Arbitration Fairness Act of 2009.[64]

B. The Arguments for and Against the Enactment of the Arbitration Fairness Act of 2009

The Arbitration Fairness Act of 2009 essentially seeks to make fee-splitting provisions in pre-dispute agreements unenforceable.[65] The Act was first proposed in 2007 by Senator Russ Feingold and Congressman Hank Johnson.[66] Introduced to the United States Congress on February 12, 2009, it has not yet been scheduled for Congressional vote.[67] If enacted, it would amend the Federal Arbitration Act by adding a provision under Sec. 2. Validity and Enforceability, stating:

> (b) No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of—
>
> (1) an employment, consumer or franchise dispute; or
>
> (2) a dispute arising under any statute intended to protect civil rights.
>
> (c) An issue as to whether this chapter applies to an arbitration agreement shall be determined by Federal law. Except as otherwise provided in this chapter, the validity or enforceability of an agreement to arbitrate shall be determined by the court, rather than the arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement.

> (d) Nothing in this chapter shall apply to any arbitration provision in a collective bargaining agreement.[68]

Not surprisingly, scholars and politicians argue over the potential consequences of passing the Act. Those in favor of the Bill contend that it will finally put a stop to the unequal power between an employee and employer. For example, Scott L. Nelson, a member of the ABA's Special Committee on the Future of Civil Litigation, stated that: "[The Act will return arbitration] to what it was intended to be, which is something that allows sophisticated entities to agree on an alternative means of resolving their disputes [rather than] something imposed on weaker parties in essentially one-sided transactions."[69]

In contrast, those against the Act's enactment argue that it "overrules the settled law balancing the authority of the arbitrator and the court"[70] and neglects the fact that litigation is expensive and a burden on the court's overflowing dockets.[71] As one scholar commented:

> As now drafted the bill would undercut more than 80 years of thoughtfully developed arbitration law and reverse fundamental globally accepted principles of arbitration as to the allocation of authority between the court and the arbitrator. The bills that have been proposed would hamper the ability of US business interests to compete in cross-border commerce, where arbitration is the widely accepted method for dispute resolution, and would have a negative impact on businesses that have freely contracted for domestic arbitration as their mechanism of choice. The bills under consideration are likely to cause significant delays and additional costs, impose a meaningful extra burden on the courts, and alter the economics of commercial transactions.[72]

Arguing that the Bill is over-expansive, opponents are concerned that the Bill's breadth would invalidate predispute arbitration clauses between sophisticated business parties.[73]

Part III: The Benefits of Mandatory Arbitration Provisions Containing Fee-Splitting Provisions Outweigh the Disadvantages

As explained below, fee-splitting provisions are neither unfair nor detrimental for most employees. Although an arbitrator's fee may at first glance seem prohibitively expensive, arbitration costs are overall less expensive than litigation. Moreover, arbitration provides a forum that would otherwise be unavailable to many claimants. Thus, although there may be a few example cases to the contrary, for many claimants, it is "arbitration or nothing."[74]

A. Bargained for Fee-Splitting Provisions Are Rooted in the Freedom of Contract

The freedom of contract is a fundamental concept rooted in American contract law. Given this essential privilege, most courts defer to the parties' negotiations and interfere as little as possible with the intent of the parties.[75] In fact, in contrast to *Brady*, courts have upheld this principle despite an argument that it violates public policy. For example, in *Townes Telecommunications Inc., v. Travis, Wolff & Co. L.L.P.,*[76] the Texas Court of Appeals vacated an arbitration award which did not award costs to the prevailing party as specified in the parties' agreement but instead split the fees equally between the parties.[77] Although splitting the fee might be more equitable,[78] the Court held that the arbitrator "exceeded its powers by allocating between the parties the cost of the arbitration in direct contravention of the agreement."[79] Moreover, the parties' freedom to contract is not superseded by the argument that fee-splitting provisions are contracts of adhesion. Addressing this very argument, the Supreme Court upheld such agreements on the basis that they "merely provide for a change of forum and not a loss of substantive rights."[80]

B. The Costs and Recovery Rate in Arbitration Versus Litigation

Arbitration is generally the faster and cheaper alternative to litigation.[81] However, as demonstrated by the majority in *Brady*, that is not always the case. Like many lawyers in major law firms, arbitrators are paid based on the "billable hour."[82] This hourly basis includes many facets of the case outside of the amount of hours the arbitrator spends attending the arbitration hearing.[83] Accordingly, it is not surprising that the arbitrator's fee could sometimes exceed the amount in dispute as frequently occurs in litigation. Although there may be cases in which the claimant had to pay incredible arbitration fees,[84] these cases are the exception, not the rule.[85]

In addition, plaintiffs fare significantly better in arbitration than in litigation.[86] In a study conducted by the AAA, arbitral claimants prevailed 63% of the time.[87] In contrast, another study determined that claimants only prevailed in federal court 14.9% of the time and 16.8% of the time in EEOC trials.[88] Studies also indicate that although claimants at trial generally obtained larger awards from judges or juries, claimants as a group recovered more damages in arbitration.[89] In fact, "one study concluded that litigation is not a plausible option for employees below around the $60,000 income level but that arbitration is a realistic alternative."[90] This is due to the fact that "arbitration does not include extensive discovery or the numerous

stages that are inherent in litigation."[91] Moreover, because of the informality of the process, "it is easier for a *pro se* plaintiff to prosecute a claim through arbitration rather than litigation."[92] Therefore, because arbitration provides the parties with a low-cost method to resolve their disputes that otherwise would not be available, "for many claimants, it is arbitration or nothing."[93]

C. Fee-Splitting Provisions Reduce the Risk of Arbitrator Bias

Arbitrator bias does exist in practice, most often to the detriment of the employee.[94] This bias is often created "in favor of the employer because the employer is a repeat player and [therefore is more likely] to pick that arbitrator again while the individual will probably never be before the arbitrator again."[95]

In a study on whether there is a bias in favor of repeat player employers, Professor Lisa Bingham of Indiana University proved such bias exists as employees were significantly less likely to prevail on their claims and were awarded considerably lower damages when they did win against repeat player employers.[96] As a result, "[i]ndividual employees [may] feel more comfortable paying part of the arbitrator's fee, being unable to accept the notion there is no connection between the source of payment and a potential bias on the part of the decisionmaker."[97] Given that the source of payment may affect the arbitrator's neutrality, splitting the arbitrator's fee reduces the risk of arbitrator bias.

D. The Arbitration Fairness Act Fails to Address the Problems It Seeks to Rectify and Should Not Be Enacted

Despite the valid concerns of those against mandatory arbitration agreements, the Arbitration Fairness Act of 2009 fails to address the problems that these critics seek to rectify. First, the Act ignores the potential cost of arbitration. There is no evidence "that a post-dispute agreement will cost less than a pre-dispute agreement or that the consumer will receive any information about the cost of arbitration."[98] Second, the Act does not completely eliminate fairness concerns given that "the AFA does not devise a mechanism to help consumers understand arbitration clauses, which may lead to unsuspecting consumers entering into post-dispute arbitration agreements."[99] Finally, although post-dispute agreements are more likely to be truly voluntary given that they are entered into after a particular issue has already arisen and the employee can therefore make an informed decision whether to arbitrate or go to court, "management representatives testified before the Dunlop Commission that employers would generally not be willing to enter into post-dispute agreements to arbitrate."[100] Therefore, instead of rendering mandatory arbitration provisions unenforceable, critics should instead focus on ensuring that arbitration due process protocols, including the neutrality of the arbitrator, are followed.

Conclusion

Despite valid evidence that arbitration is generally cheaper than litigation and that fee-splitting provisions may reduce the risk of arbitrator bias, the enforceability of fee-splitting provisions in the employment context remains a controversial issue. Although the unpredictable outcome in *Brady* may be difficult to draft around, *Brady* sends a message to employers that they need to carefully examine any fee-splitting provision in their arbitration agreement as it may be rendered void as against public policy. "Employers should beware of any such fee-sharing provisions which likely will be viewed with skepticism, especially when challenged by employees who have not secured new employment and thus, arguably do not have sufficient income to share arbitration costs."[101]

Endnotes

1. *See* Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 MICH. J. L. REFORM 783, 788–89 (2008).
2. *Id.* at 787.
3. *Id.* at 783.
4. 64 A.D.3d 127, 878 N.Y.S.2d 693 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010).
5. *Id.* at 138, 878 N.Y.S.2d at 702.
6. *Id.* at 129, 878 N.Y.S.2d at 695.
7. *See Brady v. Williams Capital Group, L.P.*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010).
8. *See, e.g., Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). The court held that "large arbitration costs could preclude [a plaintiff] from effectively vindicating her federal statutory rights in the arbitral forum" but did not delineate what circumstances would invalidate an agreement. *Id.* at 90. *See also* Clara H. Saafir, *To Fee or Not to Fee: Examining Enforceability of Fee-Splitting Provisions in Mandatory Arbitration Clauses in Employment Contracts,* 48 LOY. L. REV. 87, 90 (2002) (noting that "because the Supreme Court has yet to directly address this issue, lower courts are left to grapple over whether to enforce fee-splitting provisions").
9. 105 F.3d 1465 (D.C. Cir. 1997).
10. *Id.* at 1485. The court held that "an employee can never be required, as a condition of employment, to pay an arbitrator's compensation in order to secure the resolution of statutory claims…[t]he only way that an arbitration agreement of the sort…can be lawful is if the employer assumes responsibility for the payment of the arbitrator's compensation." *Id.* at 1468.
11. 134 F.3d 1054 (11th Cir. 1998).
12. *See* Saafir, *supra* note 8, at 102. *See also Shankle v. B-G Maint. Mgmt. of Colo., Inc.*, 163 F.3d 1230, 1235 (10th Cir. 1999). Also relying on *Cole*, the Tenth Circuit held that such agreements are unenforceable under the Federal Arbitration Act because they do not provide the employee with an accessible forum to resolve the employee's statutory rights. *Id.*
13. *See* Ryan P. Steen, *Paying for Employment Dispute Resolution: Dilemmas Confronting Arbitration Cost Allocation Throw the Arbitration Machine Into Low Gear*, 7 J. SMALL & EMERGING BUS. L. 181, 189 (2003).

14. *Id.*

15. 531 U.S. 79 (2000).

16. *See* Saafir, *supra* note 8, at 104–05. The court held that the simple assumption that a claimant would be "saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 105.

17. *Id.*

18. *Id.* at 106.

19. *See* Steen, *supra* note 13, at 200.

20. 238 F.3d 549 (4th Cir. 2001).

21. *Id.* at 556.

22. *Id*.

23. *See Brady v. Williams Capital Group, L.P.*, 64 A.D.3d 127, 134, 878 N.Y.S.2d 693, 699 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010) (noting that the majority of the federal circuit courts adopted *Bradford's* case-by-case analysis). *See also Brady v. Williams Capital Group, L.P.*, 14 N.Y.3d 459, 467, 928 N.E.2d 383, 387–88, 902 N.Y.S.2d 1, 6 (2010) (adopting *Bradford's* analysis as a matter of New York state law).

24. *Id.*

25. *Id.*

26. *Id.*

27. *See Brady v. Williams Capital Group, L.P.*, 17 Misc. 3d 325, 326, 844 N.Y.S.2d 584, 585 (Sup. Ct. N.Y. County 2007).

28. *See Brady v. Williams Capital Group, L.P.*, 64 A.D.3d 127, 134, 878 N.Y.S.2d 693, 699 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010).

29. *Id*. at 129–30, 878 N.Y.S.2d 696.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id. See also Brady v. Williams Capital Group, L.P.*, 17 Misc. 3d 325, 328, 844 N.Y.S.2d 584, 587 (Sup. Ct. N.Y. County 2007).

34. *See Brady v. Williams Capital Group, L.P.*, 64 A.D.3d 127, 878 N.Y.S.2d 693 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010).

35. *Id.* at 128, 878 N.Y.S.2d at 695.

36. *Id.* at 132, 878 N.Y.S.2d at 697 (quoting *Credit Suisse First Boston Corp. v. Pitofsky*, 4 N.Y.3d 149, 154 (2005)) (quoting *Matter of Siegel*, 40 N.Y.2d 687, 689 (1976)).

37. *Id.*

38. *Id.* at 138, 878 N.Y.S.2d at 702.

39. *Id.* at 133, 878 N.Y.S.2d at 698 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Green Tree Fin. Corp-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

40. *Id.* at 135, 878 N.Y.S.2d at 700.

41. *Id.*

42. *Id.* (contending that "in general, it cannot be disputed that the out-of-pocket expenses for an employee filing a legal suit are minimal"). The majority argued that unlike in arbitration where the parties pay the arbitrator's fee, "the costs of maintaining and operating the court system, including the salaries of judges and other court employees, are borne by the taxpayers, not the litigants themselves." *Id.*

43. *Id.*

44. *Id.* at 137, 878 N.Y.S.2d at 701. In support of this remedy, the majority argued that the agreement itself contains a clause providing that "the rendering of any provision void or unenforceable 'shall not affect the validity of the remainder of the Agreement,'" and the court therefore "will not be overriding the intent of the parties to arbitrate." *Id.* at 137–38, 878 N.Y.S.2d at 701.

45. *Id.* at 156, 878 N.Y.S.2d at 714 (McGuire, J., dissenting). For example, the dissent argued that the majority's "implicit assumption that representation on a contingency fee basis is more likely in litigation than when attorneys represent claimants in arbitration [is based] on sheer speculation." *Id.* at 157, 878 N.Y.S.2d at 715.

46. *Id.* at 153, 878 N.Y.S.2d at 713–14.

47. *Id.* at 139, 878 N.Y.S.2d at 702–03 (citing *Matter of Salvano v. Merrill Lynch, Pierce, Fenner & Smith*, 85 N.Y.2d 173, 182-183 (1995)).

48. *Id.* at 145, 878 N.Y.S.2d at 706–07. The dissent also argued that the severability clause is not properly before the court because Brady only first mentioned the clause in her reply brief. *Id.* at 148, 878 N.Y.S.2d at 709.

49. *See Brady v. Williams Capital Group, L.P.*, 14 N.Y.3d 459, 928 N.E.2d 383, 902 N.Y.S.2d 1 (2010).

50. *Id.* at 465–66, 928 N.E.2d at 386, 902 N.Y.S.2d at 4–5.

51. *Id.* at 465–66, 928 N.E.2d at 386, 902 N.Y.S.2d at 5. Although the Court of Appeals does not require a full hearing in all situations to determine whether a litigant can afford the costs of arbitration, the Court does require "a written record of the findings pertaining to a litigant's financial ability." *Id.* at 467, 928 N.E.2d at 388, 902 N.Y.S.2d at 6.

52. *Id.* at 466–67, 928 N.E.2d at 386–88, 902 N.Y.S.2d at 5–6.

53. *Id.* at 467, 928 N.E.2d at 387–88, 902 N.Y.S.2d at 6.

54. *Id.* at 467–68, 928 N.E.2d at 388, 902 N.Y.S.2d at 6.

55. *Id.*

56. *See Brady,* 64 A.D.3d at 136, 878 N.Y.S.2d at 700 (The majority cast off the dissent's argument as "an attempt to minimize the effect of [the] high cost [of arbitration] by [suggesting] that the alternative litigation cost would be much higher.") Moreover, the length and detail of the dissent demonstrates the dissent's disdain for the majority opinion. *Id.* at 139–59, 878 N.Y.S.2d 702–17.

57. *See* Elkouri & Elkouri, How Arbitration Works 36 (Alan Miles Ruben, ed., 6th ed. 2003).

58. *See* Interview with Mitchell Rubinstein, Senior Associate, New York State United Teachers (Oct. 14, 2009).

59. *See* Antoine, *supra* note 1, at 788.

60. *See* Interview with Mitchell Rubinstein, Senior Associate, New York State United Teachers (Oct. 14, 2009).

61. *Id.*

62. *See* David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557, 1563 (2005).

63. *See, e.g., Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1485 (D.C. Cir. 1997) (holding that "[i]t is doubtful that arbitrators care about who pays them, so long as they are paid for their services").

64. *See* Sherwyn, Estreicher & Heise, *supra* 62, at 1563 (noting that "policy debates [regarding arbitration] continue with undiminished force in the academy [and] is often the case with controversial issues, those opposing arbitration are more vocal than those favoring arbitration").

65. *See* Edna Sussman, *The Unintended Consequences of the Proposed Arbitration Fairness Act*, 58 FEDRLAW 48, 48 (May 2009).

66. *See* Richard M. Alderman, *Why We Really Need the Arbitration Fairness Act: It's All About Separation of Powers*, 12 J. Consumer & Com. L. 151, 157 (2009).

67. *See* Sandra D. Grannum, *The Faith and Face of Securities Arbitration After the 2008 Crash* in Practising Law Institute, *Corporate Law and Practice Course Handbook Series: Securities Arbitration*

in the Market Meltdown Era: Achieving Fairness and Perception in Reality, 111, 115 (2009) (noting that the Bill "'has a long way to go'").

68. *See* ARBITRATION FAIRNESS ACT OF 2009, H.R. 1020, 111th Cong. (2009), *available at* http://www.opencongress.org/bill/111-h1020/text (last visited October 20, 2009).
69. *See* Henry R. Chalmers, *Future of Mandatory Arbitration of Consumer Disputes in Doubt*, LITIGATION NEWS (August 2009), *available at* http://www.abanet.org/litigation/litigationnews/top_stories/arbitration-consumer-disputes.html.
70. *See* Sussman, *supra* note 65, at 48.

> Although it is the court's responsibility to determine if there is a valid agreement to arbitrate, arbitrators generally decide if a contract is otherwise valid or if a specific dispute falls within the scope of the arbitration clause. Yet the [Arbitration Fairness Act] would invest the courts with sole authority to determine the validity of arbitration agreements irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. *Id.* at 50.

71. *See* Chalmers, *supra* note 69 (citing Edward M. Mullins, current co-chair of ABA's International Litigation Committee, and Andrew L. Sandler, co-chair of ABA's Consumer and Personal Rights Litigation Committee).
72. *See* Sussman, *supra* note 65, at 48.
73. *Id.* at 50. For example, the Bill as now drafted would invalidate pre-dispute clauses in franchise disputes which have sophisticated parties on both sides. *Id.*
74. *See infra* note 93.
75. *See supra* note 36.
76. 291 S.W.3d 490 (Tex. App. 2009).
77. *Id.* at 492. The Court vacated the portion of the award relating to the payment of costs. *Id.* at 494.
78. *Id.* at 493.
79. *Id.*
80. *See* Antoine, *supra* note 1, at 783.
81. *See* Elkouri, *supra* note 57, at 40.
82. *See* Ronald J. Offenkrantz, *Arbitrating Commercial Issues: Do You Really Know the Out-of-Pocket Costs*?, 81 N.Y. ST. B. J. 30, 31 (2009).
83. *See* Elkouri, *supra* note 57, at 40 (noting that "[a]d hoc arbitrators typically charge on a per diem basis for hearing time, travel time, and time spent studying the case and preparing the decision").
84. *See* Offenkrantz, *supra* note 82. For example, one claimant was forced to seek bankruptcy protection in a California Bankruptcy Court to avoid a $50,000 arbitrator advance retainer. *Id.*
85. *See supra* note 81.
86. *See* Sherwyn, Estreicher & Heise, *supra* note 62, at 1578 (noting that "there is no evidence that plaintiffs fare significantly better in litigation…in fact, the opposite may be true").
87. *See* Antoine, *supra* note 1, at 792.
88. *Id.* at 792–93. However, these studies have been met with skepticism as the reports may have been "comparing apples and oranges." *Id.* In an attempt to obtain more precise results, Professor Lisa Bingham of Indiana University conducted a study comparing claims based on individual contracts and claims based on employee manuals. *Id.* In these two separate studies, Bingham concluded that employees prevailed 68.8 and 61.3% of the time on claims based on individual contracts but only 21.3 and 27.6% of the time on claims based on employee manuals. *Id.*
89. *See* Antoine, *supra* note 1, at 792.
90. *See* Antoine, *supra* note 1, at 791. Arbitration is also well-suited for those whose potential recovery does not warrant the substantial amount of time and money to hire a first-rate lawyer to prepare the action for court. *Id.*
91. *See* Kevin R. Casey, *Mandatory Consumer Arbitration*, THE METROPOLITAN CORPORATE COUNSEL, Aug. 5, 2009, *available at* http://www.metrocorpcounsel.com/current.php?artType=view&artMonth=August&artYear=2009&EntryNo=10019.
92. *See* Sherwyn, Estreicher & Heise, *supra* note 62, at 1575.
93. *See* Casey, *supra* note 91. *But cf.* Sherwyn, Estreicher & Heise, *supra* note 62, at 1564–65 (noting the impossibility to gather completely accurate statistics through these studies). The problem with these studies is that no case is ever the same and "one can never be sure if the reason for a disparity in outcomes, if any, involves the adjudication system or some other factor, such as the strength of the case, or perhaps a selection factor determining which cases go to court and which cases end up in arbitration." *Id.* Nevertheless, although these studies may not be perfect, these studies show that arbitration serves as a more than adequate mechanism to dispute a party's claim.
94. *See infra* note 96.
95. *See* Interview with Mitchell Rubinstein, Senior Associate, New York State United Teachers (Oct. 14, 2009).
96. *See* Sherwyn, Estreicher & Heise, *supra* note 62 at 1570 (noting that "Bingham found that while employees won 64% of all cases combined, they won only 16% of cases against repeat players"). Nevertheless, Bingham acknowledged that there may be causes for repeat employer success other than arbitrator bias such as the fact that repeat players are more experienced in the process and better able to identify cases worth settling. *Id.*
97. *See* Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 INDIANA L. J. 83, 89 n. 45 (2001).
98. *See* Casey, *supra* note 91.
99. *Id.*
100. *See* Antoine, *supra* note 1, at 790.
101. *See* Fee-Splitting Provisions in Arbitration Agreements Subject to Scrutiny, CROWELL & MORING LABOR & EMPLOYMENT LAW ALERT, May 2009, *available at* http://www.crowell.com/NewsEvents/Newsletter.aspx?id=1222.

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Grandparent Visitation

By Debra L. Rubin

Domestic Relations Law section 72(1), which authorizes a Court to order grandparent visitation, was necessitated by the common-law rule that grandparents have no standing to assert a right to visit a grandchild against a custodial parent. The reasoning behind the crafting of the statute is the recognized benefit that children generally receive from sharing a relationship with a grandparent—a positive experience that cannot be duplicated in any other relationship.[1]

Domestic Relations Law section 72(1), while allowing a Court to order grandparent visitation, does not create an automatic right to such visitation by a grandparent.[2] The statute, which provides as follows, requires the Court to make a two-part inquiry prior to making a determination:

> Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply to the supreme court by commencing a special proceeding or for a writ of habeas corpus to have such child brought before such court, or may apply to the family court pursuant to subdivision (b) of section six hundred fifty-one of the family court act; and on the return thereof, the court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.[3]

The Court must first determine whether the grandparent(s) making an application for visitation have standing. Standing will be found where one or both of the parents are deceased, or where "equity would see fit to intervene." If the Court concludes that standing exists, it must then determine whether ordering visitation is in the best interests of the grandchild.[4]

Whereas the death of one of a child's parents essentially affords a grandparent automatic standing to seek visitation, a grandparent of a child with two living parents has standing to seek visitation only if he or she can establish circumstances in which equity would see fit to intervene.[5] Although circumstances under which "equity would see fit to intervene" have not been specifically defined by statute, case law has guided us with respect to the primary factors to be considered by the Court: 1) the nature and extent of the grandparent-grandchild relationship; and 2) the nature and basis of the parents' objection to visitation.[6] While the equitable circumstances provision of the domestic relations statute is not intended to allow automatic standing to seek visitation, it is error to conclude that standing is permitted only in cases where there was "a change in the status of the nuclear family, or interference with a derivative right, or some abdication of parental responsibility."[7]

"[W]hile the problems resulting from animosity between a parent and grandparent cannot be ignored, such an acrimonious relationship is generally not sufficient cause to deny visitation to a grandparent."

However, it has been repeatedly held that the Court should not readily intrude on family relationships against the wishes of a fit parent. There is a strong presumption that the decisions of a fit parent are in the best interests of the child and the Court should at least afford some special deference to the parent's decision. As is further detailed below, without such deference to a parent's decision, the constitutionality of statutes providing for grandparent visitation is subject to challenge. Nonetheless, while the problems resulting from animosity between a parent and grandparent cannot be ignored, such an acrimonious relationship is generally not sufficient cause to deny visitation to a grandparent. It is crystal clear that where grandparents must seek the intervention of the Court in order to obtain visitation rights with their grandchildren, some level of animosity must exist between them and the custodian of the children; otherwise, they could presumably resolve this issue by agreement.[8]

Constitutional challenges have been mounted to Domestic Relations Law section 72(1) based upon perceived interference with a fit parent's decision making

process. However, as mentioned above, the statute can be and has been interpreted to accord deference to a parent's decision, although such deference is not specifically provided for in the language of the statute. Additionally, Domestic Relations Law section 72(1) is drafted much more narrowly than a "breathtakingly broad" Washington statute which was *not* declared to be invalid by the United States Supreme Court in *Troxel v. Granville.*[9] Accordingly, it has been held that the more narrowly drafted New York Statute is *not* unconstitutional on its face.[10] Thus, while Court intervention is not proscribed when a fit parent refuses grandparent visitation, it is required that a Court afford some special weight to a parent's decision when determining whether or not grandparent visitation should be granted.

The Court of Appeals dealt directly with the aforesaid issues in *E.S. v. .P.D.*[11] The issues presented to the Court of Appeals were whether the petitioner grandparent was properly granted visitation with her grandchild pursuant to Domestic Relations Law section 72(1), and whether said statute was constitutional in light of the decision of the United States Supreme Court in *Troxel v. Granville*. The Court of Appeals answered both questions in the affirmative.

In *E.S. v P.D.*, the parents, who were married, gave birth to a son in November 1993. In June 1997, the mother was diagnosed with cancer and the paternal grandmother was asked to move into their residence to care for her terminally ill daughter and the child. The grandmother cooked, cleaned, shopped and assisted in caring for the child. When the mother died, the father invited the maternal grandmother to stay on in order to assist with child care and household duties. During the following three and a half years, they resided together amicably and the maternal grandmother comforted the child, got him ready for school, put him to bed, did his laundry, drove him to school, doctor's appointments and activities, and arranged for play dates.

By the fall of 2001, the father and maternal grandmother began to have difficulties getting along. The maternal grandmother was apparently less strict in enforcing certain rules and the father was of the belief that she was interfering with his authority as a parent. In February of 2002, the father demanded that the maternal grandmother vacate his home. For approximately seven or eight weeks thereafter, the father forbade any contact between the maternal grandmother and the child. Starting in April of 2002, the father allowed sporadic visits and occasional telephone calls. After waiting four hours for a scheduled visit with the child in December of 2002, the grandmother, then 78 years of age, brought an application pursuant to Domestic Relations Law section 72(1) and Family Court Act section 651 seeking an order of visitation with the then nine-year-old child.

Following a lengthy hearing, the Supreme Court made an order of visitation to the maternal grandmother, stating as follows:

> Although mindful of [the father's] right to rear [the child] as he sees fit, and of his stated concern that [the grandmother] undermines his parental authority, the Court finds that he has failed to present any credible evidence warranting either the termination of the relationship between [the grandmother] and [the child] or the imposition of restrictions on the right of visitation. Instead, the evidence in the record establishes the existence of a very close, loving relationship between [grandmother] and [the child] and that [the child's] best interest is served by granting [the grandmother] regular, unfettered visitation.[12]

On appeal, the Appellate Division, Second Department, rejected the father's argument that the Supreme Court had abused its discretion in granting visitation to the grandmother, affirmed the Supreme Court's judgment, but modified certain terms of the visitation schedule in accordance with the father's wishes, relying on *Troxel*. The Appellate Division noted:

> Contrary to the father's contention, this Court has determined that New York State's grandparent visitation statute, Domestic Relations Law § 72, is not facially invalid under [*Troxel*] even though it does not specifically require that parental decisions are to be given "special weight."…Our visitation statute, narrowly drafted to only afford a grandparent standing to sue for visitation when a child's parent has died or where 'conditions exist which equity would see fit to intervene' and additionally requiring that after standing has been conferred, that the grandparent establish why visitation is in the child's best interest, necessarily gives the parent's decision presumptive weight.[13]

In *E.S. v. P.D.*, the Court of Appeals found that the grandmother had "automatic standing" under Domestic Relations Law section 72(1), based upon the death of her daughter, the child's mother.[14] The Court further found that records before the Supreme Court and the Appellate Division supported their determinations that visitation between the grandmother and the child was in the child's best interests.[15]

The Court of Appeals further rejected the father's contention that Domestic Relations Law section 72(1) was facially unconstitutional in light of *Troxel*.[16] Notably, the Washington statute at issue in *Troxel* allowed:

> "[A]ny person" to petition for visitation rights at "any time" and authorize[d] [state superior courts] to grant such visitation rights whenever "visitation may serve the best interest of the child."[17]

In *Troxel*, the paternal grandparents petitioned for visitation of their grandchildren under this statute. The mother did not object to all visitations but sought to limit them. The trial court awarded visitation to the grandparents. The intermediate appeals court reversed on statutory grounds and dismissed the grandparent's petition entirely. The Washington Supreme Court then affirmed the holding of the intermediate appellate court, but on different grounds. The Court held that it was facially invalid under the Federal Constitution because it infringed on the right of parents to raise their children.

The United States Supreme Court affirmed the dismissal of the petition but declined to hold the Washington statute unconstitutional. The plurality considered it critical, however, that there were no allegations or findings of the mother's unfitness as a parent and that there was no "special weight" given to the fit parent's own determination. The implication was that if there was finding of unfitness, or if the trial court had indicated that such "special weight" was given to the parent's decision, that the award of visitation may have been upheld.

In applying the reasoning from *Troxel*, the Court of Appeals in *E.S v. P.D.* found Domestic Relations Law section 72(1) to be "facially constitutional," quoting as follows from Justice Altman:

> [The statute] can be, and has been, interpreted to accord deference to a parent's decision, although the statute itself does not specifically require such deference. Further, [section 72(1)] is drafted much more narrowly than the Washington statute [considered in *Troxel*]. If the United States Supreme Court did not declare the 'breathtakingly broad' Washington statute to be facially invalid, then certainly the more narrowly drafted New York statute is not unconstitutional on its face. In fact, the Court indicated that it would be hesitant to hold specific nonparental visitation statutes unconstitutional per se because 'much state-court adjudication in this context occurs on a case-by-case basis.' *Troxel* does not prohibit judicial intervention when a fit parent refuses visitation, but only requires that a court accord 'some special weight to the parent's own determination' when applying a nonparental visitation statute.[18]

The Court of Appeals further noted that other states have also chosen to read their grandparent visitation statutes so as to encompass the constitutional protections necessary to protect parental rights.

In further distinguishing *Troxel* from *E.S. v. P.D.*, the Court of Appeals noted that the Trial Court in Washington applied a presumption in favor of grandparent visitation, rather than applying the presumption that a fit parent will act in the best interests of his or her child. In contrast, the trial court in *E.S. v. P.D.* emphasized that it was "mindful" of the father's parental wishes and employed the presumption that his wishes were in the child's best interests. However, the maternal grandmother overcame that presumption by demonstrating the level of care she had provided and the relationship that she had established with the child for more than three years.

In *Dorothy M. v. Amy N. and Trevor N.*,[19] decided shortly after *E.S. v. P.D.*, the Monroe County Family Court carefully followed the guidance of the Court of Appeals in arriving at its determination so as to avoid any constitutional challenges.

After finding that the grandmother had standing based upon equitable circumstances (primarily her past nurturing relationship with the child), the Monroe County Family Court cited to *E.S. v. P.D.* in noting that "Domestic Relations Law § 72 (1) must be interpreted to accord deference to a fit parent's decision as to whether to allow visitation with a grandparent."[20] After acknowledging the special weight to be afforded to the parent's determination, the Monroe Family Court found, as did the Court of Appeals in *E.S. v. P.D.*, that the grandmother surmounted this heavy burden with evidence that she resided with the child for approximately a year and then lived across the street from him and continued to have daily positive contact with him for an additional two years.[21] Accordingly, the Family Court found a "substantial relationship" between grandmother and grandchild, and determined that it was in the best interests of the child to visit with his grandmother, despite the animosity existing between her and the child's mother, which was an outgrowth of a divorce between the grandmother and the grandfather.[22] The Family Court stated that, "[a]nimosity

between the parent and grandparent is not a proper reason for denial of visitation, without more."[23]

As with any visitation determination, an application for grandparent visitation is fact sensitive, and each and every case must be considered on its own merits. Most trial courts *want* to find a basis to award visitation to a grandparent, it being a relatively common belief that a relationship between a grandparent and a grandchild has a special and distinct element, which lends something positive to a child's life. However, the courts must be, and have been, careful to balance the grandparent/grandchild relationship with the right of a fit parent to make determinations for his or her own children.

"Most trial courts want *to find a basis to award visitation to a grandparent, it being a relatively common belief that a relationship between a grandparent and a grandchild has a special and distinct element, which lends something positive to a child's life."*

It is likely that the law will continue to evolve in this area. The absence of a specific definition for circumstances "where equity would see fit to intervene," and the lack of a specific statutory provision mandating deference to a fit parent's determination, leave ample room for statutory interpretation, and possibly further constitutional challenges.

Endnotes

1. *Emanuel S. v. Joseph E.*, 78 N.Y.2d 178, 181 (1991).
2. *Wilson v. McGlinchey*, 2 N.Y.3d 375, 380 (2004) (citing *Lo Presti v. Lo Presti*, 40 N.Y.2d 522, 526 (1976).
3. N.Y. DOM. REL. Law § 72(1) (McKinney 2010).
4. *Matter of Emanuel S.*, 78 N.Y.2d at 181.
5. *Id.*
6. *Dorothy M. v. Amy N. and Trevor N.*, 866 N.Y.S.2d 91 (Fam. Ct. 2008).
7. *Matter of Emanuel S.*, 78 N.Y.2d at 181-82.
8. *LoPresti v. LoPresti*, 40 N.Y.2d at 526.
9. 530 U.S. 57, 63 (2000).
10. *E.S. v. P.D.*, 8 N.Y.3d 150, 153 (2007).
11. *Id.*
12. *E.S. v. E.D.*, 800 N.Y.S.2d 345 (2004).
13. *E.S. v. E.D.*, 815 N.Y.S.2d 607, 609 (2d Dept. 2006).
14. 8 N.Y.3d at 157.
15. *Id.*
16. *Id.* at 158-60.
17. *Id.* at 158 (quoting *Troxel*, 530 U.S. at 60, quoting WASH. REV. CODE § 26.10.160(3)).
18. 8 N.Y.3d 150, 159-60 (2007) (citing, *Hertz v. Hertz*, 738 N.Y.S.2d 62 (2d Dept. 200); see also *Morgan v. Grzesi*, 732 N.Y.S.2d 773 (4th Dept 2001).
19. 866 N.Y.S.2d 91 (Fam. Ct. 2008).
20. *Id.* at 3.
21. *Id.* at 4.
22. *Id.*
23. *Id.* at 5.

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Play It Again Bud: Baseball and Instant Replays

By Bennett Liebman

Adopted from a speech delivered on September 25, 2010

The major sporting upset in this country 70 years ago, according to the Associated Press, was a football game between Dartmouth and Cornell.[1] Cornell's football team had been undefeated for over two years. This unbeaten streak stood at 18 games. In 1940, going into the Dartmouth game, Cornell had outscored opponents 18 to 13, and was ranked second in the nation.[2] On the field, the Big Red had seemed to beat Dartmouth as well. The score at the end of the game was 7-3 Cornell, according to the referee: But that score would not stand.

The Fifth Down Game

As the game reached the final seconds with Dartmouth leading 3-0, Cornell had a first and goal at the Dartmouth six-yard line. Three plays later, Cornell approached the goal line. On fourth down, Cornell was called for delay of game after calling an improper time-out. The ball was brought back to the six. An incomplete pass into the end zone should have been the end of the game. However, the referee, Red Friesell, did not see it that way. He still called it fourth down, and Cornell scored with six seconds left to seemingly win the game 7-3.

The National Collegiate Athletic Association barely held any power then, and the issue initially went to the Eastern Intercollegiate Football Association (EIFA).[3] The head of EIFA, Asa Bushnell, said that he had no power to change the result[4]—that would be up to the athletic departments of the colleges. With films and charts of the game made available, the referee admitted error. Cornell conceded the game, and the fifth down game went down in the record books as a 3-0 Dartmouth victory.[5]

Asa Bushnell after the Cornell concession stated, "Only when an official reverses his decision on the last play of the game is it possible to accept such a reversal and permit it to change the score."[6] Bushnell wrote, "In any sport…where the game unfolds in a consecutive series of inter-related and inter-dependent plays, it is manifestly impossible to alter any of these plays without affecting and altering perhaps every one of them which follow."[7] The Dartmouth-Cornell game was what Bushnell called the "one game in a million," where a change could be made without establishing a dangerous precedent.

Joe Williams, the syndicated columnist for Scripps Howard, wrote that the "photo finish had come to football... Now you can't follow it without a camera."[8] But 70 years later, it remains controversial. It was not a one in a million game. Similar cases have been rare, but they have occurred. There have been other college football games where the on-field result was not changed. There have been two fifth down situations in college football where games turned in the last seconds on the award of an extra down.[9] One fifth down decision eventually led to Colorado being the national champion in 1990.[10] The erroneous referee decisions were not overturned. Similarly, in 1961, the referees made a mistake on a rules interpretation on a field goal on the final play between Syracuse and Notre Dame.[11] The referees mistakenly let Notre Dame retry the field goal, and Notre Dame won. Again, the referees erred on the last play, but the result was not changed. Even the precedent established by the Cornell-Dartmouth decision has not been followed.

It should be noted that fans really cannot sue to overturn the decision of the referee. The few court decisions in this field show no such creature as referee malpractice. Either the issue is not justiciable,[12] or there is no legal duty—except for some possible safety concerns—that a referee has for fans.[13] This is probably best established in the area of horse racing. Where fans have sued to recover for their bets when the stewards made an incorrect call, they lost.[14] The finding was that the bettors are bound by the stewards' decisions as part of the rules of the game and cannot contest them.

The Baseball Issue

In the last year, we have seen this umpire or referee mistake issue turn up repeatedly in baseball, and we have seen that baseball has hardly had any answers to these mistake questions.

Without any need to view the videotapes, baseball has seen Detroit Tiger pitcher Armando Galarraga lose a perfect game on an admittedly mistaken call with two out in the bottom of the ninth inning by umpire Jim Joyce. During the American League playoffs in 2009, we witnessed umpire Phil Cuzzi call a ball hit down the left field line by Minnesota Twin catcher Joe Mauer foul that was obviously fair.[15] In the American League Championship Series, the umpires missed three calls in one inning. Two of the missed calls were made by umpire Tim McClelland, who in 1983 had made the overturned call that George Brett's use of a bat with more than 18 inches of pine tar on it from the bat handle was enough to declare him out.[16] The mistakes

were reminiscent of Don Denkinger's missed call in the ninth inning of the sixth game of the 1985 World Series, which may have led to the St. Louis Cardinals losing the World Series.[17]

In the absence of Leslie Nielsen (as Frank Drebin or Enrico Pallazzo, or whatever his name may have been) in the 1988 movie *The Naked Gun*,[18] Major League Baseball (MLB) is not doing much to correct umpire errors. All that the MLB is doing is reviewing certain potential home runs. This system has been in place since late in 2008. One can resort to instant replay for a home run to see if the batted ball is fair or foul, whether it left the playing field, and whether or not there was fan interference on a home run.[19]

Replays in Other Sports

That is far less of a replay rule than in other major sports.

Professional basketball can determine whether a shot was a two-pointer or a three-pointer, and whether a shot was taken before or after the buzzer. The replay rule is also used to figure out who exactly was involved in a fight.[20]

Professional hockey uses replays to review goals, whether a puck crossed the goal line, whether the puck crossed the goal line before a period ended, whether it was directed in by a foot or hand, or deflected off the high stick of an attacking player, or whether the goal was scored before the net became dislodged.[21]

Professional football has a rule for a host of calls, although generally not including fouls. These include scoring plays, pass completions or interceptions, going out of bounds, passes or fumbles, forward progress, placements of footballs, and whether there were a legal number of players on the field. In theory, this is not supposed to include judgment calls, such as holding or pass interference, but some calls, such as forward progress or certain catches, can involve exercises of judgment.[22]

Tennis now has the Hawk-Eye simulation system, which has been in place for the past four years, to govern out-of-bounds calls. While there have been a few problems, most everybody seems to think that the system has been excellent in establishing quick straightforward reviews of out-of bounds calls.[23] The system basically makes a decision in 10 seconds.

The absence of instant replay was a major deal in the recent World Cup where a number of referee errors were made on goals that could not be corrected.

If baseball does move towards instant replay, what does it do, and what are the concerns?

Levels of Review

In most sports, there are three levels of review of umpire decisions.

First, there are the umpires/referees themselves conferencing after a play. In baseball, after a completed play, one will see the officials occasionally huddling to try to get the initial call and its applicable rule correct. That occurs repeatedly in football as well, to coordinate the actual decision. In baseball, sometimes different umpires might have better angles on certain plays such as whether or not a ball was caught or trapped. Umpires will huddle to make sure that the rules have been interpreted properly.

Second, there is the video replay, where an official views the instant replay of an event to determine whether a call was correct, and whether it should be overturned.

Finally, there is the review by the Commissioner/off-playing field authority after the entire event has been run. This is the Galarraga perfect game review or the George Brett pine tar bat review.

The question for baseball is what should be looked at for each respective level, and what should be the proper parameters of a review system. There is little criticism of the existing umpire conferencing system. Obviously, there can only be one decision emanating from the game officials, and if a conference places all the officials on the same page, that certainly makes sense.

Instant Replay Issues for Baseball

The instant replay question raises the most concern for baseball. As compared with football, one of the instant replay concerns is that it takes too long to make a decision. Baseball prides itself on the fact that time is never of the essence in a baseball game, but how much is too much?

In addition, who initiates the review? Does it go to the teams, giving them a limited number of challenges? Such a system might seem akin to establishing a review system based on our legal notions of harmless errors on appeal. If there are a limited number of appeals, teams will rationally only use them for errors that cause real harm. Would it become a self-policing harmless error process, or should the initiator of the challenge be the crew chief of the umpires? Would there be a separate instant replay official making a sua sponte challenge? In theory, the replay rules in the National Basketball Association (NBA) are automatically triggered. Or, is it better to turn to a mixed system, like the National Football League (NFL), where the teams make most of the challenges, but the instant replay official makes the

challenges in the last two minutes? Perhaps all ninth inning and extra-inning decisions to go to replay will be determined by the instant replay official.

Who would make the instant replay decision? Would it be the crew chief, an instant replay official, the on-field officials jointly (which is the way the NBA is supposed to work), or perhaps a system like tennis, where for some decisions the replay system itself makes the call?

What respect is accorded the initial call on the field? How strong is the presumption that the initial call is the correct one?[24] In the NFL, one needs "incontrovertible visual evidence" to overturn a call. In the NBA, the standard is "clear and conclusive visual evidence." Looking at the National Hockey League rules, there does not appear to be any presumption. Should one even have a presumption, and just make the call de novo from the replay? Why should a traditional legal appellate deferential standard apply when the whole idea of instant replay is to get the facts right? After all, the basis of deference to the trier of facts is that the trier of facts is more familiar with the evidence than the appellate court.[25] In the instant replay system, the replay official is likely to know more about the evidence than the on-field official. Should lawyers use this as a teachable moment, as some have claimed, about the nature of appellate review and error correction?[26]

Who does the deciding official talk to before reaching the decision? Does he or she talk to other on-field officials? Should the official allow the mangers to have an opportunity for a brief oral argument to assuage due process concerns? There is actually a horse racing case from the Montana Supreme Court where the decision of the racing stewards to disqualify a horse was overturned because the stewards had failed to give the trainer of the horse that was disqualified an opportunity to plead his case.[27]

How would the notion of the field of play decisions integrate with instant replay? Under numerous decisions of the world-wide arbitration panel, the Court of Arbitration for Sport, field of play decisions should not be altered. Most notable is the Court of Arbitration's 2004 decision involving the award of the overall men's Olympic gymnastic gold medal to American Paul Hamm. The court found that a mistake in the calculation of a score could not be remedied after the overall competition because the mistake occurred in the course of the competition.[28] All of the competitors took actions relying on this mistaken decision, and "no one can be certain how the competition in question would have turned out had the official's decision been different, for a court to change the result would on this basis still involve interfering with a field of play decision."[29] Therefore, that means at a minimum, one has to make the replay decision before the next event in the game occurs. It also should mean that umpires should not regularly make speculative judgments on what would have happened if a different decision had been made. For example, in a fair ball down the left field line example with runners on base, if the decision is overturned and the ball ruled fair, how would the runners be replaced? Would one look at the subjective base running attributes in question, or make the decision based on the speed of a reasonable professional baseball runner? Does the arm of the leftfielder become a factor? To what extent should umpires be allowed to make these types of field of play decisions?

Most importantly, for baseball, there is the issue of which decisions should be subject to instant replay. There are a few obvious candidates. There is the Phil Cuzzi fair or foul decision on the line. That is an easy one for baseball. It is not too different from the in-court decision in tennis or the out-of-bounds decision in football. It would probably be best to make the calls at first base decision (whether the Denkinger/Galarraga decision) subject to replay. Did the first baseman or the pitcher catch the ball at first before the batter reached the bag? What about the sacrifice fly ball play? Would not an instant replay be especially useful in determining whether a player tagged up before the ball was caught? Recently cases involving whether or not a thrown pitch hit a batter have been in the news.[30] In fact, there have been a number of famous World Series games that might have been determined based on the issue of whether a batter was hit by a pitch.[31] That ought to be subject to review. What about catcher's interference calls, and whether or not a batted ball struck the batter in foul territory? Did the runner reach home plate before a third out on the base paths was recorded? Was the fielder making the catch properly inside the playing field at the time of the catch? These rules would be good ones for review.

Baseball presents many issues that, while objective on their face, are as a practical matter subjective. Ball and strike calls are theoretically objective, but that is actually not the case and would be terrible issues for replay. Over the years, players have been forced out when the infielder making a catch by the base was generally in the area of the base (but not necessarily on the base) when the ball was caught. Should this type of on the base decision be subject to review? One might assume, given baseball custom, that the answer would be no for any base other than first base. The same would be true for the balk rules or the check swing question. The MLB, in fact, has no rules about what is a check swing. Custom has it always as a judgment call. Baseball rules call for a pitch to be thrown within 12 seconds after a pitcher receives the ball when the bases are unoccupied. That is certainly objective. It would actually work under replay, but since the rule is barely

enforced now, one can assume it would not be a great candidate for replay.

Then, there are a host of other questionable issues. Was a player tagged out properly on the base paths? Did the catcher catch strike three or properly catch a foul tip? Was a ball trapped or caught? Did a ball that hit before first or third base go over the bag in fair or foul play? Did a player run out of the base lines? These are certainly dicey situations and might explain a lot of the reluctance that baseball has had for instant replay rules.

Finally, baseball has to concern itself with the effect of instant replay on the umpires. Will it make them better because their judgments will be subject to peer review? Will it make them somewhat more gun-shy to make a controversial call? Why bother to make a call that a runner tagged up too soon? If they really think he tagged up before the catch was made, let them appeal it to the instant replay official. Maybe this hesitancy to make controversial calls will lead to a general decline in the quality of umpiring. One could assume that the evidence from other sports is that instant replay will not have a significant effect on the overall quality of the judging.

Role of the Commissioner

The final subject is what should be the role of the baseball commissioner in reviewing decisions of umpires. In June, Baseball Commissioner Bud Selig refused to overrule the on-field decision that Cleveland Indian Jason Donald was safe at first, thereby denying Detroit pitcher Armando Galarraga a perfect game. Selig feared setting a bad precedent and opening a "Pandora's box."[32] Yet should not this be the job of a commissioner—that of getting things right? Is not that the precedent that should be set? What should the role of a commissioner be?

It would be reasonable to assume that one thing that a commissioner should not do is become involved in the field of play decisions. That again is the lesson of the 2004 Court of Arbitration for Sport case involving Paul Hamm and Yang Tae Yang. Yang's performance on the parallel bars was given an incorrect start value.[33] If it had been given the correct start value—and nothing else had changed in the competition—Yang would have finished first in the competition and not third. The court found that this had been a field of play decision in the midst of the competition, and it might have changed Yang's future performance. He still had to compete in the high bars event, and if he had been scored properly in the parallel bars, it could have affected his mental and physical attitude and changed his performance. As the court said, "While the error may have cost Yang a gold medal, it did not necessarily do so."[34] This is much like what Asa Bushnell said in 1940. A competition unfolds in a consecutive series of interrelated and inter-dependent plays. A sports contest is like Humpty Dumpty—it cannot be played with and then put back together again. Sports are not scripted; they are not connect-the-dots contests. As Yogi Berra supposedly said, "It's tough to make predictions, especially about the future."

Therefore, it would probably be best to limit commissioner review to those cases where the referee decision has no effect on the subsequent play in the competition. As a practical matter, we are now focusing on decisions at the end of the game.

The sport of horse racing might again have some relevance here. Horse racing has no direct referees. It has stewards who function largely as instant replay officials, and the racing commissions or boards serve the function of commissioners. In those circumstances, most racing commissions have no problems in reversing not only the results of the race but also the decisions of the stewards.[35] New York State has been far more judicious than most other jurisdictions. The Racing Board does not interfere with stewards' judgment calls, but even in New York, where there has been incontrovertible visual evidence of a mistake, or a mistake in an interpretation of a rule, the result was changed by the commission.[36]

In 1986, at Saratoga, when the stewards misidentified and disqualified a horse for interference when that horse was nowhere near the interference, the Racing Board reversed the result.[37] While it may be a rare occurrence, it is hardly unprecedented in racing for placing judges to get the order of finish wrong.[38] When that happens, and the stewards do not correct it, the racing commission invariably changes the result. So if racing commissions can correct through incontrovertible visual evidence mistakes that do not implicate any field of play decisions, why not Bud Selig?

After all, what is the George Brett example? In the Brett pine tar case, the American League Commissioner Lee McPhail overruled the decision of the umpires that excess pine tar—more than 18 inches from the bat handle—was a cause for ruling the batter out. That decision ended the game. The reason for the pine tar rule was not to give a batter an advantage; it was simply to keep more baseballs in play so that they might not be damaged by contact with pine tar. The penalty was to take the bat out of play, and McPhail had previously ruled on a protest that a violation of the pine tar rule was not a proper basis for finding a batter out. McPhail reinstated Brett's home run and ordered the game to be replayed from the time after the incident.

The Brett incident was a rules misinterpretation by the umpire. Why could that be reviewed while the Galarraga incident involving "incontrovertible visual

evidence" could not? What is the possible distinction? The Galarraga incident, since it would have simply ended the game, would seem to be an easier case for the commissioner to reverse than the Brett case which involved a game to continue three weeks after it had been played.

What would Bud Selig have done if after the mistaken call on Jason Donald, the Indians had come back and won the game? They were only down 3-0. Would that have made him change the call?

It is not that simple to say that Commissioner Selig totally blew it. What would have happened if Donald had been improperly declared out when he was safe? What would Selig have done? Would he have ordered the game to continue? Would he have added an asterisk to the Galarraga perfect game?

New York Giants fans might remember the unfortunate 2003 playoff loss to the San Francisco 49ers, who came back to win from a 24-point 3rd quarter deficit. On the last play of the game, the Giants lined up for a 42-yard field goal that would have won the game. The snap was low and hit the dirt. The holder had to throw a desperation pass. The pass was incomplete. There was, however, pass interference by the 49ers. Nonetheless, the potential receiver was deemed to be ineligible, and the game was ruled over, with the Giants the losers.

It turned out there was a mistake by the officials.[39] The potential receiver was eligible, and another Giant downfield who was not involved in the play was ineligible. Legally, there should have been offsetting penalties, and the play should have been returned to the original line of scrimmage with the Giants given another play. If he had followed the George Brett formulation, should Paul Tagliabue have required this one down to be replayed a day or two later?[40]

Conclusion

This author still believes that the Galarraga decision should have been reversed, but perhaps it is the Brett decision that should be reconsidered. Maybe there should only be a commissioner's review of umpire decisions where the umpire's decision was (1) either a mistake in the rules or wrong based on incontrovertible visual evidence, (2) where the decision involved the last play of the game so that there was no subsequent field of play decisions, and (3) where the commissioner's decision to reverse the call would end the game. The Brett decision would not have qualified on the third aspect.

My own subjective field of play decision is that Commissioner Selig was wrong to deny Galarraga a perfect game. The similarities between the Galarraga case and the Cornell-Dartmouth game 70 years ago are remarkable—an objectively incorrect call on the last play of the game where the blown call could not possibly affect any subsequent field of play decisions, and where there would be no need to continue further play of the game. The fact that cases like Galarraga and Brett turn up so infrequently indicates that there is no need to worry about opening up Pandora's box or about a domino effect. Galarraga was the one case (perhaps not one in a million but one in 25,000) that Asa Bushnell was talking about 70 years ago.[41] There's little risk of establishing a dangerous precedent. If there ever was a case for a baseball commissioner reversal, the Galarraga case was it.

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12. *See* Georgia High School Ass'n v. Waddell et al., 248 Ga. 542 (1981).
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41. *See supra* note 6.

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What Is the Probable Effect of Defective Foreclosure Documents Under New York Law?

By Marvin N. Bagwell and Robert F. Bedford

One of the more tragic consequences of the ongoing financial crisis is the number of residential homes that have gone into foreclosure. Even worse, what is now coming to the fore is that many of the foreclosed-out homeowners may have lost their home due to defective documentation submitted to the courts.[1] Thus, the foreclosure of residential mortgages and the sale of properties recovered by lenders in foreclosure proceedings is a topic that has found itself thrust into the limelight, as well as under the microscope.[2] Everything from challenges to standing, to allegations of robo-signing, and assembly-line foreclosures have left many in the title insurance industry asking themselves, how do we assess the possibility that many of these homeowners may try to reclaim the titles to their home from the insured new homeowners and lenders?[3] Despite the tragedy experienced by foreclosed-out homeowners, for the reasons set forth below, it is our opinion that New York law offers substantial protection for REO (Real Estate Owned) purchasers out of foreclosure actions where some of the foreclosing lenders' documents may have been defective. Our analysis is based upon a fact situation where the foreclosed-out borrower is bringing suit and asking the Court to put him or her back into title and possession of the property because the foreclosing lender's documents allegedly are defective. The defects may have arisen from "robo-signing," unverified affidavits, defective notarizations, etc.

In New York, the most likely course of action for the returning borrower is to bring an action in fraud against the foreclosing lender, the new REO purchaser, and the purchaser's lender. It is possible that the borrower might also sue the title company which insured the new buyer and lender, but it is more likely that the title company would be brought in to defend the new borrower and lender. As a preface, note that New York is a judicial foreclosure state.

Difficulty in Pleading Fraud

The first hurdle that the returning borrower would have to overcome is the requirement of Civil Practice Law and Rules ("CPLR") Section 3016 which requires that: "Where a cause of action or defense is based upon misrepresentation, *fraud*, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong *shall be stated in detail*." (emphasis added). Mere allegations, or purported fraud, and unsubstantiated statements are insufficient to support a fraud claim.[4] Therefore, to survive a summary judgment motion, the returning and foreclosed-out buyer cannot just say that a fraud occurred; the borrower must state in specific detail how, where and when the fraud occurred. This would mean that the returning borrower will be required to show the court, at a minimum, exactly which documents were defectively executed and their adverse impact upon the plaintiff—not an easy task.

"In New York, the most likely course of action for the returning borrower is to bring an action in fraud against the foreclosing lender, the new REO purchaser, and the purchaser's lender."

Next, the returning borrower must show the court a "misrepresentation of material fact, intended to deceive [the borrower], which caused injury."[5] Although there are no cases on point in New York involving a title underwriter and mortgage fraud, it is fair to assume that a returning borrower must prove to the court that the "misrepresentation" (the defective documents) caused the borrower's injury. The loss of the borrower's home would be the conceivable injury, but there is case law in another area which suggests that the borrower would have to show that he or she could payoff the mortgage. Otherwise, the court might find that the injury was inevitable and no fault of the foreclosing lender. That law will be discussed shortly in the service of process section.

If the Plaintiff Successfully Pleads Fraud, Upon Whom Does the Loss Fall?

If the returning borrower makes it past a summary judgment motion regarding the alleged fraud, the blame for the fraud must be pinned upon one of the defending parties. In the typical case, presumably those parties would be the REO purchaser, the new REO lender, the foreclosing lender and possibly the title company that insured the new purchaser and lender. The courts have already decided upon whom the blame must fall.

In *Fidelity National Title Insurance Company of New York v. Consumer Home Mortgage*, Fidelity insured several new mortgages, but it was later discovered that the lender's counsel had stolen the pay-off funds from the old mortgages.[6] The lender, Consumer Home Mortgage

("Consumer"), brought suit against Fidelity and sought to recover its loss because Fidelity had insured the new mortgage. However, the court noted that the loss was caused by Consumer's attorney, who absconded with the funds; in other words, Consumer's own agent was responsible for Consumer's loss. The Court stated the general rule that: "[W]here a loss is caused by the fraud of a third party, in determining the liability as between two innocent parties, the loss should fall on the one who enabled the fraud to occur."[7] Therefore, the loss fell upon Consumer. In the event a foreclosed borrower returned and tried to reclaim his or her former home, certainly the new REO purchaser, the new lender, and the new title insurer can claim to be innocent parties. They had nothing to do with and had no knowledge of the defective documents submitted by the foreclosing lender to the court in the foreclosure action. The only defendant left would therefore be the foreclosing lender. Based upon *Fidelity*, the title underwriter should be dismissed from the action and the loss should fall upon the foreclosing lender.

In the above discussion, the loss will fall upon the foreclosing lender by court ruling without any claimed pay-out by a title insurance underwriter. However, if the court rules that the title underwriter has liability and the underwriter is required to pay the claim, then under the subrogation clauses of the standard title policy[8] the underwriter would "be subrogated and entitled to the rights of the insured Claimant in the Title or insured Mortgage and all other rights and remedies in respect to the claim that the insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fee, and expenses paid by the Company." Therefore, as per the subrogation clause, the title underwriter could elect to step into the insured's shoes and bring suit against the Referee who conveyed title and more importantly, against the foreclosing lender to recover the underwriter's loss.

There would be two hurdles for the underwriter to overcome in that scenario. First, the Referee's deed is without warranties. The underwriter would have to find a way to go behind the Referee to the foreclosing lender. Second, the underwriter would have to make a management decision whether it would be good business to sue a lender client. The option, however, is there.

Will the Court Force the REO Purchasers From Their Home?

It is highly unlikely that the court will order the new REO purchasers to leave their home or void the new lender's mortgage. Even in the standing cases in which the New York courts have uniformly dismissed foreclosure actions when the foreclosing lenders have been unable to prove that the lenders actually owned the mortgage at the time the lenders commenced their foreclosure actions, the courts have never voided the mortgages. The courts have always dismissed the foreclosure actions without prejudice. The courts have only required that the lenders start new foreclosure actions once their paperwork is in order.[9] Therefore, in the name of "there is no free lunch," it is likely that the returning borrower's victory will be short-lived and the courts will permit the foreclosing lender to commence a new foreclosure action.

In fact, the courts have held that a good faith purchaser is entitled to retain the ownership of property conveyed by a Referee's deed. If the mortgage on which the REO sale was based is voided, the returning borrower is only entitled to monetary damages and not to possession of the property secured by the mortgage.[10] The returning borrower is unlikely to walk away with the title to the foreclosed-out home.

Statutes of Limitations: Appeals

Under CPLR Section 5513(b), the returning borrower has thirty (30) days from the date of service of the foreclosure judgment upon the borrower to appeal. However, that is only the beginning of the story. Generally, this applies only when the foreclosed owner has appeared in the action and is now appealing the determination made in the judgment of foreclosure and sale. Upon motion to the court, under CPLR 5513(b), foreclosed owners could request permission to appeal and state the basis for their request. Whether or not the court would grant such an appeal would depend on the court's interpretation of the facts of each action; however, a judgment of foreclosure and sale is final and is an adjudication of all the questions at issue between the parties.[11] Therefore, foreclosed owners would have to present a compelling reason that they would have been incapable of arguing during the initial action to justify the grant of an appeal.

The foreclosed owner could also move to vacate the judgment of foreclosure and sale. CPLR Section 5015 (a) provides that the court issuing the judgment or order may, upon motion, relieve a party from the judgment or order upon such terms as may be just, for the grounds of: fraud, misrepresentation, or other misconduct of an adverse party in section 3, or lack of jurisdiction in section 4. Both of these issues have appeared elsewhere in this article. There appears to be no statute of limitations as to when this motion can be brought, particularly under section 4. However, as stated previously, absent a showing that the homeowner can pay off the mortgage, it is unlikely that the court would grant a vacatur motion and the outcome would be for the lender to simply re-foreclose the title.

Statutes of Limitations: Fraud

There are two statutes of limitations governing when an action alleging fraud may be brought in New York. Under CPLR Sections 203(f) and 213(8), if a plaintiff alleges that the defendant committed actual fraud, then the statute of limitations is six (6) years from the date of the fraud, or two (2) years from discovery of the fraud, whichever is later. If the plaintiff alleges that the fraud was constructive, then the six year period runs from the date that the act or omission constituting the fraud occurred. Therefore, the outside period of which the possible defendants may have liability is six (6) years from the date of the fraud. If the documents submitted to the courts from defective foreclosures are dated between 2009 and 2010, the run-out period in New York would be 2015 or 2016. It could be argued that the frauds were discovered in 2010 when news reports started coming out, thereby giving the plaintiffs until 2012 to bring suit. However, such a position might be too aggressive for the courts to bear given that people have lost their homes.

"Barring, new, unexpected turns in the law, hope upon hope, this may not turn out to be the crisis that the title underwriters fear."

Statute of Limitations: Lack of Personal Service

There is one additional statute of limitation which must be considered. Under CPLR Section 317, a person in any action who is not served by personal in-hand delivery and who does not appear in the action has one year from the date he or she learns of the judgment, but not more than five years from the date the judgment is entered, to move to vacate the judgment of foreclosure and sale, provided that person has a meritorious defense. In *Ameritek Construction Corporation v. Gas, Wash & Go, Inc.*, the court denied the taxpayer the right to re-open a tax sale because the taxpayer never attempted to tender the moneys due to the city.[12] New York title attorneys have always assumed, based upon *Ameritek* and the words "meritorious defense" in Section 317, that a returning borrower who was not served by personal in-hand service (which is the usual situation) would have to prove to the court that he or she can pay off the foreclosed mortgage before the court would re-open the foreclosure action. Although there is no case law in support, we believe that the courts will bring the "meritorious defense" requirement to fraud actions as well. Additionally, a lack of personal in-hand service is not absolute proof of lack of knowledge for the purposes of the motion. A factual showing that the foreclosed owner was aware of the action and judgment, and did not move to vacate within one year from that time, would probably be enough to defeat a motion of this nature.

Conclusion

For the foregoing reasons, we do not believe that a suit to set aside a mortgage foreclosure action based upon the foreclosing lender's submitting defective instruments to the court will result in the REO purchaser losing his or her home. Title underwriters may have to defend one or two actions, and bear the defense cost of doing so, but if they lose, the most that will happen is that the court will force the foreclosing lender to re-foreclose the property. The longest possible time period for which underwriters would have liability ends in 2016 and depending upon when the court dates the fraud as occurring, the time period may end in 2012. Barring, new, unexpected turns in the law, hope upon hope, this may not turn out to be the crisis that the title underwriters fear. For foreclosing lenders and regretfully, for the many homeowners who have lost their homes, the results may not be as cheery.

Endnotes

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3. The media have picked up the title industry's concerns. *See* David Streitfield, *Bank of America to Freeze Foreclosure Cases, N.Y. Times*, October 2, 2010, at B1.
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7. *Id. See also Greenpoint Mortgage Funding, Inc. v. Stewart Title Insurance Co.*, 49 A.D.3d 687, 854 N.Y.S.2d 185 (2d Dep't 2008).
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9. *Wells Fargo v. Marchione*, 69 A.D.3d 204, 887 N.Y.S.2d 615 (2d Dep't 2009).
10. *Aubrey Equities, Inc. v. Goldberg*, 247 A.D.2d 253, 668 N.YS.2d 598 (1st Dep't 1998).
11. *Cherico v. Bank of New York*, 211 A.D.2d 961, 621 N.Y.S.2d 235 (3d Dep't 1995).
12. *Ameritek Const. Corp. v. Gas, Wash & Go, Inc.*, 247 A.D.2d 418, 668 N.Y.S.2d 663 (2d Dep't 1998).

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Summary Judgment Motion in a Will Contest: An Updated Proponent's Perspective

By Gary E. Bashian

A motion for summary judgment pursuant to N.Y. Civil Practice Law & Rules 3212 or 3211 (CPLR) is a powerful procedural tool that can end litigation immediately.

Summary judgment can deliver a swift and decisive victory on the outcome of a matter. It can limit the issues or award the broadest types of relief by ending all claims. When granted, it can avoid years of potential litigation and expense.

But for all its versatility, drafting a motion for summary judgment can be a daunting and complex undertaking. The facts (hopefully none in question) and the applicable law in any matter can make it difficult to identify issues with no triable issue of fact. Communicating the facts and the law clearly to the court so as to show that summary judgment should be granted is the challenge.

However, estate litigation can be surprisingly well suited to determinations based on summary judgment, which should not be forgotten by proponents who find themselves in a will contest. This is largely due to the fact that estate contests that reach the point of full-blown litigation are almost always based on one, a combination of or all of the familiar objections to testamentary validity: the failure to duly execute the instrument pursuant to N.Y. Estates Powers & Trusts Law 3-2.1 (EPTL), the testator's lack of testamentary capacity or the fact that the instrument was the product of undue influence or fraud.

Although summary judgment can be granted only if the movant makes a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,"[1] this is by no means an insurmountable task, even in matters where it appears that issues of fact dominate the proceeding. This is especially true in Surrogate's Court, where the traditional aversion to granting summary judgment has been eroded over the last several years.

Indeed, a probate petitioner in Surrogate's Court holds a number of procedural advantages over an objectant when making a motion for summary judgment to dismiss objections, several of which are described in greater detail below.

Due Execution

From a proponent's perspective, the issue of due execution is perhaps best suited for summary judgment. After all, the requirements for due execution are clearly articulated in EPTL 3-2.1 and are often complied with by even the most novice of draftsmen, making it a particularly attractive issue for summary relief where a failure to duly execute has been alleged.

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It is well established that the initial burden of proof regarding due execution is on the proponent. The "party who offers an instrument for probate as a will must show satisfactorily that it is the will of the alleged testator"[2] and that the instrument was duly executed.[3] To establish due execution, a proponent must show that: "(i) the testator signed at the end of the instrument; (ii) the testator either signed in the presence of at least two attesting witnesses, or acknowledged his/her signature to them; (iii) the testator declared to each of the attesting witnesses that the instrument was his/her will; and (iv) the witnesses signed at the testator's request."[4]

This is by no means a heavy burden for a proponent, as it must be proved only by a preponderance of the evidence.[5] Furthermore, a proponent is afforded a number of favorable presumptions regarding due execution. If the instrument was signed under the supervision of an attorney, it is presumed valid. In addition, where "a propounded instrument contains an attestation clause, it is inferred that the requisite statutory requirements were satisfied."[6] Finally, case law shows that only substantial, not strict, compliance with EPTL 3-2.1 need be present.

Accordingly, an alleged failure to comply with the strict and literal terms of the statute is not a basis for dismissing a petition for probate and is insufficient to

make a showing that a will was not duly executed. The court may find that substantial compliance with the statute is in fact sufficient to establish due execution. Furthermore, compliance with EPTL 3-2.1's requirements may be found by inference from the conduct and circumstances surrounding execution of the will.[7]

Testamentary Capacity

When determining testamentary capacity, the court will consider the following factors: (1) whether the testator "understood the nature and consequences of executing a will"; (2) whether the testator "knew the nature and extent of the property" he or she was disposing of; and (3) whether the testator "knew those who would be considered the natural objects of his bounty and his relations with them."[8] When moving for summary judgment, it is the proponent's task to prove that as a matter of law, the testator was legally capable of executing the instrument.

As with due execution, the proponent has the burden of proving testamentary capacity by a preponderance of the evidence[9] but is also afforded the benefit of several presumptions. For example, until "the contrary is established, a testator is presumed to be sane and to have sufficient mental capacity to make a valid will."[10] In addition, a testator's testamentary capacity is assessed at the precise time of the propounded instrument's execution.[11] Also, a testator need only a lucid interval of capacity to execute a valid will, and this interval can occur contemporaneously with an ongoing diagnosis of mental illness, including depression.[12] Moreover, courts have consistently recognized that the existence of self-proving affidavits executed by the attesting witnesses creates a presumption of testamentary capacity.[13] Each of these presumptions can be used with great effect to prove testamentary capacity and make the proponent's burden significantly easier to meet.

Undue Influence

Unlike due execution and testamentary capacity, which must be proved by the proponent of a will, undue influence must be proved by the objectant.[14] To establish that a testamentary instrument was procured by undue influence, an objectant must demonstrate by a preponderance of the evidence "that the influencing party had a motive to influence, the opportunity to influence, and that such influence was actually exercised."[15] This influence must have been so strong and pervasive that it subverted the true intentions of the testator at the time of execution to the extent that, but for the undue influence, the testator would not have executed the instrument. Clearly, this is a rather high standard to meet. At a minimum, the objectant must make a showing of actual acts of undue influence, including proof of "time and places when and where such acts occurred."[16]

It may come as no surprise that the actual exercise of undue influence is rarely proven by direct evidence; rather, it is usually established by circumstantial evidence of a substantial nature.[17] Among the factors the Surrogates consider when determining if undue influence prevents the probate of an instrument are: "(i) the testator's physical and mental condition; (ii) whether the attorney who drafted the propounded instrument was the testator's attorney; (iii) whether the propounded instrument deviates from the testator's prior testamentary plan; (iv) whether the person who allegedly wielded undue influence was in a position of trust; and (v) whether the testator was isolated from the natural objects of his bounty."[18] Often, an objectant will fail to offer evidence of any "actual acts" of undue influence at all, much less a single example raising an inference sufficient to meet the burden of proof to establish a *prima facie* case.

As illustrated in the matter of the *Will of Julia Elizabeth Taschereau*,[19] decided in 2010 by the New York County Surrogate's Court, actual and specific acts of undue influence can be difficult to establish. *Taschereau* discusses at length the nature of the evidentiary burdens an objectant alleging undue influence must meet, albeit in the context of a successful objection. In the *Taschereau* decision, Surrogate Webber provides a careful analysis of the facts of the case within the framework of the elements discussed above.

The case involved twin sisters battling over their mother's estate, whose primary asset was a co-op in Manhattan valued at approximately $475,000. The proponent lived near her mother, and the objectant resided in France. Both had a history of animus toward each other from the time they were children, a fact well known to the testifying witnesses. The proponent petitioned the court to probate the will one day after their mother's death. The propounded instrument left the testatrix's entire estate to the proponent, was signed at the proponent's insistence while the testatrix was recovering from an illness and contained significant changes from the prior will, which left her estate to her daughters equally.

The Surrogate's Court determined that shortly before her death, the testatrix had health problems which made her dependent on the proponent, who had power of attorney, managed the testatrix's finances and who herself increasingly depended on the testatrix for financial assistance. Testimony was also admitted into evidence showing that the proponent threatened to deny the testatrix visitation of the proponent's children, to whom she was devoted, when the testatrix provided financial assistance to the objectant or allowed the objectant to stay at the Manhattan co-op during her visits from France.

Circumstantial evidence, drawn from a long and detailed family history of strife between the sisters and their relationship with the decedent, formed the basis of a reasonable inference that undue influence had occurred. However, the lessons of *Taschereau* should not be lost on a petitioner seeking summary judgment in dismissing an objection based on undue influence. This is because the objectant's burden is set rather high. In *Taschereau*, this burden was met by an abundance of credible testimony from many close friends of the decedent, coupled with inconsistent and self-serving testimony from the proponent which, in the words of the court, sought "to manipulate the record."[20] It is uncommon for objectants to have the favorable facts and wealth of multisource testimony that were present in *Taschereau*. Petitioners may be able to leverage to their advantage the absence of facts such as those present in *Taschereau* when moving for summary judgment to dismiss objections based on undue influence.

Fraud

The objectant also bears the burden of proof by clear and convincing evidence when seeking to establish a *prima facie* case regarding the exercise of fraud in the procurement of an instrument.[21] In order to state a claim for fraud and defeat a motion for summary judgment on that issue, the objectant must show that there is an issue of fact as to whether the proponent or a third party "knowingly made a false statement to the testator which caused him to execute a will that disposed of his property in a manner differently than he would have in the absence of that statement."[22] Evidence of actual misrepresentation is necessary; a showing of "motive and opportunity" to mislead is insufficient.[23] Importantly, "[m]ere conclusory allegations and speculation" are insufficient for an objectant to establish a *prima facie* case;[24] "[a]llegations must be specific and detailed, substantiated by evidence in the record."[25] Again, these can be very difficult allegations to substantiate. A petitioner should make clear in his or her motion the lack of specific examples offered by an objectant, as without such examples the objectant's argument must be dismissed.

Standing

Standing is an often overlooked avenue by which a petitioner may succeed on summary judgment. As with all litigated matters, the parties to contested probate proceedings must establish that they have the right to be heard before the court.

The Second Department decision in *Matter of Abady*[26] is a recent example of how a motion based on standing can benefit a petitioner. There, the objectant, who was the decedent's surviving spouse, filed objections to probate and notice of election. The petitioner moved for summary judgment pursuant to CPLR 3211(a), seeking dismissal on the grounds that the objectant had no standing due to her waiver of her right to any claims against the estate in two prenuptial agreements, one executed in 2001 and the other in 2006. The objectant sought to prove the prenuptial agreements invalid, arguing that they had not been properly acknowledged and that the execution of the 2001 agreement had been procured by fraud.

The Appellate Division, Second Department, determined that the execution of the 2001 prenuptial waiver "substantially complied"[27] with the standards set forth in the N.Y. Real Property Law and, by extension, the requirements of EPTL 5-1.1-A (e) (2), which provides that a waiver or release of a surviving spouse's right to an elective share of the deceased spouse's estate "must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of the conveyance of real property."[28]

As the *Abady* court noted, there "'is no requirement that a certificate of acknowledgement contain the precise language set forth in the Real Property Law. Rather, an acknowledgement is sufficient if it is in substantial compliance with the statute."'[29] Thus, the decedent's signature was not required on the waiver, as the objectant had argued, since the waiver was unilateral in form. Rather, both signatures would be required only if the waiver were bilateral in form pursuant to EPTL 5-1.1-A(e)(3)(C). In the end, the petitioner's motion for summary judgment to dismiss the objections was granted on the grounds that the 2001 waiver was properly executed and thus denied the objectant standing.

Conclusion

Estate litigators should bear in mind the foregoing key elements of summary judgment the next time they confront an objectant's claims. The presumptions in favor of a petitioner, and heavy burden of proof upon an objectant, make summary judgment a tactic that must be considered in counteracting many common objections. Some desperate objectants will attempt to present theories as factual questions, but mere speculation and conclusory allegations are not sufficient to raise triable issues of fact[30]—they are at most the "wailing and gnashing of teeth."[31]

Endnotes

1. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *see generally Friends of Animals v. Associated Fur Mfs., Inc.*, 46 N.Y.2d 1065 (1979).
2. *Rollwagen v. Rollwagen*, 63 N.Y. 504, 517 (1876).
3. *Matter of Kellum*, 52 N.Y. 517 (1873).

4. *Matter of Hirschorn*, 11/5/2008 N.Y.L.J. 36 (col. 3) (Sur. Ct., Westchester Co.) (citing *Matter of Kellum, supra*).
5. *Matter of Pirozzi*, 238 A.D.2d 833 (3d Dep't 1997).
6. *Matter of Hirschorn*, 11/5/2008 N.Y.L.J. 36 (col. 3) (Sur. Ct., Westchester Co.).
7. *See Matter of Frank*, 249 A.D.2d 893 (4th Dep't 1998).
8. *In re Kumstar*, 66 N.Y.2d 691 (1985).
9. *See Estate of McCloskey*, 307 A.D.2d 737 (4th Dep't 2003).
10. *See Matter of Beneway*, 272 A.D. 463 (3d Dep't 1947).
11. *See Matter of Minasian*, 149 A.D.2d 511 (2d Dep't 1989).
12. *See Matter of Esberg*, 215 A.D.2d 655 (2d Dep't 1995).
13. *See Matter of Castiglione*, 40 A.D.3d 1227, 1228 (3d Dep't 2007).
14. *See Matter of Bustanoby*, 262 A.D.2d 407, 408 (2d Dep't 1999).
15. *Matter of Malone*, 46 A.D.3d 975 (3d Dep't 2007).
16. *Matter of Friedman*, 26 A.D.3d 723 (3d Dep't 2006); *see Matter of Fiumara*, 47 N.Y.2d 845 (1979).
17. *See Matter of Walther*, 6 N.Y.2d 49 (1959); *Matter of Burke*, 82 A.D.2d 260 (2d Dep't 1981).
18. *Estate of Hirschorn*, 11/5/2008 N.Y.L.J. 36 (col. 3) (Sur. Ct., Westchester Co.).
19. *Will of Julia Elizabeth Taschereau*, 11/17/2010 N.Y.L.J. 34 (col. 1) (Sur. Ct., N.Y. Co. 2010).
20. *Id.*
21. *Simcuski v. Saeil*, 44 N.Y.2d 442, 452 (1978).
22. *Matter of Evanchuk*, 145 A.D.2d 559, 560 (2d Dep't 1988).
23. *Matter of Gross*, 242 A.D.2d 333, 334 (2d Dep't 1997).
24. *Matter of Seelig*, 13 A.D.3d 776, 777 (3d Dep't 2004).
25. *Matter of O'Hara*, 85 A.D.2d 669, 671 (2d Dep't 1981).
26. *In re Abady*, 76 A.D.3d 525, 526 (2d Dep't 2010).
27. *Id.*
28. *Id.*
29. *Id.* (quoting *Weinstien v. Weinstien*, 36 A.D.3d 797, 798 (2d Dep't 2007)).
30. *See generally Matter of Seelig*, 13 A.D.3d 776 (3d Dep't 2004).
31. *Book of Matthew* 13:42.

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Ethics Opinion 846

Committee on Professional Ethics of the New York State Bar Association (10/27/10)

Topic: Contacts by non-lawyer insurance company representatives with workers' compensation claimants represented by counsel.

Digest: A lawyer for an insurance carrier may not, without prior consent of claimant's counsel, send forms directly to a specific claimant where the lawyer knows the claimant is represented by counsel with respect to the claim, but if the lawyer gives reasonable advance notice to claimant's counsel, the lawyer may cause the insurance carrier's employees to send the forms. The fact that a lawyer designed, or assisted in designing, forms to be sent by non-lawyer employees of the carrier to claimants as a class does not trigger the requirements of Rule 4.2, even though the lawyer knows that some of the claimants are represented by counsel.

Rules: 4.2.

Code: DR 7-104(A)(1).

Facts

1. An insurance carrier provides workers' compensation insurance for employers in New York State. The insurance company employs (or contracts with) personnel to act as claims adjusters, examiners, investigators or third-party administrators to investigate and manage workers' compensation claims. (Although the personnel have varying titles, we will refer to all of them in this opinion by the generic term "claims adjusters.") The claims adjusters are not lawyers (or at least are not acting as lawyers in the claims adjuster jobs). In the course of investigating and managing claims, the claims adjusters regularly communicate with claimants.

2. The facts presented to us indicate that every claimant with whom the claims adjusters communicate is a party to an ongoing Workers' Compensation Board proceeding, and some of the claimants are represented by legal counsel regarding their claims. The carrier knows which claimants are represented by counsel because 12 NYCRR § 300.17 requires attorneys or licensed representatives representing claimants to file a "notice of retainer" with the Workers' Compensation Board "immediately upon being retained" and to transmit a copy of this form to the insurance carrier "at the time of filing." Whether claimants are represented by counsel or not, the carrier sends forms to claimants that seek information on their work status or entitlement to benefits. The insurers may later use the information on these forms against the claimants (*e.g.*, to seek a change in benefits due to a claimant's status, or to disqualify a claimant from receiving benefits if the representations on a form prove false).

3. When an insurance carrier sends a form to a claimant in the above circumstances, is an attorney for the insurance carrier violating the New York Rules of Professional Conduct (the "Rules") if:

   (a) the form is sent by an attorney to a specific claimant? or

   (b) the form is sent by a non-attorney to a specific claimant at the direction of an attorney? or

   (c) the form is sent by a non-attorney *not* acting under an attorney's direction, but an attorney designed or assisted in designing the form and will use the information from the form? or

   (d) the form is sent on a regular basis via computerized process without human intervention, but an attorney designed or assisted in designing the form or will use the information from the form? or

   (e) the attorney provides reasonable advance notice to the claimant's counsel?

   (f) If the answer to question (e) is yes, what constitutes "reasonable advance notice" in the case of written and oral communications?

Opinion

4. The most relevant provision of the Rules of Professional Conduct for this inquiry is Rule 4.2, which has two subparagraphs. Rule 4.2(a) prohibits lawyers from communicating or causing another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, without the prior consent of the other lawyer. Rule 4.2(b), however, permits a lawyer to "cause a client" to communicate with a represented person, and counsel the client with respect to those communications, *provided* the lawyer gives "reasonable advance notice" to the represented person's counsel that such communications will be taking place.[1]

5. We note at the outset that the restrictions of Rule 4.2 do not apply if a lawyer "is authorized…by law" to communicate or cause another to communicate with a represented party. Thus, if the Workers' Compensation Board has validly authorized insurance carrier attorneys to contact claimants, or to cause claims adjusters to contact claimants directly, with respect to matters before the Board, then Rule 4.2 would not restrict such contacts.[2]

Question (a)

6. Assuming that the restrictions of Rule 4.2 apply to sending the forms in question, it is clear that Rule 4.2(a) would prohibit the insurance carrier's attorneys from sending the forms themselves, absent prior consent of the claimant's counsel, if the lawyer knows that the claimant is represented by counsel.

Questions (b) and (e)

7. Where the lawyer directs the insurance company's non-lawyer agents to send a form to a specific claimant, Rule 4.2(b) applies and the lawyer may ordinarily "cause a client to communicate with a represented person." In that case, the lawyer may proceed without the "prior consent" of the claimant's counsel as long as the lawyer gives "reasonable advance notice" to the claimant's counsel.

Question (f)

8. Rule 4.2 does not further define what constitutes "reasonable advance notice." We believe the term must be interpreted in light of the purpose of the requirement, which is to permit the represented party's lawyer to counsel his or her client on what to do when the client is contacted by the insurance company. The notice thus must be provided in a manner and with enough time so that the receiving lawyer has a reasonable amount of time, under all the circumstances, to contact his or her client regarding the planned communication. This is consistent with the sound guidance contained in former EC 7-18 of the New York Code of Professional Responsibility, which stated, in relevant part:

> "Reasonable advance notice" means notice provided sufficiently in advance of the direct client-to-client communications, and of sufficient content, so that the represented person's lawyer has an opportunity to advise his or her own client with respect to the client-to-client communications before they take place.

Questions (c) and (d)

9. The more difficult questions concern the level of attorney involvement in the design of the forms, and the procedures for sending the forms, that will constitute "causing" the client to communicate with the claimant for purposes of Rule 4.2. We considered a related question in N.Y. State 828 (2009). In that opinion, a New York State agency maintained a staff of non-lawyer investigators who would conduct investigations of agency licensees "without any supervision of the investigators by staff counsel." When misconduct by a licensee was discovered, a report would be prepared by one of the investigators for review by counsel and possible prosecution by counsel. We opined that the non-lawyer investigator's conduct in contacting represented licensees would not be imputed to the agency's staff attorneys unless the attorneys were charged with "supervision or control" of the investigators, which was not the case. We observed:

> Where, for example, the agency requires its investigators to be instructed by staff attorneys concerning the procedures to be followed before undertaking an investigation, the conduct of the investigators will generally be imputed to the attorneys…. Where, on the other hand, there is no requirement or expectation that the agency's investigators will operate under the guidance of the staff attorneys, then… the conduct of the investigators will not ordinarily be imputed to the staff attorneys.

10. We did not specifically address in N.Y. State 828 the extent to which a lawyer's involvement in setting up or designing a general program of contacts with counterparties, some of whom may be represented by counsel, would constitute "supervision or control." With respect to the present inquiries, we conclude that the fact that an attorney designed or assisted in designing a form to be sent to claimants generally—some of whom may be represented by counsel—does not, for the purposes of Rule 4.2, constitute "causing" the carrier to communicate with those claimants who are represented. In other words, designing a form to be sent by non-lawyers does not by itself amount to supervision and control over the non-lawyers.[3]

11. This conclusion is based on sound policies. A client such as the insurance carrier here should be able to consult with its lawyers on generalized or mass communications with claimants or other

counterparties. If an attorney's design or advice about mass communications triggered Rule 4.2 based merely on the statistical probability (or even certainty) that some of the counterparties would be represented by counsel, then insurance carriers and similar clients might be chilled in seeking such advice—a perverse result that was not the intent of Rule 4.2.[4] Rather, we believe Rule 4.2 is triggered by an attorney's involvement in sending a communication to a specific claimant (or set of claimants) only when the attorney knows that the specific claimant (or set of claimants) is represented in the matter in question. Thus, we answer questions (c) and (d) in the negative.

Conclusion

12. In answer to question (a), an attorney for the insurance company may not, without obtaining consent of the claimant's counsel under Rule 4.2(a), send a form directly to a specific claimant where the lawyer knows that the claimant is represented by counsel with respect to the workers' compensation claim.

13. In answer to questions (b) and (e), the attorney for the insurance carrier may direct a non-lawyer employee of the carrier to communicate with a represented claimant after the attorney gives "reasonable advance notice" to the claimant's counsel within the meaning of Rule 4.2(b).

14. In answer to question (f), such a communication must be provided in a manner and with enough time so that the receiving lawyer has a reasonable amount of time, under all the circumstances, to contact his or her client and advise the client what to do when contacted by the insurance company.

15. In answer to questions (c) and (d), where non-lawyer claims adjusters send forms to claimants who are represented by counsel, or where a computerized process sends such forms without human intervention to represented and unrepresented claimants, Rule 4.2 does not apply simply because a lawyer designed or assisted in designing the forms unless the attorney knows that a specific claimant is represented by counsel in the matter.

Endnotes

1. Rule 4.2 provides:

> (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.
>
> (b) Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place.

Because the facts presented to us indicate that every claimant in question is at all relevant times a party to an ongoing Workers' Compensation Board proceeding, we need not address here whether Rule 4.2 restricts contact with a represented person who is not a "party" to a relevant proceeding. *Compare Grievance Comm. for Southern District of New York v. Simels*, 48 F.3d 640 (2d Cir. 1995) (criminal defense lawyer did not violate DR 7-104(A)(1) by interviewing witness represented in related matter) *with* N.Y. State 735 (2001) (in noncriminal cases, the term "party" in DR 7-104(A)(1) should be read broadly to cover represented witnesses) *and* N.Y. State 785 (2005) ("[T]he 'no contact' rule will bar unconsented communication with [a nonparty insurance] adjuster if the insurance company is known to be separately represented by counsel with respect to the matter.").

2. The Board's regulations provide that a licensed representative for an insurance carrier should "communicate with an adverse party who is represented by an attorney or licensed representative only through such attorney or representative," see 12 NYCRR § 302-2.6, but some Board opinions state that this regulatory limitation on communications with an adverse party "applies only to licensed representatives, whom the Board regulates, and attorneys for the parties, who are regulated by the Appellate Division and by the Code of Professional Responsibility, in their professional dealings with the adverse parties in litigated matters, and does not apply to claimants, employers and carriers themselves." *Matter of Nick Tahou's Inc.*, 2008 NY Wrk. Comp. 70210028, 2008 NY Wrk. Comp. LEXIS 9427. *See also Fink Baking Co.*, 2007 NY Wrk. Comp. 34566, 2007 NY Wrk. Comp. LEXIS 10305 (carrier did not err in asking its investigator to obtain represented claimant's written statement regarding work activity because "a carrier has an absolute right…to have direct contact with claimants on behalf of its insured"); *NYS Dept of Corrections*, 2001 NY Wrk. Comp. 59800320, 2001 NY Wrk. Comp. LEXIS 97590 (restriction in § 302-2.6 "applies to the representatives of claimants, employers and carriers, not to the claimants, employers and carriers themselves"). We express no view on whether the Board's regulations permit communications with claimants when those communications would be prohibited by Rule 4.2, or whether the Board's decisions supersede the restrictions of Rule 4.2. Those are questions of law beyond our jurisdiction.

3. Another rule about causing another to violate the Rules of Professional Conduct is Rule 8.4(a), which provides that a "lawyer or law firm shall not violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." A lawyer who complies with Rule 4.2(b) by causing another person (a client) to communicate with the opposing party upon reasonable advance notice to opposing counsel is not violating Rule 4.2(a). Thus, a lawyer who complies with Rule 4.2(b) also is not violating Rule 8.4(a).

4. A lawyer should not, of course, design the form so as to seek privileged information or to discourage represented claimants from consulting with their counsel. *See* Rule 4.2, Cmt. 1 (Rule 4.2 protects represented parties against "uncounseled disclosure of information relating to the representation") and Rule 4.2, Cmt. 11 (lawyer "may not advise the client to seek privileged information").

(24-10)

Ethics Opinion 847

Committee on Professional Ethics of the New York State Bar Association (12/21/10)

Topic: Conflicts of interest; lawyer's responsibilities to third parties; lawyer as corporate officer.

Digest: An attorney may represent the beneficial owner of a mortgage note and mortgage, and may concurrently serve as an officer of the mortgagee of record, for the purposes of executing a mortgage assignment to the beneficial owner and prosecuting a mortgage foreclosure action in the assignee's name.

Rules: 1.0(f); 1.7(a); 1.7(b).

Question

1. May an attorney represent the beneficial owner of a mortgage note and mortgage, and concurrently serve as an officer of the mortgagee of record, for the purposes of executing a mortgage assignment to the beneficial owner and prosecuting a mortgage foreclosure action in the assignee's name?

Facts

2. In 1993, the real estate mortgage industry created an electronic registration system for mortgages. Mortgage Electronic Registration Systems, Inc. ("MERS"), a Delaware corporation, was established to act as nominee and mortgagee of record for members of the system (the "MERS System"). The purpose of the MERS System was to facilitate the transfer and assignment of mortgages in the secondary mortgage market by bypassing, in favor of instant and inexpensive private electronic registration, the more cumbersome preparation and expensive recording of paper mortgage assignments in the real property records of the nation's municipal recording authorities. In New York, regardless of how many electronic assignments of the mortgage occurred within the MERS System, MERS would remain the mortgagee of record as reflected by the public records of the county clerks.

3. In 2006, the New York Court of Appeals upheld the continuing utility of the private MERS System by affirming a writ of mandamus and declaring that the Suffolk County Clerk was statutorily required to record and index mortgages, assignments of mortgage, and discharges of mortgage that named MERS as nominee or mortgagee of record. *See Merscorp, Inc. v. Romaine*, 8 N.Y.3d 90 (2006).

4. In connection with the specific question before us, the inquirer has related the following facts, which we assume to be true. The inquirer is an attorney ("Attorney") who represents the current mortgagee ("Client") in a pending residential mortgage foreclosure action. The inquirer does not represent MERS in the foreclosure action, and does not otherwise represent or provide legal services to MERS. The mortgage instrument executed by the mortgagor and the initial lender at the closing in October 2007 provided that MERS would be the mortgagee of record "acting solely as a nominee for Lender and Lender's successors and assigns." The initial lender subsequently sold the mortgage loan, and the inquirer's Client is the current assignee and holder of the note and mortgage, which is duly registered in the MERS System, but not in the real property records of the county clerk.

5. Many residential foreclosure actions brought in the name of MERS, as nominee and mortgagee of record, have foundered on the question of MERS' standing to sue. *See, e.g., LaSalle Bank National Association v. Lamy*, 12 Misc.3d 1191(A), 2006 WL 2251721 (N.Y. Sup. Ct. Suffolk Cty. 2006) (citations omitted) ("this court and others have repeatedly held that a nominee of the owner of the note and mortgage, such [as] MERS, may not prosecute a mortgage foreclosure action in its own name as nominee of the original lender because it lacks ownership of the note and mortgage at the time of the prosecution of the action"). To avoid dismissal or delay for lack of standing, some members of the MERS System, including inquirer's Client here, have elected to prepare and record a paper assignment with the county clerk before commencing the foreclosure action. That way, the plaintiff in the foreclosure action will not be merely the mortgagee of record; rather, the plaintiff will be the real party in interest and the holder of the mortgage note.

6. To accommodate the expeditious preparation and recording of these paper assignments from MERS as assignor to Client, as assignee, a three-party agreement entitled "Agreement for Signing Authority" was entered into between MERS, Client and Attorney in December 2007. This agreement appointed Attorney, plus three non-lawyer members of Attorney's staff, as assistant secretaries and vice presidents of MERS, and authorized each of them (i) to execute, on MERS behalf, any assignment of any mortgage lien or any release of any mortgage loan registered to Client in the MERS System, and (ii) to execute all documents necessary to foreclose upon real property secured by a mortgage loan registered to Client in the MERS System.

Opinion

A. Are There Conflicts Under Rule 1.7(a)(2)?

7. Against this background, we are asked whether Attorney's dual role—officer of MERS (or supervisor of three employee non-lawyer officers of MERS) and counsel for Client—constitutes a conflict of interest. This inquiry is governed by Rule 1.7(a)(2) of the New York Rules of Professional Conduct (the "Rules"), which addresses conflicts between a client and the personal interests of the client's lawyer. Specifically, Rule 1.7(a)(2) provides:

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

8. Because Attorney here was selected, engaged and paid by Client, not by MERS, to prosecute the foreclosure proceeding, there is no basis for a "reasonable lawyer" to conclude, under Rule 1.7(a)(2), that there exists a "significant risk that [Attorney's] professional judgment on behalf of [Client] will be adversely affected by lawyer's own financial, business, property or other personal interests" arising from Attorney's limited signing authority on behalf of MERS.

B. Are There Conflicts Under Rule 1.7(a)(1)?

9. We will also address Rule 1.7(a)(1), which addresses conflicts between or among multiple clients. Rule 1.7(a)(1) provides as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that…(1) the representation will involve the lawyer in representing differing interests.

10. Rule 1.7(a)(1) is not at issue because MERS is not a client of Attorney. Rather, Attorney represents only one client, the mortgagee. Nonetheless, for the sake of completeness, we note that there are no "differing interests" between MERS and Client that would create a conflict of interest under Rule 1.7(a)(1). Rule 1.0(f) defines "differing interests" to include "every interest that will adversely affect either the judgment or loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest." There are no differing interests between MERS and Client because the mortgage assignment from MERS to Client did not convey any tangible interest in real property. Rather, MERS was merely a nominee mortgagee of record without any economic interest in the outcome of the foreclosure proceeding. Similarly, MERS's express grant to Attorney of the requisite authority to prosecute the foreclosure action is not adverse to MERS.

11. Moreover, even if a conflict of interest did arise under subparagraphs (a)(1) or (a)(2) of Rule 1.7, the conflict was cured pursuant to Rule 1.7(b). It was cured when Attorney obtained informed consent from the affected Client, confirmed in writing, as reflected in the Agreement for Signing Authority described above.

12. It is conceivable, of course, that in preparing and prosecuting the foreclosure action, Attorney will discover some error or omission on the part of MERS that has created a viable defense to the foreclosure action or that could result in substantial delay to the entry of a mortgage foreclosure judgment in Client's favor. For example, it is possible that the electronic records of the MERS System are materially incomplete or inconsistent with Client's putative status as mortgagee. This circumstance, in which Attorney erroneously relied upon the accuracy of the MERS System in exercising the Attorney's signing authority to create and record a paper assignment in anticipation of a mortgage foreclosure action, might rise to the level of conflicting fiduciary obligations between Attorney as assistant secretary and vice president of MERS, on the one hand, and Attorney as foreclosure counsel for Client, on the other hand. Such a situation would require further analysis under Rule 1.7(a)(2) and (b). However, as far as we have been informed, such a conflict does not exist here.

13. We do not opine on the application of the Real Property Law, or other State or federal statutes, to the execution of the mortgage assignment or any other documents submitted in the foreclosure action. That is beyond our jurisdiction as an ethics committee.

Conclusion

14. Based on the facts presented, and subject to the qualifications stated, we answer the inquiry in the affirmative. An attorney may represent the beneficial owner of a mortgage note and mortgage, and concurrently serve as an officer of the mortgagee of record, for the purposes of executing a mortgage assignment to the beneficial owner and prosecuting a mortgage foreclosure action in the assignee's name.

(45-10)

Ethics Opinion 848

Committee on Professional Ethics of the New York State Bar Association (12/22/10)

Topic: Attorney newsletters; advertisements; disclaimers about prior results.

Digest: Whether a publication by a lawyer or law firm is an "advertisement" depends on its content, its intended purpose, and the targeted audience. With certain exceptions, if a publication is an advertisement, it must be labeled "Attorney Advertising," and if it makes certain types of claims it must include the precise disclaimer set out in Rule 7.1(e)(3). If a law firm's website is an advertisement, it must say "Attorney Advertising" on the home page.

Rules: 1.0(a) and 7.1(d), (e) & (f).

Facts

1. A law firm ("Law Firm") is contemplating publishing an educational newsletter, which is intended to be informative. Law Firm will publish the newsletter in both hard copy and electronic formats. Law Firm will send the newsletter to current clients, former clients, persons who are not clients, attorneys, and persons not in any of those categories who have affirmatively opted to receive the firm's newsletters, announcements, emails, or blog posts. Law Firm wants to direct the recipients of the newsletter to the firm's website and to the firm's attorneys, but does not want such references to render the newsletter an "advertisement" that will be governed by Rule 7.1.

2. Law Firm also publishes marketing brochures, blogs and announcement emails, and Law Firm currently maintains a website that includes its own disclaimer regarding prior case results. The disclaimer reads as follows: "Case results depend upon a variety of factors unique to each case and matter. Similar results are not guaranteed in any future case." Neither this disclaimer nor the statement "Attorney Advertising" appears on the home page of Law Firm's website.

Questions

3. Is a law firm's educational newsletter an "advertisement" under the New York Rules of Professional Conduct if it refers to the lawyers and law firm who send out the newsletter?

4. Must a law firm use the exact disclaimer language included in Rule 7.1(e)(3) of the New York State Rules of Professional Conduct regarding prior results, or is substantially similar language acceptable?

5. Does language disclaiming similar results in future cases as those achieved in prior cases relieve a law firm of the need to state "Attorney Advertising" on the home page of its website?

Opinion

A. Is Law Firm's Educational Newsletter an "Advertisement"?

6. The first question is whether Law Firm's educational newsletter is an "advertisement" within the meaning of the New York Rules of Professional Conduct (the "Rules"). This question is important because if a communication is deemed to be an "advertisement" as defined in Rule 1.0(a), then the language and format of the communication are governed by Rule 7.1.[1] For example, Rule 7.1(f) requires that most lawyer advertising must be labeled "Attorney Advertising."

7. Rule 1.0(a) defines "advertisement" as follows:

> "Advertisement" means any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.

8. In determining whether Law Firm's contemplated educational newsletter is an attorney advertisement within the meaning of Rule 1.0(a)—and is therefore subject to the mandates set out in Rule 7.1—we consider three factors: (i) the intent of the communication, (ii) the content of the communication and (iii) the targeted audience of the communication.

9. Regarding the first factor—the intent of the communication—Law Firm's newsletter is deemed to be advertising under Rule 1.0(a) only if its primary goal is "the retention of the lawyer or law firm." Contact or biographical information about the lawyers or the law firm contained in the newsletter does not, without more, transform an otherwise educational communication into advertising. As with general marketing materials (such as pencils, pads, and T-shirts), stating the firm's name, logo and contact information does not change attorney communications into advertising under the Rules "if their primary purpose is general awareness and branding, rather than retention of the law firm for a particular mat-

ter." *See* Rule 7.1, Cmt. 8; *cf.* Rule 7.1, Cmt. 10 (if information disseminated in connection with not-for-profit sponsorship by a firm is limited to the name of the law firm, contact information, brief description of areas of practice and the fact of sponsorship of the event, the communication is not considered advertising.)

10. Regarding the second factor—the content of the newsletter—Comment 7 to Rule 7.1 provides the following guidance:

> Topical newsletters, client alerts, or blogs intended to educate recipients about new developments in the law are generally not considered advertising. However, *a newsletter*, client alert, or blog *that provides information or news primarily about the lawyer or law firm* (for example, the lawyer or law firm's cases, personnel, clients or achievements) *generally would be considered advertising*. [Emphasis added.]

Thus, whether the newsletter is considered advertising will depend in part on its content.

11. Regarding the third factor—the audience for the communication — the definition of "advertisement" expressly excludes existing clients or other lawyers. Accordingly, communications that otherwise meet the criteria for an advertisement are not required to conform to the strict requirements of Rule 7.1 if they are directed to existing clients or other lawyers. Moreover, we believe that certain communications to former and prospective clients are not advertisements. Specifically, according to Rule 7.1, Comment 7:

> Communications to former clients that are germane to the earlier representation are not considered to be advertising.… Communications, such as proposed retainer agreements or ordinary correspondence with a prospective client who has expressed interest in, and requested information about, a lawyer's services are not advertising.

12. If Law Firm determines that its educational newsletter is an advertisement under the Rules—which will depend mainly on the intent (purpose) and content of the newsletter—then Law Firm should consider the audience for the newsletter in order to determine whether it must be labeled "Attorney Advertising." If the newsletter is produced in hard copy and mailed to the general public, then Law Firm must include the "Attorney Advertising" label required by Rule 7.1(f). Likewise, if the newsletter will also be circulated and made available electronically via the firm's website, via email, and via blogs, and posts, where the precise nature of the receiving audience is unknown, Law Firm must include the phrase "Attorney Advertising" on the electronic versions of the newsletter. However, Law Firm has the option of omitting that language in versions of the newsletter that are sent only to existing clients, other lawyers, or persons who meet the exceptions for former and prospective clients discussed above, because communications to those persons are not advertising even if their primary purpose is the retention of the lawyer or law firm.

B. Must Law Firm Use the Precise Disclaimer Set Out in Rule 7.1(e)(3)?

13. The second question is whether Law Firm must use in its newsletter the exact disclaimer language included in Rule 7.1(e)(3) of the New York State Rules of Professional Conduct regarding prior results, or instead whether substantially similar language would be acceptable.

14. We do not know the content of the proposed newsletter, but we will assume it will contain some of the categories of information governed by Rule 7.1(d), which allows a law firm to include certain types of information in an advertisement (*e.g.*, "statements that are reasonably likely to create an expectation about results the lawyer can achieve," and "statements that compare the lawyer's services with the services of other lawyers"), *provided* the advertisement complies with Rule 7.1(e). In turn, Rule 7.1(e)(3) states, in relevant part, as follows:

> (e) It is permissible to provide the information set forth in paragraph (d) provided…
>
> > (3) it is accompanied by the following disclaimer: *"Prior results do not guarantee a similar outcome."* [Emphasis added.]

15. We believe the precise disclaimer language specified in Rule 7.1(e)(3) is required, and that paraphrasing or similar language does not comply with the Rules. Rule 7.1 is written with great specificity regarding both content and format. For example, the disclaimer just quoted from Rule 7.1(e)(3) is placed inside quotation marks, and the last line of Rule 7.1(f) (quoted below) provides that in the case of email advertising, "the subject line shall contain the notation 'ATTORNEY ADVERTISING." (Quotation marks and capital letters in the original.) We think this high degree of specificity as to language and formatting dictates strict compliance with the requirements of Rule 7.1(e)(3). Language that is substantially similar to the specific disclaimer language prescribed

in Rule 7.1(e)(3) is not sufficient and does not negate the need to include the precise disclaimer set out in Rule 7.1(e)(3). Omitting that exact language violates the plain language of the rule.

16. We also believe, however, that a law firm may include additional language alongside the Rule 7.1(e)(3) disclaimer as long as the additional language does not undermine or contradict the Rule 7.1(e)(3) "prior results" disclaimer. Nothing in Rule 7.1 prohibits additional language unless it is false, deceptive, or misleading—*see* Rule 7.1(a)(1). But when an advertisement contains information falling within the ambit of Rule 7.1(d), a law firm does not satisfy Rule 7.1(d) and 7.1(e)(3) by substituting other language for the mandated language. It must include the exact wording set out in the rule.

C. Must Law Firm's Home Page Say "Attorney Advertising"?

17. The third question is whether language disclaiming similar results in future cases as those achieved in prior cases relieves Law Firm of the need to state "Attorney Advertising" on the home page of its website. This question is controlled by Rule 7.1(f), which provides as follows:

> *Every advertisement* other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any web sites related thereto), or made in person pursuant to Rule 7.3(a)(1), *shall be labeled 'Attorney Advertising'* on the first page, or *on the home page in the case of a web site*. If the communication is in the form of a self-mailing brochure or postcard, the words 'Attorney Advertising' shall appear therein. In the case of electronic mail, the subject line shall contain the notation 'ATTORNEY ADVERTISING.' [Emphasis added.]

18. Under Rule 7.1(f), all of Law Firm's communications that fall within the definition of "advertisement," including the home page of the firm's website, must include the phrase "Attorney Advertising." Thus, if Law Firm's newsletter, website, marketing brochures, blogs, announcement emails, or other communications constitute advertising under the Rules, then the communication must be labeled as "Attorney Advertising" unless specifically exempted by the Rules. The "Attorney Advertising" label "serves to dispel any confusion or concern that might be created when non-lawyers receive letters or emails from lawyers" and the recipients otherwise might not otherwise know whether these communications are advertisements or educational items. *See* Rule 7.1, Cmt. 5. Conversely, because advertisements in newspapers and on television and radio are "self evidently advertisements" and there is "no risk of such confusion or concern," the Rules do not require those forms of advertising to include the label "Attorney Advertising."

Conclusion

19. Whether a newsletter or other law firm communication is an "advertisement" under the New York Rules of Professional Conduct depends on three factors—the content of the communication, the intent (purpose) of the communication, and the targeted audience of the communication. If a particular communication is an "advertisement" within the meaning of Rule 1.0(a), then it is governed by Rule 7.1. However, limited references to the law firm, its lawyers, and their contact information do not transform an otherwise educational newsletter into an advertisement.

20. Advertisements that include information of the types set out in Rule 7.1(d), such as statements that are reasonably likely to create an expectation about results the lawyer can achieve, statements that compare the lawyer's services with the services of other lawyers, or statements describing or characterizing the quality of the lawyer's or law firm's services, must include the specific disclaimer language set out in Rule 7.1(e)(3), which states: "Prior results do not guarantee a similar outcome." The Rules permit additional language that does not contradict or undermine that disclaimer, but the Rules do not permit substitute language.

21. Finally, every advertisement other than those appearing in a radio, television or billboard advertisement, in a directory, newspaper, magazine or other periodical (and any websites related thereto) must be labeled "Attorney Advertising" as prescribed by Rule 7.1(f), and the statement "Attorney Advertising" must also appear on the home page of the firm's website if the website is an "advertisement." The presence of the "prior results" disclaimer required by Rule 7.1(e)(3) does not relieve a law firm of the obligation to include the words "Attorney Advertising" on its home page.

Endnote

1. In *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010), the Second Circuit affirmed almost all of a district court decision that certain provisions of Rule 7.1 are unconstitutional. Defendants filed a petition for certiorari in the United States Supreme Court on August 9, 2010, but that petition has been denied.

(10-10)

Ethics Opinion 849

Committee on Professional Ethics of the New York State Bar Association (1/19/11)

Topic: Conflicts analysis of concurrent representation of a bank and an equipment manufacturer in a vendor equipment financing program.

Digest: A lawyer who has previously represented a bank in connection with an equipment vendor financing program may later represent the equipment vendor regarding the vendor's participation in such a program while continuing to represent the bank on unrelated matters, provided the lawyer obtains the informed consent of each client, confirmed in writing.

Rules: 1.0(f), 1.7.

Facts

1. The inquiring lawyer represents a bank (the "Bank") in connection with an equipment vendor financing program. In this program, the Bank agrees with an equipment supplier to provide equipment lease financing for the supplier's customers to enable the customers to acquire the supplier's equipment. Among the documents in the program is a lease in which the supplier is the lessor and the supplier's customer is the lessee. If, among other things, the customer satisfies the Bank's credit standards, then the supplier sells the lease to the Bank for an amount approximating the cost of the financed equipment.

2. The Bank retained the inquirer several years ago to advise it in connection with its program with a particular equipment supplier (the "Supplier"), which had provided the form lease documents. The inquirer reviewed these lease documents to ensure they were purchase-worthy from the Bank's perspective, and advised the Bank on certain modifications that the inquirer considered appropriate.

3. The Supplier has not previously engaged the inquirer to perform legal work. Rather, the Supplier's in-house finance and legal staff conduct the negotiations over the lease with the Supplier's customers and draft the lease documents, with occasional input from inquirer (in his capacity as the Bank's counsel) and from the Bank's finance personnel. The Supplier's staff is not experienced in this negotiation and drafting, so the Supplier has asked the inquirer whether he would be available to represent the Supplier to perform various tasks.

Questions

4. May the inquiring lawyer represent the Supplier in any or all of the following activities while continuing to represent the Bank in unrelated matters?

   - Taking over from the Supplier's in-house staff the negotiation and drafting of new leases with the Supplier's customers. These new leases would be sold to the Bank or possibly used in similar financing programs that the Supplier establishes with other lenders.

   - Assisting the Supplier in organizing an efficient lease documentation process and educating its staff on equipment financing.

   - Representing the Supplier in various transactions (other than its financing program with the Bank).

5. If the inquirer agrees to represent the Supplier in this matter, he anticipates amicably ending his representation of the Bank with respect to the Supplier's program while continuing to represent the Bank from time to time on other, unrelated matters. The inquirer asks whether agreeing to represent the Supplier as requested would raise any conflict issues. We conclude that certain of the representations would give rise to conflict issues, and these issues turn on the same analysis whether the inquirer continues to represent the Bank in unrelated matters (and thus remains inquirer's current client) or ceases to represent the Bank (and thus becomes the inquirer's former client) while continuing to work on the financing program for the Supplier.

Opinion

6. Rule 1.7 of the New York Rules of Professional Conduct (the "Rules") governs concurrent conflicts of interest. Rule 1.7 says, in summary, that a conflict of interest arises if a reasonable lawyer would conclude that (i) the representation of one client will involve the lawyer in representing differing *client* interests or (ii) there is a significant risk that the lawyer's own interests will adversely affect the exercise of the lawyer's

professional judgment on a client's behalf. If either type of conflict exists, then the lawyer may proceed only if the lawyer reasonably believes the lawyer can provide competent and diligent representation to each affected client and the lawyer obtains each affected client's informed consent, confirmed in writing.

7. Rule 1.9 governs conflicts of interest with former clients. Rule 1.9 says, in applicable part, that a lawyer who has formerly represented a client in a matter may not thereafter represent another client in the same or a substantially related matter in which the subsequent client's interests are materially adverse to the first client's interests unless the subsequent client gives informed consent, confirmed in writing.

8. According to the inquirer's plan, the Bank will remain a current client on matters unrelated to the Supplier's financing program and become a former client on the substantially related matter of the Supplier's financing program. Whether the inquirer's proposed representation of the Supplier constitutes a conflict of interest depends on whether the Bank's interests will differ from those of the Supplier in any of the three assignments the Supplier has suggested, as well as on whether a significant risk exists that the lawyer's own interests (for instance, the importance of his ongoing relationship with the Bank to his law practice) will adversely affect the lawyer's professional judgment on behalf of either the Supplier or the Bank. We analyze in turn each task that the Supplier has asked the inquirer to perform.

9. ***Taking over the negotiation and drafting currently done by the Supplier's in-house staff.*** Although lease negotiations are between the Supplier and its customer as counterparties, the lease transaction is in contemplation of the Bank's acquisition of the lease. In some situations, the Bank's involvement as a lender or other participant in a transaction in which the inquirer (who is still the Bank's lawyer on other matters) represents another party may give rise to a conflict of interest, and in other instances it may not. This is a case-by-case determination.

10. In the circumstances here, we believe that the particular interests of the Bank and the Supplier will involve the lawyer in representing "differing interests" within the meaning of Rule 1.7(a)(1) and Rule 1.0(f) (defining "differing interests" as "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest"). While the Bank and the Supplier appear to be broadly aligned in interest in the proposed transactions with the Supplier's customers, the interests of the Bank and the Supplier may be "differing" within the meaning of the Rule with respect to the issues that are likely to arise in negotiation of the lease terms. In particular, the Supplier will likely be primarily interested in closing an equipment leasing deal, while the Bank is likely to be primarily interested in ensuring that the Supplier's customer satisfies the Bank's credit standards.

11. These divergent goals are sufficient to implicate the concerns of Rule 1.7(a) regarding the representation of differing interests. *See* Rule 1.7, cmt. [7] ("Differing interests" can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client); N.Y. City 2001-2 (law firm may represent client whose interests in transaction are adverse to those of a current client in a separate matter if a disinterested lawyer would believe that the law firm can competently represent the interests of each client). The divergent goals also are sufficient to implicate the concerns of Rule 1.9(a) in barring a lawyer from representing a new client (the Supplier) whose interests are "materially adverse" to the interests of a former client (the Bank) in a matter substantially related to the lawyer's work for the former client (the lawyer's work on behalf of the Bank regarding the Supplier's equipment financing program).

12. Nevertheless, we do not believe that the circumstances necessarily create a conflict beyond the capacity of informed consent to cure. If the inquirer reasonably believes that he will be able to "provide competent and diligent representation" to the Supplier in this matter and to the Bank in the unrelated matters—*i.e.*, that he will neither "pull his punches" in representing the Supplier's interests as a lessor in order to serve the Bank's interests as a lender, nor diminish his vigor in representing the Bank in unrelated matters—and if both clients give informed consent, confirmed in writing, then the inquirer is ethically permitted to take on the negotiations with the Supplier's customers regarding leases while continuing to represent the Bank in unrelated matters. *See* Rule 1.7(b)(1), (4).

13. ***Assisting Supplier in organization and education.*** The same is true with respect to the second of the requested assignments, assisting the Supplier's with education and organization. Although these activities could be said to be in the Bank's interests in minimizing the Bank's transaction costs, the main point of the exercise is to affect the negotiations between the Supplier and the Supplier's customers, which could give rise to the same differing interests with the Bank as the actual negotiation and drafting of the lease documents. For instance, when training the Supplier's employees, the lawyer would have to decide whether to instruct employees to negotiate credit terms aggressively (for the Bank's benefit) or to relax credit terms to obtain the customer's prompt acceptance (for the Supplier's benefit). Yet here, too, we do not believe that the conflict is necessarily non-consentable. As before, if inquirer reasonably believes that inquirer will be able to "provide competent and diligent representation" to the Supplier in this matter and to the Bank in unrelated matters, and if both clients give informed consent confirmed in writing, the inquirer is ethically permitted to provide this assistance to Supplier while continuing to represent the Bank in other matters.

14. ***Working on Supplier transactions outside of Bank program.*** The inquirer's representation of the Supplier in matters not involving the Bank would not raise any special conflict issues apart from those we discuss above. To the extent that inquirer needs to obtain the Bank's consent to conflicts arising out of any future representations of the Bank adverse to the Supplier, the extent of the representation of the Supplier may be material to any consent.

Conclusion

15. A lawyer who has previously represented a bank in connection with an equipment vendor financing program may later represent the equipment vendor regarding the vendor's participation in the financing program while continuing to represent the bank on unrelated matters, provided the lawyer obtains the informed consent of each client, confirmed in writing.

(27-10)

Ethics Opinion 850

Committee on Professional Ethics of the New York State Bar Association (1/19/11)

Topic: Law firm name—former partner.

Digest: A law firm may not use the name of a former partner in the firm name if the former partner continues to practice law elsewhere.

Rules: 7.5(b), 8.4(d).

Question

1. May a law firm use the name of a former partner in its firm name if the former partner departs from the firm but continues to practice law as general counsel to a corporation?

Facts

2. The inquirer is a member of a law firm, fictionally styled ABCD. Named partner B was recently hired as an officer and general counsel of a closely held corporation located in the same city as the firm. Upon accepting this position, B withdrew as a partner of ABCD. B continues to have a close social relationship with the law firm and regularly refers matters to the firm, but B no longer participates in law firm matters and neither draws an income nor takes a salary from the firm.

3. ABCD prefers not to change the law firm name, however, "due to cost and the possibility of confusion that would be caused by a name change." ABCD, which is comprised of twenty-five lawyers (of whom ten are partners), "does nothing intentionally to trade off B's name or reputation." Based on the fact that B is now employed by a corporation as general counsel, does not compete with the law firm in any way, does not hold himself out as being available to take on matters from the public, and does not take on matters from the general public for compensation, the inquirer asks whether B has "retired" from the practice of law so that the firm can continue to include B in the firm name.

Opinion

4. The question is governed by Rule 7.5(b) of the New York Rules of Professional Conduct, which provides 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.…" *Cf.* Rule 7.5, cmt. 1 ("In order to avoid the possibility of misleading persons with whom a lawyer deals, a lawyer should be scrupulous in the representation of professional status. Lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact, and thus lawyers should not hold themselves out as being partners or associates of a law firm if that is not the fact"). Rule 7.5(b) includes an exception, however, allowing a firm to "use as, or continue to include in its name 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."

5. In N.Y. State 266 (1972), we interpreted the relevant portion of Rule 7.5(b)'s identical predecessor provision in the New York Lawyer's Code of Professional Responsibility, DR 2-102(B), and concluded that "[a] law firm may continue the name of a retired partner in the partnership name provided he does not practice law independently of the firm.…" We noted that "[s]o long as the former partner has a continuing relationship with the firm and to the extent he practices law it is with his former firm, he will not be considered to be practicing independently of the firm and the firm may properly continue his name as part of the firm name."

6. Here, however, B is still actively engaged in the practice of law as the general counsel to a corporation. While Rule 7.5(b) allows a law firm to use the name of a retired member of the firm, B has not "retired" from the practice of law within the meaning of that provision. *See* 22 NYCRR § 118.1(g) ("An attorney is 'retired' from the practice of law when, other than the performance of legal services without compensation, he or she does not practice law in any respect and does not intend ever to engage in acts that constitute the practice of law."); *cf.* Rule 1.17(a) ("Retirement shall include the cessation of the private practice of law in the geographic area…"). Therefore, Rule 7.5(b) does not permit the continued use of B's name in the firm name. *See also* former New York Lawyer's Code of Professional Responsibility EC 2-11 ("the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public").

7. Moreover, using the firm name ABCD after B's withdrawal as a partner of ABCD, even though B continues the active practice of law elsewhere in the same geographic area, violates Rule 7.5(b), because the name ABCD "is misleading as to the identity of the lawyer or lawyers practicing under [the] name." *See* North Carolina Formal Opinion 20 (2007) (opining that if an attorney leaves a firm and begins engaging in the private practice of law, the firm could not continue to use the attorney's surname in the firm name because it would be misleading); Maryland Ethics Op. 00-03 (1999) (professional corporation may not continue to include the name of a former member of the firm who is no longer a shareholder and is practicing elsewhere, as such designation would be misleading); District of Columbia Op. 277 (1997) ("[i]t is…misleading to include in a firm name the name of a lawyer practicing elsewhere"); *see also* Rule 8.4(d) ("A lawyer or law firm shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

Conclusion

8. A law firm may not use the name of a former partner in its firm name when the former partner departs from the firm but continues to practice law as general counsel to a corporation.

(55-09)

Ethics Opinion 851

Committee on Professional Ethics of the New York State Bar Association (1/19/11)

Topic: Using a law firm photograph in a newspaper advertisement.

Digest: An advertisement for a law firm may feature a photograph with non-lawyer employees of the firm provided that the advertisement, viewed as a whole, is not misleading about the size of the firm, its ethnic or gender diversity, or whether those pictured are lawyers.

Rule: 7.1.

Question

1. May an advertisement for a law firm feature a photograph of the entire firm, including non-lawyer staff such as paralegals and secretaries?

Opinion

2. Rule 7.1(a) of the Rules of Professional Conduct states that "[a] lawyer or law firm shall not use or disseminate or participate in the use or dissemination of any advertisement that: (1) contains statements or claims that are false, deceptive or misleading; or (2) violates a Rule."

3. A photograph in a law firm's advertisement makes "statements or claims" within the meaning of Rule 7.1(a). The issue before us is whether a photograph of a law firm that includes non-lawyers such as paralegals and secretaries would violate Rule 7.1 by creating a misimpression about the size of the firm, the ethnic or gender diversity of its personnel, or whether all those appearing in the photograph are lawyers.

4. This Committee's prior opinions state that, when a law firm holds a non-lawyer out to the public, the firm must identify the non-lawyer as such to avoid confusing or misleading the public. For instance, we have opined that the name of a non-lawyer may appear on law firm letterhead as long as the letterhead includes appropriate disclosure of the non-lawyer's professional status. *See* N.Y. State 500 (1978) ("While non-lawyer status will no longer preclude the use of a person's name on a firm's letterhead, his name should be accompanied by language that makes clear his non-lawyer status."). Similarly, a law firm may permit a paralegal to use a business card with the law firm's name as long as the card identifies the paralegal as a non-lawyer. *See* N.Y. State 640 (1992) (when a law firm lists a paralegal on a letterhead or business card "the primary concern is to insure that the listing is not false, deceptive or misleading"). Each of these prior opinions interpreted DR 2-101, the predecessor of Rule 7.1, but the principles are the same. *See also* ABA Inf. Opinion 89-1527 ("The listing of nonlawyer support personnel on lawyers' letterheads is not prohibited…so long as the listing is not false or misleading. In order to avoid being misleading, the listing must make it clear that the support personnel who are listed are not lawyers.").

5. The Connecticut Bar Association's Committee on Professional Ethics addressed a similar question and concluded that an advertisement containing a photograph of a firm's two lawyers and the firm's paralegals would not violate that state's ethics rules as long as the "proposed advertisement makes it clear that [the] paralegals are not lawyers or otherwise competent to practice law (*i.e.*, they are staff or assistants)." Connecticut Inf. Opinion 92-27.

6. We agree with Connecticut's approach, and we conclude here that an advertisement containing a photograph of a law firm is ethically permissible if the photograph, viewed in the context of the advertisement as a whole, is not misleading. One way to ensure that a firm photograph including non-legal staff is not misleading would be to accompany the photograph with a caption specifying the professional status of each person in the photograph or stating that the photo includes non-legal staff.[1]

Conclusion

7. The question presented is answered in the affirmative, subject to the qualifications stated above. An advertisement for a law firm may feature a photograph that includes non-lawyer employees of the firm provided that the advertisement, viewed as a whole, is not misleading about the size of the firm, its ethnic or gender diversity, or whether the people in the photograph are lawyers.

Endnote

1. *Cf. Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010), *petition for cert. denied*, (U.S. Dec 13, 2010)) (No. 10-203). In *Alexander*, the Second Circuit addressed the constitutionality of parts of DR 2-101(C) and DR 2-103(G), including DR 2-101(C)(3)'s prohibition of attorney advertising featuring "the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply[ing] that lawyers are associated in a law firm if that is not the case." 598 F.3d at 90. The Court interpreted this provision to apply "only to situations in which lawyers from different firms give the misleading impression that they are from the same firm." *Id.* Subject to that interpretation, the Court held that the provision did not violate the First Amendment. *Id.*

(8-10)

Ethics Opinion 852

Committee on Professional Ethics of the New York State Bar Association (2/10/11)

Topic: Settlement agreements requiring attorney to indemnify client's obligation to third party.

Digest: An attorney may not agree to indemnify a client's obligations to a third party as part of a settlement of the client's claim.

Rules: 1.2(a); 1.8(e); 5.6(a); and 8.4(a).

Question

1. May a lawyer agree to indemnify a client's obligations to a third party as part of a settlement of the client's claim?

Opinion

2. The inquirer represents several plaintiffs in asbestos litigation. She notes that, under Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA"), defendants and insurance carriers have new reporting requirements in connection with settlements of personal injury claims. Under these new requirements, whenever there is a settlement, the defendant and its insurer have a duty to report certain payment details to the government and can be fined significantly if they fail to report. According to the inquirer, "the defendants and their insurers have been formulating ways to cover themselves in the event that plaintiffs provide them with the wrong information." The inquirer notes that one of the things frequently requested from the plaintiff's attorney is an indemnification with regard to Medicare liens owed by the attorney's client.

3. The applicability and requirements of the MMSEA are questions of law beyond the scope of this Committee's jurisdiction. We note, however, that the scenario posed by the inquirer is strikingly similar to those addressed in several recent ethics opinions. For example, in N.Y. City 2010-3, the New York City Bar's Committee on Professional and Judicial Ethics addressed whether an attorney representing a settling plaintiff may enter into a hold harmless/indemnity agreement for the benefit of the settling defendants. The opinion noted that plaintiffs in personal injury litigation frequently obtain financial assistance from Medicaid, Medicare, workers compensation carriers, or private insurance coverage. Furthermore, when a plaintiff is entitled to funds through a damages award or settlement at the conclusion of the litigation, such carriers or agencies may be entitled by statute or contract to reimbursement from the plaintiff for any payments the carriers or agencies have made to the plaintiff. These entities therefore frequently seek to recoup amounts the defendant has paid to the plaintiff in the litigation. *See, e.g., Fasso v. Doerr*, 12 N.Y.3d 80 (2009) (plaintiff's health insurer permitted to intervene in plaintiff insured's medical malpractice action to assert an equitable subrogation claim against defendant doctor for reimbursement of the payments the health insurer made for plaintiff's medical expenses); *Teichman v. Community Hosp. of Western Suffolk*, 87 N.Y.2d 514 (1996) (noting that if an injured party receives settlement monies from a tortfeasor to cover medical expenses that were paid by plaintiff's insurer, the insurer may recoup its disbursements from its insured).

4. As noted in N.Y. City 2010-3, defendants and their attorneys who settle cases generally are aware that payments made under a settlement agreement may be subject to the liens or claims of plaintiff's insurance providers or other creditors. In addition, defendant tortfeasors may be subject to subrogation claims brought by plaintiff's health insurers. *See Fasso*, 12 N.Y.3d at 86-87 ("It is well established that when an insurer pays for losses sustained by its insured that were occasioned by a wrongdoer, the insurer is entitled to seek recovery of the monies it expended under the doctrine of equitable subrogation"). To protect themselves against any potential liability for those claims, defendants frequently demand language in the settlement agreement stipulating that the settling plaintiff will hold defendants harmless from any claims made by insurers or other creditors. Defendants also frequently demand that the plaintiff's attorney personally guarantee the plaintiff's indemnification obligation and hold defendants harmless from any third party claims.

5. Rule 1.8(e) provides, in pertinent part, "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client." Rule 1.8(e)(1)-(2), however, states exceptions providing that the lawyer may "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter," and may pay court costs and expenses of litigation on behalf of "an indigent or pro bono client."

6. "Financial assistance" comes in many forms, including gifts, loans, and guarantees. *See, e.g.*, ABA 04-432 (lawyer's posting or arranging for the posting of a bond to secure release from custody of a client the lawyer represents in the matter in which the client has been detained constitutes "financial assistance" under Model Rule 1.8(e), but falls within the ambit of the exception in subparagraph (e)(1) for "court costs and expenses of litigation"); Missouri Opinion 125 (2008) ("Any type of guarantee to cover a client's debts constitutes financial assistance."). *Cf.* New York Rule 1.8, cmt. [10] ("Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation."). An attorney's agreement to indemnify the client for the client's failure to meet her own obligations, such as the payment of a Medicare lien, constitutes a "guarantee [of] financial assistance" that is prohibited by Rule 1.8(e). *See* N.Y. City 2010-3.

7. As noted above, Rule 1.8(e)(1)-(2) creates exceptions to the prohibition against advancing or guaranteeing financial assistance to the client in connection with litigation and permits the lawyer to advance or pay "court costs and expenses of litigation" in certain situations. A lawyer's agreement to indemnify or guarantee the client's obligations under a settlement does not fall within this exception because the settlement obligation does not constitute a "court cost" or "expense of litigation." As Comment [9B] to Rule 1.8 explains:

> [P]aragraph (e) limits permitted financial assistance to court costs directly related to litigation. Examples of permitted expenses include filing fees, expenses of investigation, medical diagnostic work connected with the matter under litigation and treatment necessary for the diagnosis, and the costs of obtaining and presenting evidence. Permitted expenses do not include living or medical expenses other than those listed above.

See N.Y. City 2010-3 ("a client's obligation to use settlement proceeds to satisfy a lien or other indebtedness is a personal obligation of the client, and, for purposes of the Rule, is indistinguishable from the client's obligation to pay other expenses such as medical expenses or residential rent").

8. While Rule 1.2(a) requires a lawyer to "abide by a client's decision whether to settle a matter," the lawyer cannot pursue or enter into a settlement that violates the Rules. *See* Rule 1.2, cmt. [1] (a lawyer should "take whatever *lawful and ethical* measures are required to vindicate a client's cause or endeavor") (emphasis added); *see also* Rule 5.6(a)(2) ("A lawyer shall not participate in offering or making…an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy."); Rule 5.6, cmt. [2] ("Paragraph (a)(2) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client."). Therefore, a lawyer cannot pursue or enter into a settlement agreement that requires the lawyer to advance or guarantee financial assistance to the client in violation of Rule 1.8(e) even if the client desires such a course of action.

9. Insofar as a lawyer may not agree to indemnify his or her own client's obligations to a third party as part of a settlement of the client's claim, it is also impermissible for another lawyer to enter into a settlement that requires such an indemnification. *See* Rule 8.4(a) ("A lawyer or law firm shall not…violate or attempt to violate the Rules of Professional Conduct [or] knowingly assist or induce another to do so").

Conclusion

10. Rule 1.8(e) prohibits a lawyer from agreeing to indemnify a client's obligations to a third party as part of a settlement of the client's claim, and Rule 8.4(a) prohibits another lawyer's participation in a settlement that requires such an indemnification.

(46-10)

Ethics Opinion 853

Committee on Professional Ethics of the New York State Bar Association (3/11/11)

Topic: Law firm name including name of partner who becomes inside counsel to a corporation.

Digest: A name partner who becomes inside counsel to a corporation will not be "retired" under Rule 7.5(b) so as to allow the firm to retain the partner's name in the firm's name. The firm also may not retain the partner's name in the firm's name if the partner's time working as inside counsel is considered an open-ended leave of absence, or if the partner becomes of counsel to the firm and minimizes his participation in the firm while working as inside counsel. Finally, if the partner is simultaneously associated with both the law firm and the corporation's legal department, the conflicts of one may be imputed to the other.

Rules: 1.7(a), 1.10(a)&(e), 5.1, 7.5(a)&(b).

Question

1. Inquirer is a name partner of a law firm (the "Firm"). Another name partner (the "Partner") in the Firm "will transition to an in house corporate position shortly." The Partner has not yet withdrawn from the Firm, and Inquirer hopes that the Partner will remain a partner of the Firm. The Firm wishes to retain the Partner's name in the Firm's name, and Inquirer poses three questions about the permissibility of doing so:

    A. May the Firm retain the Partner's name in the Firm's name because the Partner will be "retired"?

    B. May the Firm retain the Partner's name in the Firm's name because the Partner may be treated "essentially on a leave of absence, notwithstanding that he continues as a partner and can come and go as he pleases"?

    C. May the Firm retain the Partner's name in the Firm's name if the Partner becomes "of counsel" to the Firm and "minimizes his participation" in the Firm?

    After addressing these questions, we raise a question of our own regarding whether conflicts of the corporation's legal department will be imputed to the Firm, and vice versa.

Opinion

2. The main rule governing questions about law firm names is Rule 7.5(b) of the New York Rules of Professional Conduct (the "Rules"), which provides:

> 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, except that*… if otherwise lawful, *a firm may use as, or continue to include in its name 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. [Emphasis added.]

Question A: Will the Partner be "retired" under Rule 7.5(b)?

3. Rule 7.5(b) permits a law firm to "include in its name the name or names of one or more…retired members of the firm," so the first question is whether a Partner working in house at a corporation will be "retired" within the meaning of Rule 7.5(b). In N.Y. State 850 (2011), we opined that a lawyer who is still actively engaged in the practice of law as the general counsel to a corporation has not "retired" from the practice of law within the meaning of Rule 7.5(b). We therefore concluded that a law firm "may not use the name of a former partner in its firm name when the former partner departs from the firm but continues to practice law as general counsel to a corporation." For the same reasons, the Partner in the inquiry here will not be "retired" under R ule 7.5(b), and the Firm cannot retain his name in the Firm's name on that basis.

Question B: May the Partner be treated "as essentially on a leave of absence," notwithstanding that he continues as a partner and can come and go as he pleases"?

4. The next question is whether the Partner may be treated as if he were a partner essentially on "leave of absence" while he is working in house at the corporation, allowing the Firm to retain his name in the Firm's name on that basis. In N.Y. State 381 (1975), this Committee opined that the name of a professional legal corporation

"may not properly include the name of [a] former partner who is practicing law with another firm." An in-house lawyer at a corporation is practicing with another law firm because Rule 1.0(h) defines "Firm" or "law firm" to include "the legal department of a corporation or other organization."

5. Moreover, while the Partner is working in house at the corporation, the facts suggest that the Partner would not be active in the Firm. In N.Y. State 346 (1974), we opined that a law firm may not list on its letterhead an "inactive" partner practicing in another jurisdiction because "there is no proper purpose to be served by such a listing," and the "designation of an inactive partner would only tend to confuse the public as to the status and responsibility of the inactive member." Similarly, in N.Y. County 735 (2006), the committee opined that whether a lawyer's name may properly be included in a firm's name under the predecessor to Rule 7.5(b) involves a "qualitative" test of whether the lawyer is "sufficiently involved to provide the supervision required of the law firm collectively and himself individually as a manager of the law firm and partner" under DR 1-104 (the predecessor to Rule 5.1). That committee also concluded that if the lawyer in question "were not in fact practicing with the firm," then the name of the firm that includes the absent lawyer would violate the rule governing law firm names. We agree with that conclusion.

6. Accordingly, we conclude that the name of a partner who is not retired from the practice of law, but is practicing elsewhere and is not actively involved in the supervision and management of the law firm's practice, cannot be included in the firm's name.

7. We note that the inquiry here refers to "essentially…a leave of absence," but the facts suggest an open-ended departure to practice elsewhere with no particular expectation by the Firm that the Partner will ever return. We express no view on whether a partner who leaves a firm for a relatively brief period, or leaves in other circumstances with the expectation of returning, must always remove his or her name from the law firm's name.

Question C: May the Firm retain the Partner's name in the Firm's name if the Partner takes "of counsel" status and "minimizes his participation" in the Firm?

8. The third question is whether the Firm may keep the Partner's name in the Firm name if the Partner takes of counsel status and "minimizes his participation" in the Firm. As a threshold matter, there is no prohibition on retaining in a firm's name the name of a former partner who has retired and taken of counsel status. *See* ABA 90-357 (1990) (finding no risk of misleading the public in that situation). *See generally* N.Y. City 1995-9 ("There is no requirement that a firm's name consist exclusively of partners; a person's continuing 'of counsel' relationship with the firm is enough").

9. But the Partner here will not qualify as an "of counsel" lawyer while working full time as an in house lawyer at a corporation. An of counsel relationship is one in which "the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis.'" N.Y. State 793 (2006). The ABA Standing Committee on Ethics and Professional Responsibility has described the "core characteristic properly denoted by the title 'counsel'" as "'a close, regular, personal relationship.'" ABA 90-357 (1990). *See also* Rule 7.5(a)(4) ("A lawyer…may be designated 'Of Counsel'…if there is a continuing relationship with a lawyer or law firm, other than as a partner or associate.")

10. In an opinion closely on point, the Ethics Advisory Panel of the Rhode Island Supreme Court opined that a law firm could not continue to use the name of a partner who took a position as inside counsel and became "of counsel" to the firm. Rhode Island Opinion 94-65 (1994). The Panel stated that "if the lawyer is a named partner of the firm and is retiring to become 'of counsel,' the lawyer's name may be retained in the firm name. This is not true if instead of retiring, the lawyer is withdrawing to practice in another place, to take other employment or is taking a leave of absence." (Citations omitted.) The panel reasoned that retaining the lawyer's name in the firm's name under the circumstances "connotes a partnership and is therefore misleading to the public." The Nebraska Lawyers' Advisory Committee recently reached a similar conclusion. In Nebraska Opinion 10-04 (2010), the committee opined that if a "retired partner resumes the practice of law outside and apart from the firm, continued use of the attorney's name in the former firm's name is misleading to the public and therefore prohibited. This is true even if the attorney becomes 'of counsel' to the former firm after resuming practice." The committee reasoned that "[w]hen an attorney is actively practicing law and the attorney's name appears in a firm name…there is an implicit representation to the public that the lawyer is a partner or principal in that firm with fully shared responsibility for the firm's work."

11. We agree with the Rhode Island and Nebraska committees, and we therefore conclude that, as we understand the facts here, the Firm may not continue to include the Partner's name in the Firm's name if the Partner becomes of counsel and minimizes his participation in the Firm while working as inside counsel at a corporation.

Listing of predecessor firm

12. Although we have concluded that it would be inappropriate to retain the Partner's name in the Firm name under any of the alternative scenarios presented, the Firm may wish to consider whether it meets the criteria for listing, on its letterhead and professional announcement cards, "the names and dates of predecessor firms in a continuing line of succession," under Rules 7.5(a)(2), (4). If so, the Firm may note the former Firm name on its letterhead and announcement cards. However, even if the Firm may do so, under the facts here it may not use that former name as the Firm's name on an ongoing basis. *See, e.g.,* N.Y. State 622 (1991) (articulating factors for determining when a law firm may continue to use the name of a successor law firm).

Imputation of conflicts of interest

13. Finally, although Inquirer has focused on questions about retaining the Partner's name in the Firm's name, we perceive an additional issue regarding imputed conflicts of interest. Rule 1.10(a), New York's main rule on imputation of conflicts, provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein."

14. The term "associated" is not defined in the Rules. We have previously opined that "the concept extends beyond lawyers who are partners, associates or 'of counsel' in a firm, [but] it does not apply to all lawyers who are in any way 'connected' or 'related.'" N.Y. State 715 (1999) (whether a contract lawyer is "associated" with a law firm "depends on the facts and circumstances of the employment"). The touchstone is whether the lawyer "has general access to the files of all clients of the firm and regularly participates in discussions of their affairs." *Id*. Thus, conflicts may be imputed from the Partner to the Firm if, after he assumes the position of inside counsel, the Partner continues to be "associated" with the Firm, albeit on a basis that is too attenuated for him to be held out as either a name partner or of counsel.

15. More broadly, if the Partner is simultaneously associated for purposes of Rule 1.10(a) with both the Firm and the legal department of the corporation, the conflicts of the Firm and the legal department will generally be shared and must become part of both of their conflict-checking systems under Rule 1.10(e). For example, in N.Y. State 793 (2006), we considered the circumstance when an attorney ("L") simultaneously had an of counsel relationship with two law firms, XYZ and ABC. We concluded that if attorney X, a partner with the XYZ firm, was disqualified from a particular representation under the predecessor to Rule 1.7(a), then all lawyers associated with the firm XYZ, including L, were also disqualified, and the disqualification generally extended to the lawyers with whom L was associated in the ABC law firm. *See also* N.Y. City 2007-2 (discussing the imputation of conflicts in the context of a "secondment," such as a temporary assignment of a lawyer to a corporate client, and discussing how to safeguard against imputation); ABA 90-357 ("the effect of two or more firms sharing an of counsel lawyer is to make them all effectively a single firm, for purposes of attribution of disqualifications"); D.C. Opinion 338 (2007) (a lawyer may be a partner in one firm and of counsel to another firm, but "any disqualification of a lawyer in either firm will be imputed to all lawyers in both firms," unless an exception applies).

Conclusion

15. The Partner, who is becoming inside counsel to a corporation, will not be "retired" under Rule 7.5(b), and it would therefore be improper to retain the Partner's name in the Firm's name on that basis. Nor may the Firm continue to retain the Partner's name in the Firm's name if the Partner is considered to be on an open-ended leave of absence, or if the Partner takes of counsel status and minimizes his participation in the Firm while working elsewhere as inside counsel. If the Partner is simultaneously "associated" with both the Firm and the legal department of the corporation, the conflicts each one will generally be imputed to the other, and the conflict-checking systems of both the corporation's legal department and the Firm need to take the other's conflicts into account.

(35-10)

Ethics Opinion 854

Committee on Professional Ethics of the New York State Bar Association (3/11/11)

Topic: Reporting known or suspected violation of Rules of Professional Conduct by another lawyer.

Digest: Lawyer who was employed by another lawyer must report knowledge of former employer's violation of the Rules of Professional Conduct if the violation raises a substantial question about the employer's honesty, trustworthiness, or fitness as a lawyer and if the report does not disclose confidential information. If the former employee lacks knowledge, he may report a good faith belief or suspicion of the former employer's professional misconduct to an appropriate authority if the report does not disclose confidential information, but may not communicate that belief or suspicion to the employer's clients.

Rules: 1.6, 8.3(a) & (c).

Facts

1. Lawyer A (for "Associate") was formerly employed by another lawyer, Lawyer P (for "Partner"). Lawyer A believes that Lawyer P wrongfully failed to pay wages and premiums on employer-provided health insurance, overbilled clients, and misrepresented to his clients the services that he could perform for them. (Lawyer A does not suggest that any of the clients were his personal clients, and we assume for purposes of this inquiry that they were not.)

Question

2. Lawyer A (the inquirer) has raised two related questions:

   A. May (or must) Lawyer A report Lawyer P's alleged misconduct to a disciplinary authority?

   B. May (or must) Lawyer A inform Lawyer P's clients about Lawyer P's alleged misconduct?

Opinion

Question A: May (or must) Lawyer A report Lawyer P's alleged misconduct to a disciplinary authority?

3. The most relevant rule in the New York Rules of Professional Conduct (the "Rules") is Rule 8.3. That rule provides, in pertinent part:

   (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

   * * * *

   (c) This Rule does not require disclosure of:

   (1) information otherwise protected by Rule 1.6; or

   (2) information gained by a lawyer or judge while participating in a bona fide lawyer assistance program.

4. In N.Y. State 635 (1992), which construed DR 1-103 (the nearly identical predecessor to Rule 8.3), this Committee opined that a lawyer in Lawyer A's situation *must* report professional misconduct by another lawyer (here, Lawyer P) if four criteria are satisfied. Those criteria are consistent with the New York Rules of Professional Conduct that took effect on April 1, 2009. The four criteria are as follows:

   A. Lawyer A has "actual knowledge" or a "clear belief" as to the pertinent facts, *i.e.*, more than a "mere suspicion" or a "reasonable belief";

   B. None of the information that would be essential for Lawyer A's report is protected as confidential information (see Rule 8.3(c)(1)) and none of the information was gained while participating in a bona fide lawyer assistance program (see Rule 8.3(c)(2));

   C. Based upon Lawyer A's knowledge about the facts, Lawyer A knows or has a "clear belief" that Lawyer P has violated one or more Rules of Professional Conduct; and

   D. The violation "raises a substantial question" as to Lawyer P's "honesty, trustworthiness or fitness as a lawyer" (Rule 8.3(a)).

5. As in N.Y. State 635, we express no opinion here on the question whether Lawyer P's al-

leged conduct was a "violation of the Rules of Professional Conduct" or, if it was, whether the violation raises a "substantial question" as to Lawyer P's "honesty, trustworthiness or fitness as a lawyer.…" Rule 8.3(a). Answering those questions would require us to make factual determinations about circumstances that may well be disputed, and would require us to evaluate the past conduct of an attorney other than the inquirer. As in N.Y. State 635, "It is for [Lawyer A] to determine, based on his knowledge of all the pertinent facts and circumstances, whether the foregoing prerequisites have been met" and, therefore, whether Lawyer A *must* report Lawyer P's misconduct to an appropriate tribunal or disciplinary authority.

6. Even if Lawyer A determines that he is not *required* to report lawyer P, he is nevertheless *permitted* to report his reasonable suspicions of misconduct if the report does not reveal confidential information protected by Rule 1.6. "As a general proposition, a lawyer is always free to report evidence of what may constitute improper conduct by another attorney, subject to the obligations to preserve client confidences and secrets. The lawyer need not have actual proof of misconduct; a good faith belief or suspicion that misconduct has been committed is a sufficient basis for making a report." N.Y. State 635 at p. 4, *citing* N.Y. State 480 (1978.) *See also* SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 77 (2008 ed.) ("a lawyer may report another lawyer based on rumor, suspicion, or hearsay, and may report activities raising less-than-substantial questions about a lawyer's fitness as a lawyer").

7. But the freedom to report a good faith belief or suspicion of misconduct should not become a pretext for a report intended "to gain advantages or concessions from other lawyers in the course of litigation, in private business transactions, or in interpersonal relationships, or by attorneys acting purely out of spite." N.Y. State 635 at p. 4. Even though disciplinary complaints are confidential under Judiciary Law §90, "it would be patently improper for a lawyer to make a report of misconduct and subject another lawyer to investigation without having a reasonable basis for doing so or solely to gain a tactical advantage in a matter." *Id.* (citations omitted). *See also* SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED, *supra*, at 78 (mandatory reporting rule "should not be used as a weapon against opposing lawyers or competing law firms").

Question B: May (or must) Lawyer A inform Lawyer P's clients about Lawyer P's alleged misconduct?

8. Lawyer A is not *required* to inform Lawyer P's clients about Lawyer P's alleged misconduct. However, assuming Lawyer A does not improperly disclose confidential information concerning any client, and assuming Lawyer A acts in good faith, Lawyer A is *permitted* to disclose knowledge (as distinguished from a suspicion) of Lawyer P's misconduct to the affected client or clients. (Whether such a disclosure could violate the dictate of § 90 of the New York Judiciary Law that disciplinary complaints shall be confidential unless and until professional discipline is publicly imposed is a question of law as to which we offer no opinion.)

9. However, before making any such discretionary report to Lawyer P's clients, Lawyer A should carefully consider the dangers of informing another lawyer's clients about that lawyer's misconduct. As this Committee observed in N.Y. State 480 (1978), the dangers inherent in reporting another lawyer's misconduct to that lawyer's clients are greater than the dangers of reporting the lawyer's misconduct to appropriate authorities. In particular, divulging another lawyer's alleged misconduct to that lawyer's clients may unnecessarily endanger that lawyer's attorney-client relationships.

10. Moreover, a lawyer may not inform another lawyer's clients about mere suspicions of the other lawyer's misconduct. We recognized in N.Y. State 480 that a lawyer may properly report mere suspicions to an appropriate authority, but we perceived "a substantial danger in permitting a lawyer to approach present clients of the suspected counsel" because in that instance "the sanctity of the attorney-client relationship weighs far more heavily in favor of proscribing the communication.… Usually the interests of all can best be served by reporting suspicious conduct to an appropriate authority. The former client's confidence in his present counsel should not be jeopardized unnecessarily."

11. In deciding whether to disclose either actual knowledge or a clear, good faith belief of misconduct by another lawyer to anyone other than an appropriate tribunal or disciplinary authority, therefore, a lawyer should carefully weigh (i) the certainty or uncertainty of his belief (*i.e.*, whether the belief rises to the level of knowledge or a clear belief, as opposed to a mere suspicion), (ii) the risk of unnecessary and perhaps

unwarranted damage to the other lawyer's attorney-client relationships, and (iii) the countervailing risks of irreparable injury to the interests of the other lawyer's clients absent prompt and effective disclosure to them.

Conclusion

12. Lawyer A must report the conduct of his former employer, Lawyer P, to an appropriate authority if all four of the following criteria are met: (1) Lawyer A has knowledge or a clear belief concerning the pertinent facts (*i.e.,* he has more than a reasonable belief or mere suspicion); (2) Lawyer A's report will not reveal confidential information protected by Rule 1.6 or information that Lawyer A gained while participating in a bona fide lawyer assistance program; (3) the conduct by Lawyer P constitutes a violation of one or more Rules of Professional Conduct; and (4) the violation raises a substantial question as to Lawyer P's honesty, trustworthiness or fitness as a lawyer.

13. If all four of those criteria are met, Lawyer A may also report such misconduct to the affected clients of Lawyer P—but before informing the clients, Lawyer A should carefully weigh both dangers to Lawyer P's attorney-client relationships if the affected clients are informed against the countervailing dangers to the clients if they are not informed.

14. Even if Lawyer A is not satisfied that all four criteria have been met, Lawyer A may nevertheless report a good faith belief or suspicion of Lawyer P's alleged misconduct to an appropriate authority, provided that the report of the suspected misconduct does not require the disclosure of confidential information or information that Lawyer A gained while participating in a bona fide lawyer assistance program. But Lawyer A may not inform Lawyer P's clients about mere suspicions of Lawyer P's misconduct.

(17-10)

Ethics Opinion 855

Committee on Professional Ethics of the New York State Bar Association (3/14/11)

Topic: Conflict of interest; referral of clients to spouse's litigation financing company.

Digest: A lawyer conducting litigation for a client may not refer the client to a litigation financing company owned by the inquiring lawyer's spouse to provide financial assistance that the lawyer personally would be barred from providing.

Rules: 1.8(e), 1.8(i), 8.4(a).

Question

1. When clients of a personal injury law firm have financing needs in connection with contemplated or pending litigation, may a lawyer at the firm refer such clients to a legal financing company formed by the lawyer's spouse for the purpose of advancing funds to clients?

Opinion

2. The inquirer practices law at a firm that handles personal injury cases. Clients of the firm are sometimes unable to pay living expenses or litigation expenses, and they may turn to a litigation financing company for help. The inquirer's spouse would therefore like to establish a litigation financing company to aid such clients, and the inquirer would like to refer clients to the spouse's litigation financing company.

3. This plan implicates provisions in the New York Rules of Professional Conduct (the "Rules") concerning financial assistance to clients, taking a proprietary interest in a client's matter, and violating a Rule of Professional Conduct through the actions of another.

Prohibitions in Rule 1.8

4. Rule 1.8 is entitled "Current Clients: Specific Conflict of Interest Rules." Rule 1.8(e), which is identical to DR 5-103(B) of the former Code of Professional Responsibility as amended in 2007, provides:

   > While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
   >
   > (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
   >
   > (2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and
   >
   > (3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

5. If the inquiring attorney had asked this Committee whether a lawyer could *personally* form a litigation financing company to advance funds to clients, the Committee would have concluded that such an act violates Rule 1.8(e). Under Rule 1.8(e), the inquirer personally could not advance funds to clients in the form of loans. As Comment [10] to Rule 1.8 provides:

   > Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.

6. Nor could the inquirer overcome the prohibition against giving financial assistance to a client by obtaining the client's informed consent. As observed in SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 116 (West 2009 ed.), "Rule 1.8…makes some personal interest conflicts non-consentable no matter how fully a lawyer discloses the potential for conflicts of interest that will harm the client." Rule 1.8(e) addresses a type of personal conflict of interest that is not waivable by the client and cannot be cured by the client's consent.

7. Likewise, a lawyer may not evade the prohibition on financial assistance to clients by purchasing an interest in a client's litigation instead of providing a loan. Purchasing a proprietary interest would violate a different provision, Rule 1.8(i), which is substantially identical to former DR 5-103(A). Rule 1.8(i) states:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

8. However, there is at least one legitimate route to avoiding the restrictions imposed by Rule 1.8(e) and (i): a lawyer may refer a client to a financial institution in which the lawyer has no interest. In N.Y. State 666 (1994), a lawyer wished to refer a client to a financial institution that would lend the client money for living expenses. Repayment of the loan would be contingent on the successful resolution of the client's claim for personal injuries. The Committee concluded that "a mere referral to the lending institution would not be unethical per se," considering that the lawyer did not propose to "pay" or "advance" any part of the loan. "The lawyer's sole function would be to refer the client to a lending institution that then would assess the value of the claim and take a lien on its proceeds to secure the loan."

9. In N.Y. State 769 (2003), which specifically concerned the litigation financing industry, we acknowledged that a lawyer could ethically refer clients to a litigation financing company, but we added: "As we pointed out in N.Y. State 666 (1994), the lawyer cannot own any interest in the financing institution; any such interest would be prohibited by the Code."

Referring Clients to the Lawyer's Spouse

10. That background brings us to the question posed here. If a lawyer may ethically refer a client to a lending institution in which the lawyer has no interest for the purpose of obtaining a loan contingent on the outcome of the client's case, may a lawyer refer a client to a lending institution owned by the lawyer's spouse?

11. The Committee has frequently concluded that various rules relating to conflicts involving financial interests apply both to the lawyer and to the lawyer's business relationships with the lawyer's spouse. *See*, *e.g.*, N.Y. State 738 (2001) (referral to title abstract company in which spouse had an interest); N.Y. State 493 (1978), (lawyer or spouse as broker); N.Y. State 340 (1974) (lawyer and spouse as salesperson in a brokerage agency); N.Y. State 291 (1973) (lawyer or spouse with interest in a brokerage agency); N.Y. State 244 (1972) (lawyer and spouse real estate broker). For example, in N.Y. State 738 we asked: "May an attorney who represents clients engaged in real estate matters refer those clients to a title abstract company in which the attorney's spouse has an ownership interest?" We had stated in two previous opinions that a lawyer could not refer a real estate client to a title abstract company in which the lawyer personally owned an interest unless the abstract work was "purely ministerial" and the lawyer obtained consent from the client after full disclosure. Noting the unified financial interests of husband and wife, and based on N.Y. State 244, N.Y. State 291, N.Y. State 340, and N.Y. State 493, we concluded in N.Y. State 738 that an attorney "may not refer a real estate client to a title abstract company for other than ministerial title work where the lawyer's spouse has an ownership interest in the abstract company."

12. We believe the same conclusion applies when a lawyer refers clients to a litigation financing company owned by the lawyer's spouse, at least to the extent the lawyer personally would be barred from providing financial assistance to a client. Moreover, referring clients to a litigation financing company owned by the lawyer's spouse would usually also implicate Rule 8.4(a), which provides: "A lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Referring clients to the spouse's financing company would violate Rule 1.8(e) "through the acts of another," essentially using the spouse as a front for advancing improper financial assistance to a client for whom the lawyer is conducting litigation.

Conclusion

13. A lawyer may not refer a client for whom the lawyer is conducting litigation to a litigation financing company owned by the lawyer's spouse in order to advance financial assistance to the client based on the prospective recovery in that litigation if the lawyer personally would be barred from providing that financial assistance.

(18-10)

Ethics Opinion 856

Committee on Professional Ethics of the New York State Bar Association (3/17/11)

Topic: Limiting the scope of a representation to particular stage of a matter.

Digest: A lawyer may limit the scope of the representation of a client provided that the client gives informed consent to the limitation, the scope of the representation is reasonable under the circumstances, and the limitation is not prejudicial to the administration of justice. However, even if the original limitation is permissible, the ethical obligation to represent the client may extend beyond the initial limitation contemplated by the lawyer and client if withdrawal from the representation requires court permission and the court withholds or denies that permission.

Rules: 1.2(c), 1.16(c)-(e), 8.4(d).

Question

1. May a lawyer limit representation of a client in a criminal case to representation for arraignment purposes only?

Opinion

2. A union legal services plan regularly retains a lawyer to represent union members in criminal matters for arraignment purposes only. After arraignment, the legal services plan requires the union member to personally obtain counsel (either the original legal services plan attorney or some other private attorney) for the remainder of the criminal matter or, if the member cannot afford to retain counsel, to seek a court-appointed or legal aid attorney. Occasionally, however, a court will disregard the terms of the union's legal services plan and order a legal services plan attorney to continue representing the union member after arraignment, even if the member cannot afford the attorney's fees and the member does not personally retain the legal services plan's attorney.

A. Is limited representation ethically permissible?

3. The first question that arises is whether it is ethical for a lawyer to enter into a limited scope representation (in this case, through arraignment only) and then withdraw unless the client personally retains him or her.

4. The attorney-client relationship is generally contractual in nature, and the lawyer and client may ordinarily determine the scope of their relationship, but any contractual limitation on the scope of the lawyer's representation must be consistent with the New York Rules of Professional Conduct (the "Rules").

5. Limited representation is directly addressed in Rule 1.2(c) of the Rules of Professional Conduct, which provides as follows:

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

6. Comments [6] and [6A] to Rule 1.2 are helpful in understanding this rule. Those Comments provide, in relevant part, as follows:

> [6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client.
>
> [6A] In obtaining consent from the client, the lawyer must adequately disclose the limitations on the scope of the engagement and the matters that will be excluded. In addition, the lawyer must disclose the reasonably foreseeable consequences of the limitation. In making such disclosure, the lawyer should explain that if the lawyer or the client determines during the representation that additional services outside the limited scope specified in the engagement are necessary or advisable to represent the client adequately, then the client may need to retain separate counsel, which could result in delay, additional expense, and complications.

7. Rule 1.2(c) had no direct equivalent in the former Disciplinary Rules, but this Committee issued an opinion on limited representation under the old Code of Professional Responsibility. That opinion, N.Y. State 604 (1989), is consistent with Rule 1.2(c) and its Comment and is useful in applying Rule 1.2(c) to the present inquiry.

8. In N.Y. State 604, we opined that a lawyer may limit the scope of a representation to the investigative and grand jury proceedings in a matter

if three conditions are satisfied. First, the lawyer must obtain the client's agreement to the limitation after the lawyer has disclosed "all relevant circumstances," including: (i) the potential outcomes of the limited representation, (ii) the possibility that the client may need to promptly retain new counsel depending on the outcome of the limited representation, and (iii) any facts affecting the substantive rights of the client or the client's ability to retain replacement counsel. This condition parallels the "informed consent" requirement in Rule 1.2(c). Second, the scope of the representation must be sufficiently broad to allow the lawyer to render practical (*i.e.*, competent) service to the client. This condition matches the requirement in Rule 1.2(c) that the limitation must be "reasonable under the circumstances." Third, the lawyer's limited representation must not be prejudicial to the administration of justice (*e.g.*, it must not violate a court rule or unreasonably delay the court's calendar). This condition is today found in Rule 8.4(d) of the Rules of Professional Conduct, which prohibits a lawyer or law firm from engaging in "conduct that is prejudicial to the administration of justice."

9. Similarly, on the facts before us here, we believe that limiting the representation to arraignment pursuant to the union legal services plan is ethical provided that the lawyer complies with Rule 1.2(c) and Rule 8.4(d). We believe the lawyer can comply with those rules by satisfying the three conditions set out in N.Y. State 604: (a) the lawyer must obtain the client's consent after giving the client the information necessary to make an informed decision whether to agree to the limitation, (b) the limitation must be reasonable under the circumstances (*i.e.*, the scope of the representation must be sufficiently broad to enable the lawyer to render competent service), and (c) the limitation must not be prejudicial to the administration of justice.

10. As to the language in Rule 1.2(c) concerning notice to the tribunal and/or opposing counsel "where necessary," we think notice of the limited representation is "necessary" under Rule 1.2(c) only if a court rule requires such notice, and we lack jurisdiction to interpret court rules. *See generally* N.Y. County Lawyers 742 (2010) (interpreting the notice clause of Rule 1.2(c) in the context of "ghostwriting").

B. Is withdrawal after arraignment ethically permissible?

11. The second question that arises is whether the union legal services plan lawyer may freely withdraw following arraignment if the client cannot afford to pay the lawyer's fees and does not enter into a new retainer agreement with the lawyer providing for post-arraignment representation.

12. Ordinarily, if a lawyer has obtained, in advance, the client's knowing and free assent to terminate the representation upon the occurrence of certain specified events, then the lawyer may withdraw when those events occur. *See* Rule 1.16(c)(10) ("Except as stated in paragraph (d), a lawyer may withdraw from representing a client when…the client knowingly and freely assents to termination of the employment"). In addition, N.Y. State 604, while not directly discussing advance assent to withdrawal, indicates that a lawyer may ethically agree with a client to terminate a representation after "a discreet stage of a matter," and arraignment is such a "discreet stage."

13. Of course, there are some limitations on advance consent to withdrawal. We expressed some of those limitations in N.Y. State 719 (1999), where a domestic relations lawyer's retainer agreement said that the lawyer would have "good cause" to withdraw if (among other things) the client failed to follow the lawyer's advice, failed to approve an expert recommended by the lawyer, failed to pay any bill within thirty days, or failed to approve a change in the lawyer's hourly rate. We concluded that these grounds for withdrawal were not authorized under DR 2-110 (the predecessor to Rule 1.16), and that the withdrawal provisions were therefore improper under the general principle that a retainer agreement "may not authorize the attorney to withdraw from the representation under circumstances in which withdrawal would be impermissible under DR 2-110." We also said that the provision in DR 2-110 permitting withdrawal when a client "'knowingly and freely assents to termination' …does not authorize an agreement *in advance* by which the client assents to termination upon some future occurrence that is unrelated to achieving the objectives of the representation." (Emphasis in original.)

14. We applied the reasoning of N.Y. State 719 in N.Y. State 805 (2007). There we concluded that a retainer agreement "may not ethically provide for a client's advance assent to a lawyer's withdrawal from employment based on the client's failure to pay agreed legal fees and expenses," but could "advise the client of the lawyer's right to withdraw, subject to court approval where applicable, if the client 'deliberately disregards' a payment obligation."

15. N.Y. State 719 and N.Y. State 805 are distinguishable from the situation here. Both of those opinions rested on a lawyer's attempts to gain through a retainer agreement the right to withdraw on grounds not set forth in the withdrawal rule (then DR 2-110, now Rule 1.16). The situation before us now, in contrast, is more like the situation in N.Y. State 604, which approved a retainer agreement in which the client agreed that the lawyer could terminate a representation after "a discreet stage of a matter." That describes the facts at hand. Also, the "objectives of the representation" (providing counsel for the client at arraignment, which can occur on short notice) have been met here. Accordingly, our reasoning in N.Y. State 719 and N.Y. State 805 does not prohibit a retainer agreement in which a lawyer obtains a client's informed advance consent for the lawyer to withdraw after arraignment. By representing the client through arraignment, the lawyer has completed the representation that the client expected the lawyer to undertake.

16. However, even if a lawyer validly obtains a client's informed advance consent to withdraw after a discreet stage (such as after arraignment), the lawyer must also comply with Rule 1.16(d), which provides: "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission." As N.Y. State 604 observed, the Appellate Division rules in all four departments require both assigned and retained counsel to represent a defendant in trial court "until the action or proceeding has been terminated" in that court. Those rules remain in effect today. *See* 22 NYCRR § 606.5(a)(1) (First Department); 22 NYCRR § 671.2 (Second Department); 22 NYCRR § 821.1(a) (Third Department); 22 NYCRR § 1022.11(a) (Fourth Department). Although interpreting the rules of the Appellate Divisions is beyond the jurisdiction of this Committee, we can confidently observe that permission to withdraw from the representation is likely to be required with respect to representation in a criminal matter once the lawyer has entered an appearance on behalf of a client for purposes of an arraignment, whether or not the client is willing or able to pay the attorney for future stages of the representation.

17. Rule 1.16(d) also provides: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Thus, even if the original limitation on the representation was ethical, and even if the lawyer has good cause for terminating the representation because the client knowingly and freely assented, in advance, to the lawyer's withdrawal after arraignment, Rule 1.16(d) requires the lawyer to continue the representation if ordered to do so by the court. The court may take into account whether or not the client can afford to pay the lawyer's fees for continuing the representation after arraignment—that is up to the court—but if the court orders the lawyer to continue the representation, then Rule 1.16(d) requires the lawyer to continue the representation even if the client cannot pay for the representation.

18. Finally, we caution that even when a court permits the lawyer to withdraw from the representation of a criminal defendant at the end of arraignment, Rule 1.16(e) obligates the lawyer to "take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client…." Rule 1.16(e) notes that these steps may include, among others, (i) "allowing time for the client to employ other counsel," (ii) "delivering to the client all papers and property to which the client is entitled," and (iii) "complying with applicable laws and rules." *Cf.* N.Y. State 604 ("it is not unethical for a lawyer…to terminate his or her services under the contract upon indictment, as long as there is enough time between the indictment and the trial date for the client to hire and prepare new counsel.").

Conclusion

19. A lawyer may limit the scope of the lawyer's representation of a client provided that the lawyer complies with Rule 1.2(c) and Rule 8.4(d). A lawyer can comply with Rules 1.2(c) and 8.4(d) by satisfying three conditions: (a) the lawyer must obtain the client's consent after giving the client the information necessary to make an informed decision as to the limitation, (b) the scope of the representation must be reasonable under the circumstances, and (c) the limitation must not be prejudicial to the administration of justice. However, even if the initial limitation on the scope of the representation is permissible, a lawyer's ethical obligation to represent a client may extend beyond the initial limitation if a court's permission to withdraw from the representation is required and the court denies permission. Finally, if the court does grant permission to withdraw, the lawyer must take steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client.

74-09

Ethics Opinion 857

Committee on Professional Ethics of the New York State Bar Association (3/17/11)

Topic: In-person distribution of announcements of law firm's name change.

Digest: Distribution of law firm's announcements by a lawyer's employee must not involve in-person contact with recipients, or the distribution will constitute forbidden in-person solicitation.

Rules: 7.1, 7.3, 7.5.

Question

1. May an attorney have her employee personally distribute professional announcements to nearby residences?

Opinion

2. The inquiring attorney has changed the name of her law firm and wishes to have her paralegal personally deliver an announcement of the renaming to residences near her office.

3. Rule 7.5(a)(2) of the New York Rules of Professional Conduct (the "Rules") permits lawyers to use professional notices announcing a law firm's name change, provided the announcements comply with Rule 7.1 ("Advertising"). However, the methods of distributing such announcements are subject to some restrictions. In particular, Rule 7.3(a) prohibits lawyers from engaging in solicitation by "in-person or telephone contact" unless the recipient is "a close friend, relative, former client or existing client." Rule 7.3(b) defines "solicitation" to mean, in pertinent 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, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.

4. This Committee addressed the issue of the hand-delivery of advertising in N.Y. State 659 (1994). There, the inquiring attorney asked whether he could allow his law firm's advertisement to be included in an "information package" to be distributed by a car dealer to car buyers. The Committee concluded that hand-delivery of the packet to car buyers by the dealer would not transform the distribution into a prohibited in-person solicitation by the lawyer. We said:

> The Committee…does not perceive any substantive difference between sending an advertisement through the mail and having it handed to a recipient as part of an information package. It is presumed that the delivery of the information package will not be made by the attorney (and thus would not involve in person solicitation of a prospective client by the attorney), and that the car dealer or his employee will deliver the information package but not discuss the advertisement with the purchaser.

5. The Committee's conclusion in N.Y. State 659 that the car dealer's personal distribution of the lawyer's advertisement was not a forbidden in-person solicitation rested on the facts that the car dealer was not being paid by the attorney and would not discuss the advertisement with car buyers. Here, however, the proposed delivery agent is the attorney's own paid employee and agent (her paralegal), so N.Y. State 659 is not dispositive.

6. The lawyer cannot have her paralegal do what the lawyer herself is forbidden to do, so the propriety of the proposed distribution by the lawyer's paralegal rests on whether the paralegal's hand-delivery of the announcement constitutes in-person solicitation in violation of Rule 7.3(a). *See* Rule 8.4(a) ("A lawyer or law firm shall not (a) violate or attempt to violate the Rules of Professional Conduct…through the acts of another").

7. The inquirer contends that the delivery would not meet the definition of "solicitation" in Rule 7.3(b) because the announcement is not an "advertisement" within the meaning of Rule 1.0(a). It is not an advertisement or solicitation, the inquirer says, because its "primary purpose" is not "pecuniary gain." We reject that contention. The inquirer is not offering her services pro bono, and the primary motive is surely the hope that once the recipients of the announcement know she is in the neighborhood, some of them will retain her. *See* Rule 7.3, Comment [2] (contrasting a lawyer's advertisement "that has as a significant motive for the lawyer to make money" with "a public-interest lawyer offering pro

bono services.") We therefore conclude that the name-change announcement is an "advertisement" within the meaning of Rule 1.0(a) because it is a communication by the inquiring lawyer about her firm whose "primary purpose…is the retention of the lawyer or law firm." Similarly, we conclude that the announcement is a "solicitation" within the meaning of Rule 7.3(b) because "a significant motive…is pecuniary gain" and it is "directed to, or targeted at," a specific recipient or recipients. (Comment [3] to Rule 7.3 notes that any advertisement that is made by in-person or telephone contact is "directed to or targeted at" a specific recipient or recipients.)

8. Given that the name-change announcement is a solicitation, we see two possibilities. On one hand, if the inquirer proposes to have her paralegal deliver these announcements in a manner that will bring the paralegal into personal contact with the residents, the Committee concludes that the delivery will constitute an impermissible in-person solicitation (unless the recipients are close friends, relatives, former clients, or existing clients). On the other hand, if the paralegal will simply leave a name-change announcement at a residence—for example, by hanging the announcement on a door handle or placing it on a porch—and if the paralegal has no personal contact with the recipients, then the paralegal's delivery of the announcements will not constitute forbidden in-person solicitation. The ban in Rule 7.3(a) is not against all solicitation—it is only against in-person solicitation. The inquirer must avoid in-person solicitation through her paralegal.

9. Rule 7.3 imposes various additional requirements and restrictions on any solicitation directed to a recipient in New York State, but the inquirer has not raised any issues concerning those requirements and restrictions, so we do not address them. We assume that the inquirer will study and abide by all applicable provisions of Rule 7.3.

Conclusion

10. Provided the announcements are delivered without any personal contact between the inquirer's paralegal and the recipients, provided the announcements conform to the requirements of Rule 7.1, and provided the inquirer abides by all applicable requirements and restrictions of Rule 7.3, the inquirer may cause her paralegal to deliver the name-change announcements to residences.

(43-10)

Ethics Opinion 858

Committee on Professional Ethics of the New York State Bar Association (3/17/11)

Topic: Conditioning in-house attorney's employment on execution of a confidentiality agreement.

Digest: A general counsel licensed in New York may ethically require staff attorneys to sign a confidentiality agreement that arguably extends staff attorney confidentiality obligations, after their employment ends, to information not otherwise protected as confidential information under the New York Rules of Professional Conduct, if the agreement makes plain that such confidentiality obligations do not restrict the staff attorney's right to practice law after termination and do not expand the scope of the staff attorney's duty of confidentiality under the Rules.

Rules: 1.6(a), 1.9(c), 5.6(a).

Question

1. As a condition of an in-house staff attorney's employment or continued employment, may a New York lawyer acting as in-house general counsel for a New York not-for-profit corporation require an in-house staff attorney to enter into an employee confidentiality agreement which (1) prohibits the employee-attorney from disclosing information deemed confidential, including information as to the employer's trade secrets and business and regulatory activities; and (2) contains a "savings clause" providing that the restrictive covenant shall be interpreted consistently with applicable rules of professional conduct and will not restrict the lawyer's right to practice law following employment?

Facts

2. The inquiring attorney, a New York attorney, is the in-house general counsel of a New York not-for-profit corporation (the "Corporation"). The Corporation has regional offices across the country, including in New York, and it employs in-house staff attorneys who are members of the New York bar. This inquiring attorney wants to require the Corporation's in-house attorneys to enter into the same confidentiality agreement imposed on all other current or prospective employees as a condition of employment or continued employment. The proposed confidentiality agreement is a form agreement intended to have effect in multiple jurisdictions.

3. The Corporation provides regulatory and business services and engages in research and marketing activities. These services and activities involve highly sensitive information. The information that the Corporation seeks to keep confidential may relate to the Corporation and may also relate to its customers, vendors and members.

4. The proposed confidentiality agreement purports to bar employees from using or disclosing information (except as required by the scope of the employee's employment duties) that the Corporation has delineated as confidential. The proposed agreement provides that these confidentiality obligations survive termination of employment—indefinitely as to all trade secrets, and for two years with respect to any other confidential information. However, the proposed confidentiality agreement sets forth exclusions for previously acquired information, public knowledge, or information available from other sources, and sets forth an exception for compliance with court orders.

5. The proposed confidentiality agreement also contains a "savings clause" applicable only to licensed attorneys. The savings clause expressly limits the agreement's confidentiality restrictions by providing that the agreement "shall be interpreted to be consistent with" the applicable rules of professional conduct or ethics rules and that it "shall not expand the scope" of an attorney's duties to maintain privileged and confidential information under any such rules.[1]

Opinion

6. The central question here is whether the proposed confidentiality agreement will restrict an in-house lawyer's right to practice law following employment. Rule 5.6(a)(1) of the New York Rules of Professional Conduct (the "Rules") prohibits lawyers from participating in, offering or making agreements that restrict the right of a lawyer to practice law upon the termination of an employment relationship. Specifically, Rule 5.6(a)(1) provides as follows:

> (a) A lawyer shall not participate in offering or making:
>
> (1) a partnership, shareholder, operating, employment, or other similar type of agreement that *restricts the*

> *right of a lawyer to practice after termination of the relationship*, except an agreement concerning benefits upon retirement.… [Emphasis added.]

7. 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. *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."); N.Y. State 129 (1970) ("A covenant restricting a lawyer after leaving the partnership from fully practicing his profession appears…to be an unwarranted restriction on the right of the lawyer to choose his clients in the event they seek his services and an unwarranted restriction on the right of the client to choose the lawyer he wishes to represent him"); *see also Cohen v. Lord, Day & Lord*, 75 N.Y.2d. 95, 98 (1989) ("The purpose of the rule is to ensure that the public has the choice of counsel"). Agreements prohibited by Rule 5.6 have the practical effect of restricting the pool of available attorneys and thus limiting a client's choice of legal counsel and a lawyer's autonomy in accepting new engagements.

8. When one New York lawyer seeks to impose a confidentiality provision on another New York lawyer as a condition of employment, a pivotal question is whether the confidentiality provision defines protected information more expansively than Rule 1.6(a), which itself is quite broad. Rule 1.6(a) provides, in pertinent part, as follows:

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

9. A New York attorney's continuing obligation of confidentiality after termination of employment is almost equally broad, though not unlimited. Rule 1.9(c) provides that a lawyer who has formerly represented a client in a matter, or whose present or former firm has formerly represented a client in a matter, shall not thereafter:

> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
>
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

10. If the proposed confidentiality agreement protects more information than Rules 1.6(a) and 1.9(c), a New York lawyer who enforces the agreement after an in-house legal employee terminates employment may be violating Rule 5.6(a)(1) by restricting the former in-house lawyer's practice of law. However, as a practical matter, because the definition of confidential information in Rule 1.6 is so broad, most contractual confidentiality provisions are not likely to exceed the scope of a New York lawyer's confidentiality obligations under the Rules.

11. This Committee's prior opinions regarding restrictive covenants that affect competition, and the Committee's prior opinions regarding obligations that restrict a lawyer's right to practice law, arose in the quite different contexts of partnership agreements and settlement agreements. *See* N.Y. State 129 (1970) (lawyer must not "be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of the lawyer to practice law after the termination of the relationship created by the agreement"); N.Y. State 730 (2000) (lawyers must not enter into a settlement agreement whose overly broad confidentiality provisions restrict the right of the lawyer to practice law). Thus, N.Y. State 129 and N.Y. State 730 do not control the present situation. Much more closely on point are New Jersey Opinion 708 (2006) ("it may be reasonable for a corporation to request its lawyers to sign a non-disclosure or confidentiality agreement, provided that it does not restrict in any way the lawyer's ability to practice law or seek to expand the confidential nature of information obtained by the in-house lawyer"); and Washington State Advisory Opinion 2100 (2005) (confidentiality provision that dealt specifically with a lawyer's post-employment activities unrelated to the practice of law did not violate Rule 5.6(a)).

12. In any event, the proposed confidentiality agreement in question contains a so-called "savings clause." This savings clause specifically states that, as applied to licensed attorneys, the agreement's provisions are not meant to restrict the employee's post-termination right to practice law in violation of the applicable rules of professional conduct or in violation of the ethics rules of the jurisdictions in which the attorney is licensed. The agreement also provides that it is to be interpreted consistently with all such rules and does not expand the duty to maintain confidentiality under those rules.

13. The effect of this "savings clause" is to make plain that, to the extent the limitations imposed by the proposed agreement appear to be more stringent than the Rules, the limitations in the agreement apply only to an attorney's use and disclosure of information with respect to the practice of law. Thus, even if the contractual confidentiality provision on its face might be construed to expand the scope of an attorney's confidentiality obligations beyond those provided by the Rules, the savings clause keeps the agreement within the confines of the Rules and renders further analysis under Rule 5.6 unnecessary. *See* Connecticut Informal Opinion 02-05 (2002) (deciding, in connection with a proposed employment agreement that would apply to lawyers, that a savings clause in the agreement "fairly vitiates ethical concerns over executing, procuring execution, and/or enforcement of the agreement while seeking to preserve legitimate non-ethical concerns").

14. We therefore determine that the proposed confidentiality agreement does not run afoul of Rule 5.6(a)(1). In making this determination, this Committee does not reach or imply any conclusion as to whether the confidentiality agreement is enforceable. However, we have noted that "an agreement restricting a lawyer's right to practice law may be enforceable even if it violates the disciplinary rule." N.Y. State 730 (2000) *(citing Feldman v. Minars*, 230 A.D.2d 356 (N.Y. 1st Dep't 1997)). Conversely, a contractual provision that passes ethical muster may be unenforceable. In either case, enforceability is a question of law beyond our jurisdiction.

Conclusion

15. A general counsel who is a New York attorney may require in-house staff attorneys to sign a confidentiality agreement that might otherwise extend staff attorney confidentiality obligations, after the employment period, to information not otherwise protected as confidential information under the Rules, if the agreement makes plain that such confidentiality obligations do not restrict the former in-house attorney's right to practice law following employment and do not expand the scope of the attorney's duty of confidentiality under the Rules.

Endnote

1. The proposed agreement that we address in this inquiry provides:

> If I am a licensed attorney, this confidentiality provision is not meant to restrict my right to practice law, after I cease to be an employee, in violation of the applicable rules of professional conduct (such as Rule 5.6 or its equivalent), and the confidentiality provision shall be interpreted to be consistent with all such rules. The confidentiality provision shall not expand the scope of my duty to maintain privileged or confidential information under Rule 1.6, Rule 1.9, or other applicable rules of professional conduct.

(2-11)

Ethics Opinion 859

Committee on Professional Ethics of the New York State Bar Association (3/25/11)

Topic: Part-time government attorneys: conflicts of interest, imputed conflicts, non-consentable conflicts.

Digest: A part-time Department of Social Services attorney's representation, in a criminal proceeding, of a private client who is also a respondent in unrelated child abuse and neglect proceedings brought by Social Services, creates an incurable conflict of interest that is imputed to the other members of the Social Services legal unit.

Rules: 1.0(f) & (h), 1.7, 1.8, 1.9, 1.10, 1.11.

Facts

1. A County's Department of Social Services ("Social Services") has a legal unit ("Legal Unit") that employs one full-time attorney (the inquirer) and one part-time attorney. The full-time attorney supervises the Legal Unit and has an office at Social Services. The part-time attorney is in private practice and does not have an office at Social Services. However, the part-time attorney frequently visits Social Services and its Legal Unit to retrieve and discuss files, to conference cases, and to obtain supplies.

2. Social Services brought a child neglect petition against an individual (the "Respondent"), and the Legal Unit assigned the case to the part-time attorney. Upon assignment, the part-time attorney realized that the Respondent is the part-time attorney's client in an "unrelated" local criminal proceeding.[1]

Questions

3. These facts raise four related questions:

   a. May the part-time attorney represent the Respondent in the child neglect proceedings brought by Social Services?

   b. Would consent (waiver) by the Respondent (or Social Services) cure the conflict?

   c. If the conflict cannot be cured by consent, may the full-time attorney in the Legal Unit prosecute the child neglect proceedings?

   d. Would a screening process avoid or cure the conflict?

Opinion

4. To represent Social Services against the Respondent, and simultaneously to act on behalf of the Respondent in an unrelated criminal proceeding, will involve the lawyer in representing "differing interests," a phrase defined by Rule 1.0(f) to include "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

5. Rule 1.7(a)(1) of the New York Rules of Professional Conduct prohibits concurrent representations involving "differing interests," unless they are permitted by Rule 1.7(b). Rule 1.7(b) provides as follows:

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

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

   (2) the representation is not prohibited by law;

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

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

6. The first of these four conditions—the lawyer's reasonable belief that the lawyer can competently and diligently represent each affected client—is "by far the most important" element in the analysis. ROY D. SIMON, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 102 (West 2009 ed.). It determines whether a conflict can or cannot be cured by disclosure and consent. (A conflict is also non-consentable when a representation is "prohibited by law" or when the same lawyer is representing both sides in the same proceeding before a tribunal, but those situations are not presented here.) "The con-

sentablility language in Rule 1.7(b) is somewhat different but nevertheless essentially equivalent to language formerly found in DR 5-101(A) and DR 5-105(C)." *Id.*

7. This Committee has repeatedly opined that a part-time prosecutor who is also in private practice is barred from representing criminal defendants in any state court in New York. *See* N.Y. State 544 (1982) ("attorney who has prosecutorial responsibilities as an incident of part-time employment by a local governmental unit is disqualified from the private practice of criminal law in all courts of the state.");. N.Y. State 657 (1993) (if part-time attorney for Town prosecutes traffic violations, then he is "precluded from representing, in criminal cases, a defendant in any court of the State," and consent cannot cure the conflict); N.Y. State 788 (2005) (part-time prosecutor may not act as criminal defense counsel in New York State courts, "risk of the public perceiving favoritism at the prosecutor's office precludes waiver of the conflict"). We have also said that a part-time prosecutor is barred from representing a criminal defendant in a civil matter and that the conflict "cannot be cured by consent." *Id.* Here we determine that the Department of Social Services attorney is subject to these principles.

8. In N.Y. State 788, a part-time prosecutor, as part of her private practice, had begun revising wills for a husband and wife when the lawyer learned that another attorney in the same prosecutor's office was bringing criminal charges against the husband. Applying the Disciplinary Rules then in effect in New York, the Committee concluded that (i) a prosecutor (including a part-time prosecutor) may not represent a private client in a civil matter if the private client is also a criminal defendant in a matter brought by the same prosecutor's office, (ii) the part-time prosecutor's conflict could not be cured by consent, and (iii) the conflict was imputed to the entire prosecutor's office. We advised the part-time prosecutor to withdraw from representing the client in the civil matter if withdrawal could be accomplished without prejudice to the client. However, if withdrawal would prejudice the civil client, and if the civil matter was "substantially related" to the criminal matter, then the entire prosecutor's office should be disqualified and a special prosecutor appointed. "If the criminal prosecution involves allegations of secreting assets, for example," we said, "an estate-planning representation might be substantially related to that prosecution, requiring appointment of a special prosecutor. If the alleged crime is a traffic offense, however, that is unlikely."

9. N.Y. State 657 and 788 both noted that prosecutors have special responsibilities to the public that render the roles of prosecutor and defense counsel "inherently incompatible." In addition, there are significant risks of an actual or perceived miscarriage of justice because a prosecutor's office may show favoritism to persons who hire part-time prosecutors to represent them in other matters. *See also* N.Y. State 683 (1996) (a prosecutor's "special duty" to seek justice "imposes a responsibility on prosecutors not only to ensure the fairness of the process by which a criminal conviction is attained, but also to avoid the public perception that criminal proceedings are unfair.").

10. N.Y. State 800 (2006) dealt with a situation closer to the one here. A part-time prosecutor sought to represent indigent persons in Family Court matters. We held that "a part-time prosecutor is not precluded from accepting all assignments as court-appointed counsel in Family Court." Yet we also said that "[i]n specific types of cases and specific situations, including cases in which law enforcement personnel with whom the prosecutor works as a prosecutor are involved, and cases that are quasi-criminal in nature, the prosecutor is barred from accepting assignments." We emphasized that the attorney "must avoid all conflicts of interest, ensuring that neither the attorney's own interests nor the attorney's simultaneous work as a prosecutor preclude the attorney from exercising independent judgment on behalf of his or her clients…."

11. N.Y. State 800 also focused on ways in which law enforcement matters may be intertwined with Family Court matters (including child protective proceedings, adoption, custody and visitation, support, family offense, guardianship, delinquency, paternity, persons in need of supervision (PINS), and foster care approval and review). We said:

> [V]irtually all types of proceedings heard by the Family Court are likely to have some involvement of law enforcement agencies or similar governmental entities. In neglect and abuse cases, for example, multiple government entities are often involved. The local child protective service investigates allegations and the county attorneys present ("prosecute") the case in the Family Court. Family offense

> cases by their nature pose a great risk of criminal charges being brought…

12. Therefore, the Committee concluded in N.Y. State 800 that the part-time prosecutor was barred from accepting assigned cases in three situations: (a) matters involving law enforcement personnel with whom the lawyer works (or has worked) as a part-time prosecutor; (b) juvenile delinquency proceedings; and (c) PINS proceedings. The Committee then singled out representation of respondent parents in abuse and neglect proceedings (*i.e.,* child protective proceedings) for "special mention," saying:

> In child protective proceedings, respondent parents are answering to charges from the government regarding their parenting. Ultimately, the parent could temporarily or permanently lose custody of the child as a result of this proceeding. Here, too, even if the government personnel charging the parents are not those with which the part-time prosecutor would be involved, a part-time prosecutor must be particularly sensitive to the appearance of impropriety that may arise from his or her attempting to appear adverse to authorities conducting proceedings very similar to those of a prosecutor.

13. The role of the Social Services attorney when prosecuting child abuse and neglect proceedings is comparable to the role of the D.A.'s office in criminal prosecutions. In both, the attorney represents the interests of the state in matters with grave consequences (incarceration in one, custody and parentage in the other). Like the D.A. in criminal prosecutions, the Social Services prosecutor has a special role that is "inherently incompatible" with the role of defense counsel. *See* N.Y. State 657 and N.Y. State 788.

14. The public can assume that individuals will be driven by great forces to do everything they can to avoid the consequences of a prosecution or a finding of child abuse and neglect. That urge may include—or so the public might believe—hiring a part-time Social Services attorney in an unrelated proceeding to secure an advantage in the child abuse and neglect case. This creates significant risks of an actual or perceived miscarriage of justice due to potential favoritism shown to persons who hire part-time prosecutors to represent them in other matters.

15. Moreover, the personnel with whom the part-time Social Services attorney will work in neglect and abuse proceedings will often include law enforcement personnel. *See* N.Y. State 800. Those same personnel may oppose the part-time Social Services attorney when representing the defendant in the criminal matter. In the criminal defense role, therefore, the part-time Social Services attorney might have to impeach the same law enforcement personnel on whom Social Services relies in abuse and neglect proceedings. Accordingly, a part-time Social Services attorney prosecuting an abuse and neglect case cannot "reasonably believe[]" that he or she will be able to "provide competent and diligent representation to each affected client" within the meaning of Rule 1.7(b)(1).

16. Regarding our first and second questions, therefore, we conclude that the part-time attorney may not represent the Respondent in the child neglect proceedings brought by Social Services, and we further conclude that informed consent (waiver) by the Respondent or by Social Services (or by both) cannot cure the conflict.

17. That brings us to our third question: May the full-time Social Services attorney who works in the same office with the inquiring attorney prosecute the abuse and neglect case against the Respondent while the part-time attorney defends the Respondent in the "unrelated" criminal matter? We also answer no to this question. Under Rule 1.10(a): "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." The full-time and part-time Social Services attorneys are "associated in a firm" under Rule 1.10(a) because Rule 1.0(h) defines a "firm" to include "lawyers employed in … a government law office…." This conclusion is consistent with N.Y. State 788, which reiterated our long-held view that a D.A.'s office must be treated as a "law firm" for purposes of imputation of conflicts.

18. Thus, the part-time lawyer's conflicts are imputed to the entire Social Services Legal Unit. The part-time Social Services attorney has access to information about the office and its cases. This access is comparable to the access enjoyed by a lawyer who is "of counsel" to a law firm. An of counsel lawyer's conflicts are imputed to all lawyers in the firm. *See* N.Y. State 773 (2004) (if lawyer who serves on municipal board is

disqualified from a particular representation, the disqualification is imputed to a law firm with which that lawyer has an "of counsel" relationship). Therefore, under Rule 1.10(a), the part-time attorney's conflicts are imputed to all attorneys in the Social Services Legal Unit.

19. Conversely, the part-time attorney's conflicts of interest arising from government service are imputed to (and therefore disqualify) the part-time attorney's partners and associates in private practice. *See* N.Y. State 450 (1976) (if part-time town attorney is disqualified, then his firm is also disqualified from representing private clients in matters where clients may need building permits, zoning variances, etc., from the town).

20. Turning to our fourth question, can a screening mechanism prevent imputation of the conflict? No. Under Rule 1.11(b)(1), screening mechanisms apply only to *former* government employees moving to private practice. Screening cannot prevent imputation of a *current* employee's conflicts to the other attorneys in the government office.

21. However, screening is not the only solution. If the part-time attorney stops working at Social Services, then the imputation will cease. Social Services may then continue prosecuting the parents for abuse and neglect as long as Social Services lawyers do not possess confidential information about the Respondent that the part-time attorney represents in private practice. *See* Rule 1.10(b) (when a lawyer terminates an association with a firm, the firm may not oppose any client of the terminated lawyer if any lawyer in the firm still has confidential information about the terminated lawyer's client).

22. Alternatively, if the part-time attorney can and does ethically withdraw from representing the Respondent in the unrelated criminal matter, Social Services may continue to prosecute the Respondent (who would now be the part-time attorney's former client) for abuse and neglect. Since the facts state that the criminal matter is not substantially related (and is indeed unrelated) to the abuse and neglect proceedings, Social Services would not need the consent of the part-time attorney's former client pursuant to Rule 1.9. *See* N.Y. State 788 (D.A.'s office may continue prosecuting former client of part-time D.A. as long as criminal prosecution is not substantially related to matter in which part-time prosecutor represented defendant in private practice.)

Conclusion

23. The part-time Social Services attorney may not represent the Respondent in abuse and neglect proceedings brought by Social Services. The full-time attorney is disqualified from representing Social Services in the child neglect and abuse proceedings against the Respondent while the part-time attorney is representing the Respondent in the unrelated criminal matter. These conflicts of interest are not curable by consent or by screening, but may be cured if the part-time attorney either terminates his association with Social Services or withdraws from representing the Respondent in the unrelated criminal matter.

Endnote

1. The inquirer has informed the Committee that the criminal proceeding is "unrelated." We accept that representation for purposes of this opinion and we understand it to mean that the criminal proceeding involves a different factual setting, although it is difficult to imagine how the existence of a criminal proceeding, and the facts relating to the criminal proceeding, would not be potentially germane to Social Services in prosecuting a neglect and abuse proceeding involving the Respondent. *Cf.* Rule 1.9, cmt. [3] (explaining meaning of "substantially related").

(14-10)

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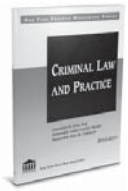

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