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ONEONONE

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

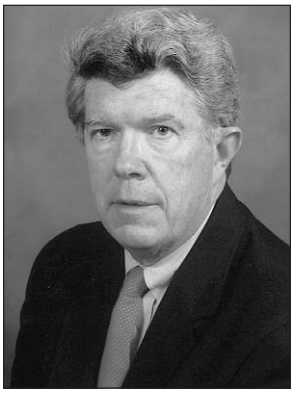
A Message from the Chair

I hope all of our members enjoy this edition of *One on One*. The Section is deeply indebted to our Editor, Martin Minkowitz, who toils endlessly to bring this publication to fruition. The Section also extends sincere thanks to the authors of the various articles appearing in this edition.

The General Practice Section had, as part of its summer meeting, a "Strategic Planning Workshop" whereby the Section looked at its strengths, weaknesses and opportunities. The Section developed goals in order to improve benefits to its members and increase participation by members in the Section. The Workshop, conducted by Rich Martin and Terry Brooks of the New York State Bar Association, tried to refocus the Section in light of ever-increasing change to our membership and in the areas of practice by our members. Some of the changes necessary to implement these goals will be presented to our members at our Annual Meeting in January 2006. We ask our members to consider the changes in our by-laws which will be proposed at the January meeting and to support them.

Our summer meeting also covered substantive areas in Criminal Defense, Ethics and New York State Estate Taxes. We thank our presenters, Steven L. Kessler, Aaron Ben-Merre, Seth Rosner and Timothy L. Thompson, for their excellent and informative presentations. We also extend our appreciation to Christine S. Filip whose presentation on law firm marketing was most informative. Even though our attendance was not what we had expected, the program was excellent. We hope we can increase attendance by our members at future summer meetings.

The General Practice Section looks forward to its Annual Meeting at the New York Marriott Marquis in New York on January 24, 2006. Our program will deal with Pilot Electronic Filing for the State Courts, Hot Tips for the General Practitioner in the areas of Trusts & Estates, Elder Law, Real Property Law, and Family Law, and also a presentation on Ethics. We look forward to an exciting program, especially dealing with the electronic filing that will be coming in the future to the State Courts. You will be receiving further information on the program from the Bar Association.



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Inside

From the Editor

The title of our publication is still *One on One*, although we are considering options for a new name as I indicated in this column in our last edition.

We have continued in this issue a new "Recent Decisions" article from Justice Bruce M. Balter and Paul Forster, Esq. because of the good reviews that we received from our last publication of their work.

A new area of law that we haven't addressed before is found in an article on financial reporting and accounting for property and casualty reinsurance, which I believe you should find to be interesting, even if you have had little exposure to it.

Domestic relations is an area that most general practitioners have had some experience with and we have included an interesting paper prepared by a graduating student, Norah Hart.

We, of course, invite your comments with regard to these articles and the author's thoughts.

We have concluded again with what has become popular with our publication—some of the complete recent opinions of the State Bar's Committee on Professional Ethics.

I hope you will find this edition to be interesting and informative. Those of you who would like to share thoughts with the rest of the members of the Section are again invited to forward a prepared paper to me for consideration to be included in the next *One on One* (or whatever we decide to call it in the future).

Best wishes for the New Year!

Martin Minkowitz

A Message from the Chair *(Continued from page 1)*

We thank our Co-Chairs, Linda Margolin and Harriette Steinberg, for their efforts in coordinating the Annual Meeting and program. We hope that you will join us at our Annual Meeting and program on January 24, 2006, in New York City. We look forward to seeing you at the Annual Meeting and we ask that you consider becoming more involved in the activities of the General Practice Section.

The Section wishes to extend a warm welcome to our new liaison with the State Bar, Pamela McDevitt, Director of Law Practice Management. We look forward to working with Pam on Section matters during the coming year.

Thomas J. Mitchell

Law, Accounting and Financial Reporting in Property/Casualty Reinsurance Regulation

By William D. Latza

The core of reinsurance regulation is found in the rules applicable to the accounting for, and disclosure of, reinsurance transactions by ceding insurers and reinsurers. The laws and regulations that prescribe the conditions to be satisfied before a cedent is permitted to recognize an asset or a reduction of liability from a reinsurance transaction, together with corresponding accounting and financial reporting prescriptions, are of critical importance.

Insurance Company Accounting in a Nutshell: SAP and GAAP

Statutory Accounting Practices (SAP)

Since the 1870s, the National Association of Insurance Commissioners (NAIC) has evolved a system of uniform accounting practices and procedures for insurance companies known as statutory accounting practices (SAP). Virtually every state has adopted NAIC SAP through enactment of a statute requiring insurers to file quarterly and annual statements in accordance with the forms, instructions and accounting practices and procedures adopted from time to time by the NAIC. Although each state may prescribe or permit its own accounting rules applicable to its domestic insurance companies (and those exceptions trump SAP[1]), this near universal adoption of NAIC SAP means that the NAIC has the most influence on the regulatory accounting rules applicable to insurers.

SAP underwent a substantial codification effort in the late 1990s, culminating in the adoption of the 2001 *NAIC Accounting Practice and Procedures Manual* (which has been modified from time to time since its adoption). Because regulators are most concerned about the solvency of insurance companies—they want insurers to be around to keep their promises to policyholders—SAP tends to be highly conservative. SAP focuses on the balance sheet as the best indicator of the insurer's ability to pay its insurance obligations. Some describe SAP as a "modified liquidation basis" of accounting: if the company stopped doing business tomorrow, how much would be available to pay policyholders and other creditors?

Generally Accepted Accounting Principles (GAAP)

Insurers that are publicly traded, owned by publicly traded companies or issue publicly traded debt are also required to prepare financial statements on the basis of generally accepted accounting principles (GAAP). Those insurers are subject to GAAP accounting rules promulgated by the Financial Accounting Standards Board (FASB), which has been delegated rulemaking authority by the Securities and Exchange Commission.

GAAP rules are generally less conservative than SAP. GAAP focuses on the income statement to provide information to stock and bond investors on the reporting entity's relative earnings performance between accounting periods and compared with other entities. A key question under GAAP is whether the reporting entity is a "going concern."

International Accounting Standards

In addition to SAP and GAAP, the International Accounting Standards Board (IASB), with the help of FASB, is developing accounting practices and procedures that are ultimately intended to supplant home country GAAP. IASB has taken as one of its earliest projects the development of insurance accounting practices and procedures.

Though originally on a fast track, the development of IASB insurance accounting rules has slowed down a bit in the face of controversy over some proposed elements, such as so-called fair value accounting for insurance liabilities.

Many insurers and reinsurers believe that, because there is no meaningful market for insurance liabilities, establishing a "fair value" for them is an exercise in futility that can only lead to needless volatility in reported results. In any event, it appears that a true international GAAP is at least five to ten years away. And IASB GAAP is not likely to be broadly adopted by the NAIC; instead, regulators are likely to do the same thing with IASB GAAP pronouncements that they do with FASB GAAP pronouncements: evaluate them to see if they meet the conservatism and consistency requirements of SAP.

Credit for Reinsurance

The ability of an insurer or reinsurer to take credit on its financial statements for reinsurance or retrocession, as an asset or a reduction of liability, is a critical component of most reinsurance transactions. State insurance departments regulate reinsurance transactions with the goal of ensuring that reinsurers can and will make full and timely payment to the cedent. Accounting and financial reporting requirements are intended to assure the fair presentation of the cedent's financial condition and results of its operations, including the effect of reinsurance.

Insurers and reinsurers buy reinsurance for five main reasons:

1. Financing and surplus relief;
2. Stabilization or reduced volatility of results;
3. Capacity to assume more or larger risks;
4. Catastrophe protection; and
5. Access to reinsurer-provided services such as claims audits, underwriting reviews, product development, actuarial reviews, financial advice, systems advice and engineering and loss prevention.

Four of these purposes are achieved through an accounting convention: credit for reinsurance allowed on insurer and reinsurer financial statements. Accounting and financial reporting are where the credit for reinsurance laws and regulations are implemented.

A common statute is exemplified by New York Insurance Law section 1301(a)(14), which provides that in determining the financial condition of an insurer, reinsurance recoverable by a ceding insurer may be allowed as an admitted asset of the insurer if the reinsurance is recoverable:

> (i) from an insurer authorized to transact such business in [New York] . . . in the full amount thereof; (ii) from an accredited reinsurer . . . to the extent allowed by the superintendent [of insurance] on the basis of the insurer's compliance with the conditions of any applicable regulation; or (iii) from an insurer not so authorized or accredited . . . in an amount not exceeding the liabilities carried by the ceding insurer for amounts withheld under a reinsurance treaty with such unauthorized insurer . . . as security for the payment of obligations thereunder if such funds are held subject to withdrawal by, and under the control of, the ceding insurer. Notwithstanding any other provision of this chapter, the superintendent may by regulation prescribe the conditions under which a ceding insurer may be allowed credit, as an asset or as a deduction from loss and unearned premium reserves, for reinsurance recoverable from an accredited reinsurer, [or] an insurer not authorized in [New York].

Required Contract Provisions

State insurance regulations generally require specific contract provisions as a prerequisite for a cedent to receive statutory credit for a reinsurance transaction.

Insolvency Clause

In *Fidelity & Deposit Co. of Maryland v. Pink*, 302 U.S. 224 (1937), the United States Supreme Court applied the principle of indemnity and held that the cedent's liquidator was entitled to recover the reinsurer's share of only that portion of allowed claims actually paid by the liquidator. Today, as with the insurance statutes and regulations of virtually all states, New York Insurance Law section 1308 and section 125.1 of New York Insurance Regulation 17 (11 N.Y.C.R.R. § 125.1) require that the reinsurance contract contain an insolvency clause that provides for reimbursement on the basis of the claim allowed, without diminution because of the cedent's insolvency.

Intermediary Clause

In *In re Pritchard & Baird, Inc.*, 8 Bankr. 265 (D.N.J. 1980), *aff'd*, 673 F.2d 1299 (3d Cir. 1981), the court held that a reinsurance intermediary is the agent of the cedent for all purposes, including receipt and transmission of funds. In response, again as with the insurance statutes and regulations of virtually all states, section 125.6(a)(1) of New York Insurance Regulation 20 (11 N.Y.C.R.R. § 125.6(a)(1)) requires a reinsurance contract to shift to the reinsurer all credit risks related to payments to an intermediary.

Service of Suit on Unauthorized Reinsurers

Although not a prerequisite to credit for reinsurance, section 32.1(e) of New York Insurance Regulation 98 (11 N.Y.C.R.R. § 32.1(e)) seeks further to assure collectibility of reinsurance by prohibiting a licensed intermediary from procuring a reinsurance contract from an unauthorized reinsurer, unless in the contract the reinsurer appoints an agent in New York State for service of process in any suit arising out of the contract.

Statement of Statutory Accounting Principles (SSAP) No. 62

In addition to statutes and regulations prescribing contract terms as prerequisites for credit for reinsurance, Paragraph 8 of SSAP No. 62 sets out certain required terms for reinsurance agreements. It provides that credit for reinsurance shall not be allowed unless:

1. The agreement contains an acceptable insolvency clause;
2. Recoveries are available without delay, in a manner consistent with orderly payment of incurred policy obligations by the cedent;
3. The agreement constitutes the entire agreement between the parties and there is no guarantee of profit from one party to the other;
4. The agreement requires reports of premium and losses, and payment of losses, no less frequently than quarterly; and

5. The agreement, if a retroactive reinsurance agreement, contains specific provisions relating generally to the permanence of the cedent's surplus resulting from the retroactive reinsurance.

Unauthorized Reinsurance

A reinsurer is regulated by both its domiciliary jurisdiction and by other jurisdictions in which it does business. In its domiciliary jurisdiction, a reinsurer is regulated like any other domestic insurance company—it is subject to capital and surplus requirements, restrictions on legal investments, ownership, management and operations, and financial reporting and examination requirements. Outside its domiciliary jurisdiction, a reinsurer may be either (i) licensed or accredited (i.e., authorized) or (ii) unauthorized.

Schedule F Penalty

The first applicable model act of the NAIC prohibited cessions to unauthorized reinsurers.[2] The current requirement is to reduce the cedent's statutory surplus by requiring the establishment of a liability (the "Schedule F penalty") in the amount of unsecured reinsurance recoverables from unauthorized reinsurers.[3] In effect, credit for reinsurance is disallowed for unsecured cessions to unauthorized reinsurers by permitting reserves to be carried net of the reinsurance (as discussed below), but separately increasing liabilities on account of the unsecured, unauthorized portion of that reinsurance.

Security for Unauthorized Reinsurance—Reducing the Schedule F Penalty

A cedent can reduce its Schedule F penalty if the unauthorized reinsurer provides security for its obligations under the reinsurance contract, including its obligations with respect to: (i) unreimbursed paid losses and loss adjustment expenses; (ii) reserves for losses reported and outstanding; (iii) reserves for losses incurred but not reported (IBNR); (iv) reserves for allocated loss adjustment expenses (LAE); and (v) reserves for unearned premium.

The general notion is that the liability can be reduced to the extent that the unauthorized reinsurer provides funds held "by or under the control of" the cedent. E.g., section 125.6(b) of New York Insurance Regulation 20 (11 N.Y.C.R.R. § 125.6(b)). The unauthorized reinsurer can:

1. Provide a clean, irrevocable, unconditional and evergreen letter of credit issued or confirmed by a qualified financial institution in favor of the cedent. E.g., New York Insurance Regulation 133 (11 N.Y.C.R.R. Part 79); or

2. Deposit eligible securities in trust with a qualified financial institution for the sole use and benefit of the cedent, pursuant to a clean and unconditional trust agreement. E.g., New York Insurance Regulation 114 (11 N.Y.C.R.R. Part 126).

Reinsurance Accounting

Early GAAP–SFAS 60

Short Duration vs. Long Duration Contracts

Current GAAP rules regarding reinsurance accounting have their origins in Statement of Financial Accounting Standards No. 60 (SFAS 60). Adopted in 1982, SFAS 60 codified principles previously laid out in the publications of the American Institute of Certified Public Accounts (AICPA). It marked the beginning of the shift from largely self-regulation by certified public accountants to regulation by a standard-setting board.

SFAS 60 makes a distinction (which does not exist outside of the accounting literature) between "short duration" and "long duration" insurance and reinsurance contracts. In long duration contracts, benefits and services are provided over an extended period of time and unilateral changes in contract terms are prohibited (e.g., a whole life insurance policy). In short duration contracts, benefits and services are provided over a short period of time, and the insurer has the ability to cancel coverage or revise premium charges at the beginning of each policy period (e.g., a personal auto policy, or a yearly renewable term life policy).

Because of their characteristics (usually written as annual agreements, which can be cancelled or revised annually), almost all property and casualty insurance and reinsurance contracts qualify as short duration contracts. And that's true even if the "tail" of liability arising during the life of the insurance or reinsurance contract is long (e.g., payments may be made under a medical malpractice policy for 20 years or more).

Rules Applicable to Short Duration Contracts

Four basic rules apply to accounting for short duration contracts:

1. Premium is earned ratably over the life of the contract.

2. Losses are reserved to ultimate on occurrence (i.e., as they are incurred—including losses that are incurred but not reported to the insurer).

3. Acquisition costs are expensed ratably in relation to earned premium (instead of recognized upfront).

4. Other costs that do not vary with and primarily relate to the acquisition of new or renewal contracts are expensed as incurred.

Effect of Premium Deficiency

If expected losses exceed the amount of unearned premium on the books, then they are first charged against unamortized acquisition costs, and any remaining amount is set up as a liability. In short, any premium deficiency accelerates loss recognition.

Risk Transfer

SFAS 60 also provided that if a reinsurance contract doesn't provide indemnification of the cedent against loss or liability—that is, if risk isn't transferred to the reinsurer—then the transaction would be accounted for as a deposit. However, SFAS 60 didn't describe what risk transfer is or how to account for deposits.

Net Accounting

Finally, SFAS 60 provided for "net accounting." Under net accounting, reinsurance recoverable on paid claims is classified as an asset, but reinsurance recoverable on unpaid claims and claims expenses is deducted as a "contra-liability" (that is, it is netted out of the unpaid liability and only the net liability is carried).

Current GAAP–SFAS 113

SFAS 113—Guidance on Risk Transfer in Reinsurance Contracts

In 1992, ten years after adoption of SFAS 60, FASB issued a new statement dealing exclusively with reinsurance. SFAS 113 ("Accounting and reporting for reinsurance of short duration and long duration contracts") provided guidance on the "risk transfer" question. It was motivated by the perceived abuses of using reinsurance contracts as financial engineering tools. The notion was to stop giving reinsurance accounting for deals with little or no risk to the reinsurer.

Under SFAS 113, transfer of risk—indemnification against insurance risk—requires that:

1. The reinsurer assumes significant insurance risk under the reinsured portions of the underlying insurance agreements; and
2. It is reasonably possible that the reinsurer may realize a significant loss from the transaction.

Insurance risk includes both underwriting risk and timing risk. Underwriting risk is the uncertainty concerning the ultimate amount and timing of premium and cash flows under the contract. Timing risk is the uncertainty of the timing of these cash flows.

Risk transfer is tested at the inception of the reinsurance contract by discounting all cash flows between cedent and reinsurer to present value under reasonably possible outcomes.

The 10/10 Benchmark for Risk Transfer

Industry professionals and auditors have historically used the so-called "10/10" rule as a benchmark: if the result of the scenario testing has at least a 10 percent chance of at least a 10 percent (of premium) loss to the reinsurer, the contract transfers risk. This rule of thumb hasn't been codified, and some practitioners believe the quantum of risk should be higher. A committee of AICPA has asked FASB to reconsider the risk transfer rules with respect to contracts containing certain loss limiting features, such as loss corridors. FASB has assigned a staff project to review the issue.

Prospective vs. Retroactive Contracts

SFAS 113 also distinguishes between "prospective" and "retroactive" reinsurance contracts. Prospective reinsurance contracts cover losses from future insured events and receive reinsurance accounting. Retroactive reinsurance contracts cover losses from loss events that have already occurred (e.g., a loss portfolio transfer) and receive deposit accounting. If a reinsurance contract covers both future loss events and loss events that have already occurred and it can be bifurcated, the prospective piece receives reinsurance accounting and the retroactive piece receives deposit accounting. If the contract can't be bifurcated, the whole contract must be accounted for as a deposit, using the guidance set forth in AICPA Accounting Standards Executive Committee Statement of Position No. 98-7.

The retroactive reinsurance rules operate to prevent cedents from recording any immediate gains from retroactive reinsurance transactions and from using such transactions to affect their income statements. In short, from an underwriting perspective, insurers have to eat what they cook.

Elimination of GAAP Net Accounting

SFAS 113 also abolished net accounting for GAAP accounting purposes, requiring explicit recognition of the full amount of liability for unpaid claims and claims expenses (instead of netting out reinsurance recoverables). A separate asset for unearned ceded reinsurance premiums is also required.

Current GAAP—EITF 93-6

In July 1993, FASB's Emerging Issues Task Force issued EITF 93-6: "Accounting for Multiple-year Retrospectively Rated Contracts." EITF 93-6 requires current recognition of any future obligations (such as increased premium) incurred as a result of current loss experience. Hurricanes Andrew and Iniki revealed that many companies had entered into so-called funding covers, in which the cedent took credit in the current accounting period for reinsurance recoverable, but deferred recognition of the ceded premium obligation generated by that reinsur-

ance recoverable until a later accounting period. By requiring current accounting of future obligations, EITF 93-6 effectively eliminated those funding covers in the U.S.

SAP Compared to GAAP

NAIC SSAP No. 62 and SSAP No. 75

There are both substantial similarities and some significant differences between accounting under SAP and accounting under GAAP. In fact, over time GAAP has followed SAP and SAP has followed GAAP, depending on which standard-setter has acted most recently.

For example, in October 1994, the NAIC made revisions to Chapter 22 of its accounting practices manual that substantially, but not completely, adopted the risk transfer guidance of SFAS 113 and EITF 93-6. Those revisions were carried forward under codification into Statement of Statutory Accounting Principles No. 62, *Property and Casualty Reinsurance*. In addition, the NAIC adopted a modified version of SOP 98-7 as SSAP No. 75, *Reinsurance Deposit Accounting–An Amendment to SSAP No. 62, Property and Casualty Reinsurance*.

The 9-Month Rule and Retroactive Reinsurance Accounting

SSAP No. 62 contains a number of provisions not found in GAAP. Under the so-called 9-month rule, reinsurance contracts that aren't reduced to written form and signed by the parties within nine months after the effective date of the contract are presumed retroactive (with some limited exceptions) and must receive retroactive reinsurance accounting treatment. Exceptions to the retroactive reinsurance rules are made for structured settlements, novations, substitutions of reinsurers, and reinsurance contracts between affiliates where there is no gain in surplus at the inception of the agreement.

Netting Issues

SAP still allows netting of unpaid case and IBNR loss and LAE recoverables against the corresponding gross liabilities. GAAP requires these balances to be shown in the reinsurance recoverable asset. (However, the significance of this difference is diminished by the fact that insurers are required in Schedule F-Part 8 of the annual statement to "gross up" the balance sheet to show the effect of reinsurance.) SAP also allows netting of ceded unearned premiums against the corresponding gross liability. GAAP records this amount as a prepaid asset.

Recognition of Gain on Retroactive Reinsurance

SAP requires a gain on retroactive reinsurance to be written in as "other income" and to segregate that gain as restricted surplus—which makes the gain unavailable for ordinary shareholder dividend calculation purposes—until the actual recoveries exceed the amount of premium paid. GAAP requires the gain to be deferred and amortized over the settlement period.

Through the Schedule F "provision for reinsurance," SAP requires recognition of a minimum liability for certain unsecured or overdue reinsurance recoverables (100 percent for unsecured, unauthorized reinsurance (as discussed above) and up to 20 percent recoverable from certain reinsurers more than 90 days overdue on their payments). These conditional reserves are intended to make the balance sheet more conservative. GAAP only requires establishment of an "appropriate" reserve.

Both GAAP and SAP require recognition of future obligations triggered by current losses. GAAP permits this calculation on the assumption that the reinsurance contract may be terminated early (and therefore the future premium obligation won't be incurred). SAP doesn't.

GAAP requires deferral and amortization of the gain from a structured settlement where the insurer has not been released from its obligation. SAP doesn't.

Deposit Accounting

Finally, GAAP deposit accounting for reinsurance contracts that don't transfer insurance risk differs somewhat from SAP deposit accounting. Among other things, GAAP allows contracts that transfer underwriting risk but not timing risk to be accounted for as reinsurance. SAP doesn't—which means that those contracts won't affect the combined ratio (and the insurer eats what it cooks).

Endnotes

1. SAP includes procedures for adoption of such "permitted practices."
2. Nat'l Ass'n of Ins. Comm'rs (sub nom. Nat'l Convention of Ins. Comm'rs), 1919 PROCEEDINGS 18-19.
3. NAIC Annual Statement Instructions for Property and Casualty Companies; *cf.*, N.Y. Ins. Law § 1301(a)(14) (credit for unauthorized reinsurance allowed only to the extent of funds held as security).

William D. Latza is a partner in the Insurance Practice Group of Stroock & Stroock & Lavan LLP. This article was written in June 2005 and has not been updated to reflect subsequent developments. It does not address on-going investigations concerning finite reinsurance or the requirements for officer certification with respect to finite reinsurance as set forth in New York Insurance Department Circular Letter No. 8 (2005), Supplement No. 1 to Circular Letter No. 8 (2005) and similar pronouncements of the National Association of Insurance Commissioners.

Prohibiting Commercial Surrogacy: Revisiting New York's Domestic Relations Law §§ 121–124

By Norah Hart

Introduction

This article examines surrogate birth contracts and argues that New York should permit, enforce, and regulate commercial surrogacy. New York's prohibition on commercial surrogacy, set forth in Domestic Relations Law §§ 121–124, ignores the knowledge acquired over 20 years of commercial surrogacy in the United States and is gravely out of step with the demand for assisted reproduction. This article focuses chiefly on traditional surrogacy—where the surrogate carrier is also the genetic mother of the child. Gestational surrogacy, where the carrier is not genetically related to the child, is far less controversial and is not expressly prohibited in any state. Section I discusses New York's early surrogacy cases and the policy concerns that led to the enactment of a statutory ban against commercial surrogacy in 1992. Section II asks what we have learned about commercial surrogacy by examining the surrogate birth litigation in the national reporter system and news media over the past 20 years. Section III looks at recommendations the American Bar Association has proposed in its Model Surrogacy Act and argues that additional protections are needed to bring New York's surrogacy laws into the 21st century. Lastly, Section IV considers constitutional challenges to New York's statutory ban.

I. New York's First Surrogacy Cases

Surrogacy became the focus of national attention in 1986 when New Jersey decided *In re Baby M.*[1] *Baby M* involved a surrogate mother who repudiated a contract she had entered into by refusing to surrender her biological child to its genetic father and his wife. The New Jersey Trial Court upheld the validity of the contract, ordering "specific performance," and requiring that the child be placed in the custody of the genetic father and his wife.[2] The court based its ruling on the child's best interest and on the parents' constitutional right to procreate.[3] The New Jersey Supreme Court reversed the trial court.[4] Finding that an agreement to terminate the mother's rights in exchange for payment was a violation of the state's adoption laws, the court held that consent to adoption should, as a matter of law, be revocable.[5] Subsequent courts that addressed the enforceability of surrogate contracts also found them void as contrary to adoption laws.[6]

In July 1986, New York's first case concerning a surrogate parenting agreement, *In re Adoption of Baby Girl L.J.,* was decided in the Nassau County Surrogate's Court.[7] Despite Surrogate Radigan's "strong reservations about these arrangements both on moral and ethical grounds," the court enforced this surrogacy contract as being in the best interest of the child. The intended parents were granted custody and the court ordered the payment of $10,000 to the surrogate mother, set off by $3,500 in legal costs awarded to the father and his wife. Surrogate Radigan expressed his reluctance to rule such contracts void as a matter of public policy: "For the reasons developed hereafter, the court finds it is for the legislature to determine if such payments should be disallowed so as to prevent such practices in the future."[8] The surrogate's plea for legislative guidance would become a familiar refrain in courtrooms across the country facing surrogacy disputes.

At the time of *Baby Girl L.J.,* a 1981 Michigan case similar to *Baby Girl L.J.* had been denied certiorari by the Supreme Court.[9] That case, *Doe v. Kelley,* challenged the constitutionality of the Michigan Adoption Code that prohibited any monetary exchange or consideration in an adoption. The plaintiff parents argued that the statute amounted to a governmental intrusion into their rights of privacy in violation of the Fourteenth Amendment. Although the Supreme Court had announced previously—in *Griswold v. Connecticut* and *Carey v. Population Services International*—that the decision "whether or not to bear or beget a child" was encompassed within the constitutionally protected right to privacy,[10] the Michigan Court of Appeals held that a couple's right to bear a child *with the aid of a third party* was not included in that concept.[11] Surrogate Radigan observed in his *Baby Girl L.J.* opinion that Michigan's ruling effectively prohibited the use of surrogate mothers altogether since few women other than perhaps a close family member would bear someone else's child without compensation.[12]

The next New York surrogacy case arose in the Kings County Family Court in 1989. In *In re the Adoption of Paul* involved no custody dispute.[13] Here, a surrogate birth mother petitioned the court to execute a "Judicial Consent" to the adoption of her child by the father and the father's wife. The surrogate agency negotiating the arrangement drafted an inventive contract that was intended to avert the problems earlier couples had experienced. The 49-page contract provided that the surrogate biological mother, Elizabeth A., would receive $10,000 upon her surrender of the child but stipulated that the payment was "in no way to be construed as a fee for termination of parental rights by Elizabeth A. or a payment or exchange for a consent to

surrender the child for adoption or to assist in the adoption of the child or as payment of any expenses for living or maternity care between the birth of the child and the adoption of the child."[14] The agreement included a declaration that the sole purpose of the conception was to provide a child for the intended parents and was "without any consideration other than concern for the best interests and welfare of the child."[15] The court not only denied the request but as a condition of its consent to the adoption it required the parties to pledge that no money would be exchanged for any purpose related to the surrender or adoption of the child, undermining the contract completely.[16]

A look back at New York's first surrogacy cases is instructive in order to show that the court's initial view of surrogacy was not unfavorable. The New Jersey and New York courts expressed concern over the potential for exploitation in surrogacy arrangements but in fact the first impulse of both courts was to enforce these contracts. It can be argued that the New York court's plea for legislative guidance remains unanswered because it was met with a law that merely prohibits commercial surrogacy without providing recommendations or insight into the types of issues that can arise or how they may be resolved. The law in fact deters efforts to protect against the harmful potential of surrogacy by obstructing efforts to monitor the practice.

New York's Ban on Surrogacy

Following the *Baby M* case, public debate ensued as to the dangers and benefits of surrogacy. A flurry of research and legislative proposals were formulated as a result of the total absence of legislative guidance on the subject.[17] The New York Assembly and Senate regulatory session debates led to numerous bills including Senator John R. Dunne's proposal that recommended viewing surrogacy agreements within the rubric of the constitutional right to privacy.[18] Senator Dunne's proposal, which was never passed, contained many of the same elements that would later be recommended by the American Bar Association's Model Surrogacy Act, which has likewise never been adopted by any state. Senator Dunne recommended STD–testing, mandatory counseling of the couple, and prior judicial approval "to insure that all consents are informed and voluntary." His proposal also suggested deciding in advance who would make decisions regarding the pregnancy and remedies for breach of contract. Other bills were proposed that sought to regulate surrogacy contracts or to completely ban them. None of these proposals passed until 1992 with the amendment of New York's Domestic Relations Law.

In July 1992, New York amended its Domestic Relations Law with article 8, sections 121–124, making surrogate parenting contracts void and unenforceable.[19] Section 122 reads, "Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable." Section 123.1 reads, "No person shall knowingly request, accept, receive, pay or give any fee, compensation or other remuneration, directly or indirectly, in connection with any surrogate parenting contract, or induce, arrange or otherwise assist in arranging a surrogate parenting contract for a fee, compensation or other remuneration." Sections 123.1(a) and (b) provide exceptions for adoption pursuant to Social Services Law and medical and hospital expenses incurred by "the mother in connection with the birth of the child." Section 123.2(a) states that $500 in civil penalties can be assessed against "a birth mother or her husband," or "a genetic father and his wife," along with the genetic mother and her husband "if the genetic mother is not the birth mother." Section 123.2(b) warns that a civil penalty up to $10,000 can be assessed against any person or entity which "induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee." A second offense following a civil penalty shall result in a felony violation. Section 124.2 permits the court to award actual legal expenses but not surrogacy fees.

II. Twenty Years After *Baby M:* What We Now Know About Surrogacy

Only 11 surrogacy cases went to litigation out of 5,500 estimated babies born as of 1993 through surrogate parenting in the U.S.[20] To date, only 14 cases can be found in the national reporter system where surrogate mothers asserted their right to custody.[21] Lori Andrews, a prominent surrogacy scholar, asserts that less than one percent of surrogates change their mind and try to assert their parental rights.[22]

Although the exact number of surrogate births is unknown, disputes in surrogate birth arrangements are rare. Surrogacy disputes have generated only a handful of published opinions. As of May 13, 2005, only 44 cases mentioning commercial surrogacy agreements had been reported in the national reporter system. Thirty of these cases did not involve any dispute between the parties but sought other results such as declaratory rulings of parentage or to invalidate a law or provision that interfered with their parental authority.[23] Only 14 of these cases stemmed from the surrogate's claim to custody and in three of these cases the surrogate's change of heart was precipitated by an unforeseen event such as the failure of the marriage of the intended parents,[24] incarceration of the intended mother,[25] or signs of unsuitability of the intended parents.[26]

Early opponents of surrogacy argued that a surrogate's consent to relinquish a child prior to the birth of that child can never be "true consent." This section looks at these concerns in light of what we have learned after 20 years of steady growth in the number of surrogate births.

The potential for the economic exploitation of surrogate carriers was a major concern for New York policymakers. Do surrogates who consent to relinquish their newborns do so freely, without coercion or duress? A comparison of the number of disputed surrogacy cases in relation to the number that go undisputed would shed light on this question. Such comparisons are difficult because the exact number of surrogate births is unknown. One 1992 estimate calculated that as many as 4,000 babies have been born to surrogate mothers in the United States.[27] As of 1987, an estimated 500 births had resulted from surrogate arrangements.[28] A 1989 *Detroit News* article estimated that, during the 1980s, would-be parents spent more than $33 million in connection with more than 1,200 commercial surrogacy births.[29] In 1990 it was estimated that 750 to 1,000 live births occurred in the U.S. through the use of surrogate mothers.[30] Another source put the figure at more than 2,000 surrogate births from 1987 to 1990 alone.[31] One 2003 estimate is that 20,000 births have occurred internationally since 1975, according to Shirley Zager, director of a Chicago-based surrogacy agency.[32]

Most states have no formal law regarding surrogacy and hence no administrative regulations tracking the number of births. The U.S. Centers for Disease Control does not collect data on surrogate births. A 2003 CDC report of licensed ART clinics shows that there are 391 clinics licensed in the U.S. and 72 percent provide gestational carrier services.[33] Among those clinics responding, anywhere from less than 1 percent to 5 percent of their births involve surrogates. Notably, larger clinics, i.e., clinics with the largest number of "cycles" (not to say the largest number of clients[34]) tended to involve surrogates in a higher percentage of treatments. The largest clinic in California reports that 5 percent of its cases involve surrogates.

No surrogate has ever claimed fraudulent inducement or duress in a surrogacy arrangement. Only two fraud cases involving surrogacy appear in the reporter system: In 2004 a woman sued a physician in New York who failed to perform the embryo transplantation that he had promised. As his defense he argued that the contract was void and unenforceable because the Domestic Relations Law prohibited his facilitating surrogacy contracts.[35] In fact, section 123.1 provides exceptions for medical and hospital expenses incurred by "the mother in connection with the birth of the child." One other case of fraud arose in 2004 when a woman was found guilty of theft and forgery in an Illinois surrogate pregnancy scam.[36] Debra Hemauer posed as a surrogate and lied to a couple about being pregnant with their child after accepting more than $17,000 in payment. She forged medical bills, insurance documents, and positive pregnancy test results. She pled guilty to felony theft and forgery and was sentenced to six months in jail.

New York policymakers compared surrogate mothers to poor pregnant women who in some cases had succumbed, it had been found in a statewide study, to offers to sell their children.[37] Improper analogies between adoptions and surrogate births underlay several of New York's early policy considerations. Not only is a surrogate unlike the pregnant woman who needs to put a child up for adoption, in desperate need of a solution to a problem that is growing every day, surrogates are typically financially secure. In their surrogate selection guidelines, surrogate agencies recommend not using women who are in need.[38] Richard Posner, United States Appeals Court Judge with a self-described "long-standing interest in the law and economics of the family and adoption,"[39] observed in his controversial essay advocating a free-market in surrogacy: "[T]there is no evidence that surrogate mothers are drawn from the ranks of the desperately poor, and it seems unlikely they would be. . . . A couple would be unlikely to want the baby of a *desperately* poor woman; they would be concerned about her health, and therefore the baby's."[40]

Twenty years of surrogacy have shown us that the initial concerns of policymakers are unfounded but the realities remain ignored.

A. Surrogacy Laws in Other States

In the wake of *Baby M,* nearly every state legislature considered laws to ban or regulate surrogate motherhood. Only 15 states ultimately adopted laws regarding surrogacy. Nineteen states have no law, while 34 of the states' laws are unclear or silent on the issue.[41] The most common statutes void paid surrogacy agreements (Arizona, Florida, Indiana, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Utah, Virginia and Washington). The Arizona, Indiana, Michigan, New York, North Dakota and Utah statutes void unpaid surrogacy contracts as well.[42] The constitutionality of Arizona's law was challenged in 1994 and its enforcement is completely ignored.[43]

Illinois and Utah are modernizing their surrogacy laws. On January 1, 2005, Illinois' Gestational Surrogacy Act went into effect making Illinois the most progressive state for surrogacy. Illinois previously had permitted surrogacy but the new law establishes eligibility requirements for becoming a surrogate and provides guidelines for creating surrogacy contracts. Illinois' new Act passed unanimously. Utah's Senate passed a bill on January 25, 2005, that would permit married couples to hire surrogates and that bill is pending.[44]

B. Surrogacy Stories

Following is a discussion of three surrogacy stories—two being recent and the third being a particularly tragic case from 1992—illustrating how the absence of surrogacy regulations has led to unnecessary suffering.

1. Unexpected Quintuplets

Originally, Arizona resident Teresa Anderson and her husband thought $15,000 was great pay for carrying another couple's child.[45] "I thought that would be a good way to make money while I continue on with my life," said the 25-year-old mother of two. While she knew that five embryos would be implanted in her uterus, she believed the odds of even one embryo taking hold, let alone five, were quite small. Doctors, the parents, and the patient were shocked when Ms. Anderson became pregnant with five of the Gonzalez's children. Ms. Anderson was advised by doctors to begin bed rest halfway through the pregnancy, making caring for her own two young daughters impossible.

Teresa Anderson explains that she didn't fully understand the risks of multiple fetuses because it was not made clear in the beginning. Ms. Anderson did not have any contract provision regarding her right to an additional fee for multiple pregnancies, nor were there any express terms regarding her right to abort. It so happened that the Gonzalezs, while they opposed abortion, deferred to Ms. Anderson's decision on this. "Everything goes up to her. It's her decision, not ours." *The Arizona Republic* newspaper reported that Anderson and the couple are reluctant to discuss any more details of their arrangement.[46]

Why didn't these parties have an understanding about how to address such unintended consequences? The fact of multiple births is widely known. Surrogate agencies address the issue with their clients. One surrogacy agency in southern California, Baby Miracles, Inc., requires a $5,000 additional fee for each multiple birth. The standard fee for one child is currently $20,000 for a first-time surrogate along with an agency fee of $8,000. Fees can be higher for surrogates with experience.[47] The most basic guidelines would warn parties of such outcomes and advise that they discuss their options in advance.

It is anyone's guess whether Teresa Anderson would have any recourse in the courts, or whether her surrogacy agreement was enforceable in any respect. Arizona's prohibition against surrogacy was ruled partially unconstitutional by an appellate court 10 years ago in *Soos v. Superior Court County of Maricopa*. Here, a father sought custody of triplets that were the genetic offspring of his wife but were carried by a gestational surrogate. According to the law, A.R.S. § 25-218(b), "A surrogate is the legal mother of a child born as a result of a surrogate parentage contract and is entitled to the custody of that child." The intended mother had no legal right to the children because they were born to a surrogate carrier. Section (c) granted the father a right to assert his paternity but no similar right was given to the intended mother. The court struck down section (b) as a violation of state and federal equal-protection laws of the biological mother.

It is uncertain whether section (a) of the statute, § 25-218(a), that provides "No person may enter into . . . a surrogate parentage contract" would still be in effect. Arizona State University law professor Dan Strauss said the ruling is so unclear that it likely would take a court case to test its validity.[48] A family law attorney in Arizona, Claudia Work, was quoted as saying, "This statute is dead in the water right now . . . you're in a gray area."[49] In 10 years since *Soos*, not a single surrogacy arrangement has ended up in court to test the law's validity.

Laws banning surrogacy result in a lack of information and, in Teresa Anderson's case, a lack of informed consent.

2. Absent Minded Professor

In the following case, heard in November 2004, a Pennsylvania judge bemoaned the fact that his state is among 19 states with no laws guiding surrogacy cases. In *J.F. v. D.B.*, a 62-year-old Cleveland State University professor and his 30-year-old fiancee hired a surrogate to be implanted with donor eggs fertilized by the Professor's sperm.[50] When Professor James Flynn failed to come to the hospital for six days after the unexpected birth of triplets, the surrogate took the children home with her. When Flynn brought suit for custody, he was chastised by the judge for not referring to the boys by name during testimony.[51] It was determined that he had not bonded with his children and the Judge awarded custody to the surrogate and the Professor was awarded visitation on weekends. The Professor has appealed. In addition to the Professor and the gestational carrier, the egg donor is also seeking custody.[52]

Preliminary court approval, recommended in the ABA Model Surrogacy Act, could have protected these parties and the Flynn children by setting forth the surrogate's expectations after the birth, or possibly denying approval of the arrangement based on the Professor's apparent lack of understanding regarding his responsibilities to the children upon birth.

3. Sperm Donor with Venereal Disease

The final case shows the need for medical screening of parties to a surrogacy contract. The Michigan legislature criminalized surrogate parent contracts in 1988.[53] Prior to that state's ban, a surrogate mother contracted with a surrogate broker to have a baby for Alexander Malahoff. Judy Stiver was artificially inseminated with Malahoff's semen, and a baby, Christopher, was born. By mistake, however, Stiver's husband was the father, not Malahoff, and the child was diagnosed as suffering from cytomegalic inclusion disease at birth.[54] No one

disputes that the boy's disease resulted from Judy Stiver's exposure to Malahoff's sperm. Christopher was born with an abnormally small head (microcephalic) and suffers from hearing loss, mental retardation, and severe neuro-muscular disorders. In *Stiver v. Parker* the surrogacy broker and four doctors were found liable for negligence in 1992.[55]

Each of the above examples show that laws banning surrogacy inhibit awareness of potential dangers, awareness with which people can protect themselves. The ABA Model Surrogacy Act was designed in part to assure that parties are informed of all the implications of their actions. Following is a discussion of the ABA Model Surrogacy Act and two additional recommendations for New York's revamped surrogacy law.

III. The ABA Model Surrogacy Act and Additional Recommendations for New York Surrogacy Law

Even in states with the harshest penalties for surrogacy, surrogates and parents continue to enter into surrogate arrangements without the protections they deserve. The state's interest in preventing injury would be better accomplished through regulation of contracts than through outright bans.

In 1988 the Section of Family Law of the American Bar Association adopted a draft ABA Model Surrogate Parenthood Act.[56] The Model Act authorizes surrogate arrangements under close judicial scrutiny. The Model Act takes a pragmatic approach, stating, "while surrogacy poses potential problems . . . surrogacy will be used, and therefore, it is necessary to control these problems and provide for the best interests of children born out of the use of such services."[57]

The Model Act confronts controversial issues, some familiar from notorious cases, and some that have not found their way into case law, including a situation where both intended parents die before the birth (section 12), the right of the surrogate to obtain an abortion (section 4(h)), the fee payable to the surrogate in the event of miscarriage or stillbirth (section 4(i)), and the child's right to learn the identity of the surrogate (section 7(e)).[58]

The Model Act sections that are presented here are those that I believe are most needed in order to modernize New York's surrogacy law. Two additional recommendations that would enhance the Model Act are also suggested, 1) full disclosure provisions and 2) state bonding of service providers.

Numerous provisions of the Model Act are designed to prevent exploitation of the surrogate: section 4(b) recommends setting a minimum fee of $10,000; surrogates are required to have separate independent counsel and mental health screening; and surrogates have a limited right to keep the child after giving birth.[59] In the event the surrogate chooses to abort for any reason other than medical necessity, section 4(h)(2) provides that the parties *may* agree to release the parents from any liability for the parenting fee but this is an item to be agreed upon by the surrogate and the parents.[60]

Section 6 requires a Preliminary Hearing on the Petition. The surrogacy agreement is examined to assure all provisions of section 4 are met and to satisfy the objective that it be made in good faith in the absence of any coercion, duress or misrepresentation.[61] A guardian *ad litem* is appointed for the surrogate if she is unrepresented.[62]

The payment provisions throughout stipulate that intended parents are paying for the surrogate's health risk and physical labor, and not for the purchase of a baby. The surrogate has the option of keeping the baby and is entitled to half of her fee prior to the birth.[63] Her right to keep the child is never infringed by the contract. In keeping with adoption laws that prohibit giving consideration in connection with relinquishing custody, until 72 hours after the birth she retains the right to maintain custody.[64] Section 9 provides for her assumption of all legal obligations of parenthood if she so elects and confirms that the contract is for her labor not for the child.[65]

Two additional recommendations that I believe are necessary to protect the parties are set forth here.

1. Performance Bond

A performance bond is a three-party instrument between a surety and two parties to a contract. States require performance bonds for speculative or high-risk service providers such as Professional Fund Raisers, Talent Agencies, Telemarketers, Private Investigators, and Collection Agencies. Surrogacy performance bonds would require the surrogate to meet the surety's bonding requirements, e.g., those the ABA suggests for prior judicial approval of surrogate carrier candidates: physical and mental health fitness, having given birth at least once, and fully informed consent (as defined by the provision set forth in the following section). The parents would pay for the surrogate's bond and if the surrogate is unable to successfully perform the contract, or violates the conditions or obligations, the surety is liable to the parents for any actual damages, or for an agreed upon amount. A performance bond would do much to preserve the surrogate's freedom of choice and bodily integrity, as well as alleviate the financial risk taken by the parents in paying the parenting fee and expenses. The language would be based on a typical performance bond, setting forth the agreed upon amount of coverage for certain eventualities. For example, if a surrogate decides to abort or to keep the child, the parents should

be reimbursed for any money they paid to the surrogate, surrogate agent, insurance, legal and medical costs, as well as liquidated damages for the delay. In the event the proposed father is the biological father and is ordered to pay child support, this should be addressed in a way that is meaningful to all parties.

2. Fully Informed Consent

The importance of informed consent cannot be overstated in the surrogacy context. The Model Act's section 4(d) would provide all parties with full disclosure about the medical and criminal backgrounds of each other. This is insufficient. The ABA's Model Rules of Professional Conduct require that whenever there is a possible conflict of interest between two of the attorneys' clients, the attorney must explain to the client all possible consequences of that conflict, and the client must receive said explanation *in writing* as a condition of "informed consent." This rule makes consent dependent on the extent to which the client reasonably understands the material risk the consent entails. An open-ended general consent will be ineffective in conflict of interest situations.[66] Surrogate laws should have similar rules for informed consent, requiring thorough disclosure of all known outcomes that parties may face: multiple births, contraction of venereal disease, death of intended parents, dissolution of marriage of intended parents, abuse and/or murder of the child of surrogacy. This principle should extend to surrogacy arrangements so that parents, doctor, lawyer and surrogate acknowledge all potential outcomes, despite how unlikely they may be, as a condition of informed consent.

The state's failure to regulate surrogacy increases the risks to which surrogates and intended parents are exposed. New York has an obligation to its citizens not to ignore the reality of artificial reproduction and commercial surrogacy and to create protections to prevent ambiguity, unnecessary harm and expense.

IV. Revisiting New York's Surrogacy Ban: A Constitutional Challenge

Whether the Supreme Court would deem surrogacy a fundamental procreative liberty interest has been a vigorously debated question. As early as the *Baby M* case, the Court recognized this issue: "It might even be argued that refusal to enforce these contracts and prohibition of money payments would constitute an unconstitutional interference with procreative liberty since it would prevent childless couples from obtaining the means with which to have families."[67] The Court has been reluctant to expand the list of rights recognized as "fundamental" and has rejected, for example, the idea that welfare payments or education are the sort of fundamental rights that merit heightened scrutiny.[68] Some constitutional scholars maintain nonetheless that the Supreme Court's reproduction and privacy precedents indicate that laws prohibiting surrogacy would be subject to heightened scrutiny.[69] Other participants in the debate argue that states are free to regulate these matters as they wish, subject only to rational basis limits, because no special protection is implicated.[70]

Professor John Robertson is a leading ethical theorist who argues that the right to have a biologically related child is so germane to constitutionally protected liberty that that right would include human cloning.[71] Robertson's controversial 1994 book *Children of Choice: Freedom and the New Reproductive Technologies* argues that a strict scrutiny due process review of any state infringement of reproductive rights would be necessary.[72] Robertson has said, "If bearing, begetting, or parenting children is protected as part of personal privacy or liberty, those experiences should be protected whether they are achieved coitally or noncoitally. In either case they satisfy the basic biological, social and psychological drive to have a biologically-related family."[73]

Carl Coleman disagrees with Robertson and insists that, under the John Hart Ely school of thought, heightened scrutiny is intended not to enforce particular substantive values, but to correct defects in the political process that impose a disadvantage on certain segments of society.[74] Coleman notes that the people affected by artificial reproductive technologies are disproportionately white and affluent and thus would not be entitled to the protection of heightened scrutiny.[75]

Whether the Supreme Court would deem surrogacy as a method of reproduction protected by substantive due process rights is anyone's guess. Under a heightened scrutiny review, laws like New York's would not pass muster without demonstrable evidence of injuries to the individuals involved or society as a whole. This article seeks to establish that no such harm could been shown.

Endnotes

1. *See In re Baby M*, 217 N.J. Super. 313, 525 (N.J. Super. Ch. 1987).
2. *See id.* at 525.
3. *See id.* at 525.
4. *See In re Baby M*, 109 N.J. 396 (N.J. 1988).
5. *See id.* at 423.
6. *See* Note, *Developments in the Law-Medical Technology and the Law, II. Reproductive Technologies.* 103 Harv. L. Rev. 1525, 1546, 1547 (1990).
7. *See In re Adoption of Baby Girl L.J.*, 132 Misc. 2d 972, 973 (N.Y. Sur. 1986) at 978.
8. *See id.* at 986.
9. *See Doe v. Kelley*, 106 Mich. App. 169 (Mich. App. 1981), *cert. denied*, 459 U.S. 1183.

10. *See Griswold v. Connecticut*, 381 U.S. 479; *Carey v. Population Services International*, 431 U.S. 678.
11. *See Doe v. Kelly*, 106 Mich. App. at 188.
12. *See Baby Girl L.J.,* 132 Misc. 2d 972 at 988.
13. *See In re the Adoption of Paul*, 550 N.Y.S.2d, 815 (N.Y. Fam. Ct. 1990).
14. *See id.* at 821.
15. *See id.* at 821.
16. *See id.* at 825.
17. Nancy Zeldis, New York Seen Facing Delays on Surrogate Mother Measure, N.Y.L.J., Apr. 27, 1987.
18. Paula Barbaruolo, *Albany Law Journal of Science and Technology*, 1993, The Public Policy Considerations of Surrogate Motherhood Contracts: An Analysis of Three Jurisdictions, p. 51.
19. N.Y. Dom. Rel. Law §§ 121–124.
20. Steve Johnson & V. Dion Hayes, Surrogacy Debated, but Still the Answer for Some, Chi. Trib., Jan. 17, 1993, Section 2 (Northwest) at 1.
21. A search on Westlaw on May 14, 2005, in the ALLCASES database using the search terms "surroga! /3 mother carrier birth agreement" resulted in 209 cases. One hundred and sixty-five cases used the term surrogate with agreement in a sense different than meant here. Thirty cases sought declaratory judgments on issues including constitutionality, adoption petitions, child support liability, and custody disputes between the intended parents after their relationship ended. Only 14 cases turn up that involve a surrogate carrier seeking to establish her parental rights to the child.
22. *See* Lori B. Andrews, Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood, 81 VALR 2343, 2351 n.36 (1995).
23. *See Hodas v. Morin*, 442 Mass. 544 (Mass. 2004) (seeking a declaratory pre-birth ruling as to parentage); *Cullington v. Beth Israel*, 435 Mass. 285 (Mass. 2001) (seeking declaratory birth certificate); *Falk v. Sadler*, 341 S.C. 281, (S.C. App. 2000) (seeking damage award from attorney appointed guardian *ad litem* of child born of a surrogacy arrangement); *A.H.W. v. G.B.H.*, 339 N.J. Super. 495 (N.J. Super. Ch. 2000) (seeking declaratory ruling on parentage); *Huddleton v. Infertility Center of America, Inc.*, 700 A.D.2d 453 (Pa. Super. 1992) (seeking damages in negligence where surrogate mother sued surrogacy clinic after sperm-donor father shook surrogate child to death).
24. *See In re Marriage of Moschetta*, 25 Cal. App. 4th 1218 (Cal. App. 4 Dist. 1994) (awarding joint custody to intended father and surrogate mother after breakup of intended parents' marriage precipitated surrogate's motion for custody).
25. *See Seymour v. Stotski*, 82 Ohio App. 3d 87 (Ohio App. 10 Dist. 1992) (seeking to vacate custody determination upon dissolution of intended parents' marriage and incarceration of mother).
26. *See J.F. v. D.B.*, 2004 WL 1570142 (Pa. Com. Pl. 2004) (granting gestational surrogate standing to pursue custody as legal mother where biological father's and his wife's fitness as parents was questioned when they failed to visit newborn triplets for six days following the birth).
27. Jay Mathews, *California Surrogate Stirs Dispute,* Washington Post, Sept. 21, 1990, at A8.
28. Harvard Law Review, May 1990, Developments in the Law-Medical Technology and the Law, II. Reproductive Technologies. 103 Harv. L. Rev. 1525, 1546.
29. Rebecca Powers & Sheila G. Belloli, *The Baby Business: A Detroit News Special Report,* Detroit News, Sept. 17, 1989, at 1S.
30. Robert H. Blank, Regulating Reproduction 75 (1990).
31. Andrea Sachs, *And Baby Makes Four,* Time, Aug. 27, 1990, at 53.
32. Bill Lohmann, *Gift of Life* (Dec. 7, 2003), *available at* http://www.intendedparents.com.
33. CDC 2002 Assisted Reproductive Technology Report: 2002 Fertility Clinic Report by State: Accessible National Summary, at 4. (Apr. 13, 2005), *available at* http://apps.nccd.cdc.gove/ART2002/nation02acc.asp.
34. CDC tabulates the volume of a clinic's business according to ovum-implantation cycles rather than number of clients because one client typically receives more than one cycle, sometimes up to four or five. The number of cycles compared with the number of resultant births provides a more accurate way to gauge success rates.
35. *See Itskov v. N.Y. Fertility Center*, 4 Misc. 3d 874, (N.Y. City Civ. CT. 2004) (seeking damages for breach of contract against infertility doctor).
36. Chris Dettro, *Woman Sentenced in Baby Scam Gets 180 Days in Jail, $17,818 Fine*, Springfield State Journal-Register, Oct. 26, 2004, at 1.
37. *See* William L. Pierce, Survey of State Activity Regarding Surrogate Motherhood. 11 Fam. L. Rep. 3001 (1985).
38. Merrit Morrison Turner, *What You Should Expect an Agency to Provide,* The American Surrogacy Center website (1996), *available at* http://www.surrogacy.com/Articles/news_view.asp?ID=37.
39. Richard A. Posner *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood.* 5 J. Contemp. Health L. & Pol'y, 21, 21 (1989).
40. *Id*. at 25.
41. Human Rights Campaign, *Surrogacy Laws: State by State*, (Apr. 7, 2005), *available at* http://www.hrc.org?Template.cfm?Section=Get_Informed3&Template=/TaggedPage…
42. Lori B. Andrews, *Beyond Doctrinal Boundaries: A Legal Framework for Surrogate Motherhood*, 81 Va. L. Rev. 2343, 2346 (1995); Richard A. Lord, Williston on Contracts § 16:22 (2004).
43. *See Soos v. Superior Court in and for County of Maricopa*, 182 Ariz. 470, (Ct. App. Div. 1) (1994) (biological mother of triplets born by means of surrogate challenged the constitutionality of statute which declared surrogate who gave birth to children to be legal mother).
44. Jennifer Dobner, *Senate Endorses Bill to Legalize Surrogate Contracts,* Desert News, Jan. 27, 2005, *available at* http://desertnews.com/dn/view/0,1249,600107534,00.html.
45. Kerry Fehr-Snyder and David J. Cieslak, *Mesa Mother Carries Five Babies for Gilbert Couple,* The Arizona Republic, Apr. 27, 2005, *available at* http://www.azcentral.com/arizonarepublic/news/articles/0427quintuplets27.html.
46. *Id.* at 1.
47. Alexandra McLaughlin, How to Calculate a Surrogate's Compensation (copyright 2001), *available at* http://www.everythingsurrogacy.com/cgi-bin/main.cgi?calculate.
48. Surrogate Motherhood Raises Issues. *The Arizona Republic*, Apr. 7, 2005, *available at* http://www.azcentral.com/health/women/articles/0407surrogate-side.html.
49. *Id.* at 1.
50. *See J.F. v. D.B.*, 2004 W.L. 1570142. (Pa. Com. Pl. 2004).
51. John Horton, *Surrogate Awarded Custody of Triplets CSU Professor Who Fathered Babies Gets Visitation,* Cleveland Plain Dealer, Jan. 8, 2005, at 1.
52. John Horton, *Many States Lack Laws Addressing Surrogacy,* Cleveland Plain Dealer, July 18, 2004, at 1.

53. The statute, Mich. Comp. Laws. Ann. 722.859, known as the "Surrogate Parenting Act," declares that a person "shall not enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract for compensation." A person who arranges or procures such a contract "is guilty of a felony punishable by a fine of not more than $50,000 or imprisonment for not more than 5 years, or both."
54. *See Stiver v. Parker*, 975 F.2d 261, 263 (6th Cir. 1992).
55. *See id* at 265.
56. Murray L. Manus, *The Proposed Model Surrogate Parenthood Act: A Legislative Response to the Challenges of Reproductive Technology*, 29 UMIJLR 671, 704 (1996).
57. Manus, *supra* note 62, at
58. Murray L. Manus, *The Proposed Model Surrogate Parenthood Act: A Legislative Response to the Challenges of Reproductive Technology*, 29 UMIJLR 671, 704 (1996).
59. *Id.* at 717.
60. *Id.* at 719.
61. *Id.* at 731.
62. *Id.* at 735.
63. *Id.* at 749.
64. *Id.* at 747.
65. *Id.* at 752.
66. Model Rules of Professional Conduct Rule 1.6(b).
67. *See In re Baby M*, 109 N.J. at 387.
68. *See generally* Matthew Coles, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 STNLPR 23 (2005).
69. John Robertson, Two Models of Human Cloning, 27 Hofstra L. Rev. 609, 619 (1999).
70. Radhika Rao, Property, Privacy, and the Human Body, 80 B.U. L. Rev. 359 (2000).
71. Robertson, *supra* note 69, 609.
72. John A. Robertson, Children of Choice: Freedom and the New Reproductive Technologies 37 (1994).
73. Robertson, *supra* note 81, at 39.
74. John Hart Ely, Democracy and Distrust 1 at 151 (1980).
75. N.Y. State Task Force on Life and the Law, Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy 74 at 201 (1998).

Testing Employment Relationship

By Martin Minkowitz

When a worker has an accident and sustains an injury which arises out of and in the course of the employment, the Workers' Compensation Board requires as a threshold issue that one who seeks to receive benefits under the statute be an employee engaged in an employment relationship. In most situations, that relationship is obvious. There is an identifiable employer for an employee who is engaged in an employment relationship with that employer. However, in some instances, it becomes a question of fact to be resolved by the Workers' Compensation Board. Generally, the challenge comes from the employer alleging that the claimant has no right to benefits because of a lack of an employment relationship. In rarer instances, the employee may be seeking to negate a relationship with the employer in order to be able to sue the employer in tort. Such a suit would be prohibited by the exclusive remedy doctrine of the Workers' Compensation Law if an injury arose out of or in the course of employment.

There are a number of factors that the Board will consider in determining if an employment relationship exists and its decision on that factual question is conclusive unless it is not supported by substantial evidence.[1] No one factor is dispositive, but the most often cited are the right to control the claimant's work, the method of payment for the work, the right to hire and fire the worker, the furnishing of the equipment and the relevant nature of the work. These are all tests which are applied in making the decision.[2] Complicating this further is the presentation of the evidence so that the Board can make a definitive decision.

For example, in one case, the claimant stated that Mr. Giovanni had hired him to do plastering in Mr. Newman's apartment. The claimant was injured in the course of that work and filed a claim for benefits. With regard to payroll records, the claimant alleged that he was paid in cash by Mr. Giovanni who had supplied him with all the materials. Although he said that Mr. Giovanni indicated the cash was received from Mr. Newman, he was apparently never personally paid by him. The claimant provided his own tools and set his own hours. Upon review of this testimony and the evidence thus produced, the Board concluded that claimant's fall from a scaffold while making renovations in the apartment was compensable and that the owner, Mr. Newman, was the uninsured employer, and obligated to pay the benefits.

While the homeowner's (or renter's) insurance policy has some coverage for workers' compensation in situations where workers' compensation would not normally be required, the Board determined that this was not such a situation and discharged Mr. Newman's insurance company from liability, leaving Mr. Newman uninsured. Mr. Newman appealed to the Appellate Division, Third Department, the Court to which all workers' compensation cases must be appealed.[3]

The Appellate Division on review determined that based upon the evidence as noted above, the Board's decision was not founded upon substantial evidence of an employer/employee relationship between the claimant and Newman and reversed the Board returning the case to the Board for further proceedings.[4] It would seem that on reconsideration the Board could either find that claimant was an independent contractor who worked fairly autonomously and was not entitled to benefits, or that he was an employee of Mr. Giovanni and award benefits through that employment relationship.

In conclusion, while it is not common for the Court to find that the Board's findings lacked substantial evidence to support these findings, the *Leon a.k.a. Lopez* case presents such a situation. In that regard, it gives us some insight as to what the Court will consider in its determination of whether the Board's findings are supported by substantial evidence.

Endnotes

1. *Pilku v. 24535 Owners Corp*., 19 A.D.3d 722 (2005).
2. *Marques v. Salgado*, 12 A.D.3d 817 (2004).
3. Section 23 WCL.
4. *Leon a.k.a. Lopez v. Newman*, ____ A.D.3d ____ (2005).

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Recent Decisions

By Hon. Bruce M. Balter and Paul S. Forster

We are pleased to be able to bring to you again a selection of synopses from the advance sheets of some very interesting cases involving: the limitations of a statutory health care proxy, and reiterating the long-standing and unwavering requirement in New York that clear and convincing evidence is required in order to withhold life-sustaining treatment; the denial of pension and other benefits to an ex-wife despite the decedent's failure to change beneficiary designations after their divorce; the interpretation of an agreement by one spouse in the context of a divorce proceeding to remove herself as a primary contingent beneficiary on a structured settlement annuity; the reduction of the statutory commissions of the executor-attorney-draftsman, despite language in the will approving full commissions; the application of the statute limiting commissions to attorney-executors to the paralegal of the attorney-draftsman; determination of the fees of the attorneys for a Supplemental Needs Trust; the lack of authority of the Surrogate to construe an *in terrorem* clause in a will until the instrument was admitted to probate; disclosure of otherwise confidential attorney-client communications; the recognition of common-law marriage in New York; the duties and obligations of a guardian *ad litem* and temporary administrator in the context of a foreclosure proceeding; the burdens of coming forward and proof in a contested estate accounting; the limitation on the grant of a life estate to the apartment in a two-family house occupied by the decedent so as not to permit the eviction of the decedent's daughter by her stepmother; the direction that a life estate be valued by the superintendent of insurance, rather than by using Internal Revenue Service tables, on a forced sale of property on the application by the life tenant; whether a trust interest payable to a remainderman who predeceased the life income beneficiary was vested and was payable to his estate or passed to the decedent's issue by intestacy; the effect of a failure to file a responsive pleading in the Surrogate's Court; the invalidity of an attempt to exercise a spousal right of election after the death of the surviving spouse; the Court granting a wife's application, over the objections of the decedent's parents, to disinter her husband and bury him in a Catholic cemetery so that she and their children could be buried with him; the reservation for a limited time of all of the assets of an estate not required to pay funeral or administration expenses or claims entitled to a priority, during the pendency of a negligence action against the decedent's estate; the availability of a decedent's medical records as part of an SCPA 1404 examination prior to the filing of objections to probate; the difference between a joint will and a mutual will and the requirements to make a mutual will binding; the allowance of DNA testing in a proceeding to determine inheritance rights without first establishing other elements of proof; post-death DNA testing to prove paternity; children born as a result of a surrogacy arrangement held not to be adopted and not excluded from sharing in a trust; the denial of a motion to suppress a passage in a deposition of the attorney-draftsman in a will contest; the duty of an estate fiduciary to seek court guidance if it becomes aware that a beneficiary is not legally competent; the dismissal of an article 81 guardianship proceeding which had been brought in order to provide grounds to disavow a 9/11 settlement agreement; denial of the substitution of a family member for a community-based agency as an article 81 guardian; the revocation of a later will not having the effect of reviving a prior instrument; the jurisdiction of the New York Surrogate's Court to hear a Discovery Proceeding involving a New York condominium jointly owned by a Florida decedent and the respondent; the denial of an application to entertain a petition for original probate of the will of a non-domiciliary; the Court entertaining a motion for summary judgment dismissing objections to a will even though jurisdiction had not yet been obtained over the beneficiaries pursuant to SCPA 1411; the affirmation of a directed judgment after a hung jury, admitting will to probate over objections alleging forgery and lack of due execution; the Surrogate's refusal to order sale of real estate in the decedent's corporation and a corporate liquidation; children being awarded damages for the wrongful death of their parents for loss of advocacy as separate and distinct from and in addition to an award for loss of nurture and guidance; and the dismissal of a music corporation's attempt to sue for the "wrongful death" of its "principal asset," contract entertainer (Aaliyah).

Limitations of the statutory health care proxy explained; clear and convincing evidence required in order to withhold life-sustaining treatment.

The patient's treating geriatrician recommended that she be given a percutaneous endoscopic gastrostomy (PEG) tube for hydration and nutrition because she could not be fed by mouth. The patient's daughter, invoking her status as health care agent under a statutory health care proxy, refused to authorize the surgery.

The patient's sister petitioned for an Order authorizing the surgery to insert the tube. The Court authorized the PEG surgery. The Court pointed out that under New York's health care proxy law, a patient's preferences regarding artificial nutrition and hydration must be specified before his or her agent is deemed to have the authority to decide these questions. If a patient does not clearly indicate in an advanced directive that nutrition and hydration are to be withheld or withdrawn, nutrition and hydration must be provided. Since the patient left no written instructions in her health care proxy regarding the administration of artificial nutrition and hydration, and since it was conceded that her wishes in that regard were not reasonably known and could not with reasonable diligence be ascertained, there was no clear and convincing evidence on this specific issue. Under the circumstances, the Court found that the patient's daughter was without authority to make decisions about artificial nutrition and hydration for her mother. ***Borenstein v. Simonson,*** 8 Misc. 3d 481 (Sup. Ct., Queens Co., Justice Ritholtz, 3/30/05). *[Author's Note: this case demonstrates the advisability and better practice of having the client execute not only a statutory health care proxy appointing a health care agent, but also a "living will."]*

Divorce agreement held to bar collection of pension proceeds by ex-wife, even though beneficiary designation was not changed by the decedent.

A separation agreement provided that the decedent's wife waived any right that she had to share as beneficiary of various types of assets upon the husband's death. In the course of divorce proceedings the wife conceded the agreement had been properly executed and was fair and reasonable. The decedent did not change the designation of his wife as beneficiary and after his death she claimed the proceeds. The Court held that the ex-wife was judicially estopped from challenging the validity of the agreement, and that the waiver would be given effect since it was sufficiently explicit, voluntary and made in good faith. ***In re Sbarra,*** 17 A.D.3d 975, 794 N.Y.S.2d 479, 2005 N.Y. Slip Op. 03315 (3d Dep't 2005). *[Author's Note to matrimonial practitioners: based upon the present state of the law in this area, it certainly is better practice to make sure that all beneficiary designations are changed to comport with the agreement between the parties rather than to rely on a Court at some later date interpreting the separation agreement, divorce judgment, or "intent" of the parties in your client's favor.]*

The agreement by one spouse in the context of a divorce proceeding to remove herself as a primary contingent beneficiary on a structured settlement annuity gave beneficiary designation rights to the husband and did not accelerate the rights of the originally named secondary beneficiaries.

The wife, as part of a divorce settlement, agreed to "remove herself as primary contingent beneficiary" on an annuity payable to her husband. Plaintiffs, the secondary contingent beneficiaries on the annuity, claimed that the wife's removal promoted them to primary status. The husband remarried, and substituted his second wife as the primary beneficiary under the annuity. The Court held that the conveyance of the wife's rights to the husband entitled him to name the second wife, or anyone else he liked, to receive the payments to which the first wife previously would have been entitled. ***Kamens v. Utica Mutual Insurance Company, et al.,*** 4 N.Y.3d 460 (2005).

The statutory commissions of the executor-attorney-draftsman were reduced, despite language in the will approving full commissions.

Pursuant to SCPA 2307-a(5), where the attorney-drafter-executor fails to have the testator execute the required written acknowledgment of disclosure as set forth in the statute, his commissions are limited to one-half of the statutory commissions to which he would otherwise be entitled. The attorney asserted that the language in the will that said, "he shall be entitled to a commission as provided by statutory law for services rendered in connection with the administration of my Estate," complied with the written acknowledgment of disclosure mandated by the statute. The Court held that the language in the will did not contain all of the mandated language and that the recent amendment to the statute explicitly providing that the written acknowledgment of disclosure must be separate from the will, but may be annexed to the will, was applicable to wills executed prior to its effective date. ***In re Becker,*** 7 Misc. 3d 1028(A), 2005 N.Y. Slip Op. 50796(U), (Surr. Ct., Bronx Co., Surr. Holzman, 5/27/05).

The statutory commissions of an executrix were limited pursuant to SCPA 2307-a, even though the executrix was not an attorney.

The restrictive language of the statute was applied where the attorney-draftsman had made his paralegal the executrix. ***In re Wagoner***, 7 Misc. 3d 445 (Surr. Ct., Albany Co., Surr. Doyle, 1/10/05). *[Author's Note: it appears that the principles of* ***In re Weinstock,*** *40 N.Y.2d 1 (1976) also might apply, which precluded the lawyers named as executors from serving. The father-son attorneys prepared a will naming themselves as executors without justification, since there were family members available to act, and with the result that there unnecessarily would be two executors' commissions.]*

No *per se* rule invalidating attorney's fees paid by supplemental needs trustee without court order; court must first determine whether fees were proper and reasonable and only excess is subject to refund.

In a proceeding to judicially settle an annual account of the co-trustees of a supplemental needs trust, the Court directed the co-trustees to refund $20,619 in legal fees paid by the trust on the ground that the trustees acted improperly in paying the fees without prior Court approval. On appeal, the Appellate Division reversed, stating that the proper procedure is for the Court to determine whether the fees paid were proper and reasonable, and to direct the return, if any, of excessive fees plus interest. ***In re Davis,*** 16 A.D.3d 414 (2d Dep't 2005).

Surrogate's court not permitted to construe an *in terrorem* clause in a will until instrument admitted to probate, creating uncertainty of effect on bequests under will even if successful in contesting codicil.

The decedent left a will and a codicil. The codicil revoked certain bequests. The issue was whether a beneficiary whose bequests under the will were changed under the codicil would lose her bequests under the will because of the *in terrorem* clause in the will, if she successfully contested the codicil which changed those bequests. The potential objectant sought to have the effect of the *in terrorem* clause in the will under those circumstances construed before she proceeded to litigate the codicil. The Court held that under SCPA 1420(1) a person interested in obtaining a construction of a will may petition in the court in which the will was probated, or if a party asks for construction of a will in a pending probate proceeding the court may determine the construction issue upon the entry of a decree admitting the will to probate. The Court noted that no provision is made in the statute for construction of provisions of a will prior to probate because probate logically precedes construction, for otherwise there is no will to construe under the statute. ***In re Martin,*** 17 A.D.3d 598, 793 N.Y.S.2d 458, 2005 N.Y. Slip Op. 03059 (2d Dep't 2005). *[Author's Note: this case opens the door to potentially pernicious estate planning. If a testatrix locks in a bequest in a will by way of an in terrorem clause, the bequest could be wiped out by an improper codicil, which the beneficiary would be powerless to contest for fear of losing the bequest in the underlying will. We suggest that a legislative solution might be appropriate to resolve this conundrum.]*

The confidentiality of otherwise privileged attorney-client communications was lifted in the interest of resolving a will dispute.

The decedent consulted with an attorney concerning ownership of a painting between herself and her two children and concerning the attorney's possible retention relating to the painting and the decedent's general estate plan. The attorney was not retained by the decedent. After her death, disclosure was sought as to the consultation as well as certain documents in the attorney's possession as to which the attorney-client privilege was asserted. The Court noted that disclosure of any confidential communications between a client and his/her attorney is barred, with the exception of communications concerning a will's preparation, execution, and revocation in proceedings involving the probate, validity or construction of a will, which does not apply to an attorney who did not prepare the will. Nonetheless the Court determined that under common-law principles the attorney-client privilege could be waived on behalf of the decedent in the interests of the estate in the truth-finding process. ***In re Bronner,*** 7 Misc. 3d 1023, 2005 N.Y. Slip Op. 50705(U), (Surr. Ct., Nassau Co., Surr. Riordan 5/13/05).

Common-law marriage found by surrogate.

In a proceeding to revoke letters of administration and to be appointed administrator of the decedent's estate, it was testified that the petitioner and the decedent lived together for 3 1/2 years in homes located in New York and Pennsylvania and that the decedent expressed marriage vows at the petitioner's home in Pennsylvania. The Court stated that although abolished in New York, a common-law marriage contracted in a sister state will be recognized as valid in New York if it is valid where contracted. The Court found that the proof at trial constituted clear and convincing evidence of a verbal exchange between the petitioner and the decedent to enter into a present legal relationship of marriage in Pennsylvania, the standard for proving the existence of a common-law marriage in that state. ***In re Catapano,*** 17 A.D.3d 672, 794 N.Y.S.2d 401, 2005 N.Y. Slip Op. 03233 (2d Dep't 2005). *[Author's Note: in a companion case, the Appellate Division held that the discovery after the trial of a life insurance application form in which the decedent indicated she was single was not enough to require a new trial because it failed to rebut the testimony at trial.* ***In re Catapano,*** *17 A.D.3d 673, 794 N.Y.S.2d 403, 2005 N.Y. Slip Op. 03234 (2d Dep't 2005).]* In another recent case, ***Hutton v. Brink,*** 19 A.D.3d 177, 798 N.Y.S.2d 378, 2005 N.Y. Slip Op. 04691 (1st Dep't 2005), the plaintiff alleged

that the parties, after holding themselves out as husband and wife for some three years, entered into a Pennsylvania common-law marriage when they "toasted to one another as 'Husband' and 'Wife' and publicly avowed our mutual commitment to one another as a loving married couple" during a dinner they were having in Pennsylvania with two friends. The Court held that the alleged toast did not contain an exchange of words manifesting a specific, present intent to enter into a marriage sufficient to satisfy Pennsylvania's standard.

A mortgage foreclosure proceeding was dismissed for lack of jurisdiction; the court found a lack of due diligence in obtaining the order of publication, and described the duties and obligations of the guardian *ad litem* and temporary administrator.

After scrutinizing the proceedings, the Court found service was not properly effected and dismissed the case. The Court held that a guardian *ad litem* and/or temporary administrator for the estate play an essential role in the protection of defendants who are otherwise unable to protect and defend themselves and that this role entailed the faithful performance of a series of obligations. First, the guardian and/or administrator must obtain the entire file from the plaintiff and become thoroughly familiar with it. They must review the efforts made by the plaintiff to locate the missing defendants and determine if they are sufficient. If they find that an order of publication has been issued without a showing of due diligence, they must make a motion to vacate that order and dismiss the proceeding for lack of jurisdiction. Even if they believe the efforts met a certain threshold level, they are obligated to undertake a search for the heirs on their own, particularly where the file indicates that such heirs might exist. They are further obligated to raise any and every other defense, other than jurisdictional defenses, that may be available to the defendant including but not limited to those defenses available under the Home Owner's Equity Protection Act (HOEPA); the Truth in Lending Act (TILA); Real Estate Settlement Procedures Act (RESPA); the New York Deceptive Practices Act; and Banking Law § 6-1 dealing with high-cost loans. The Court found that the order of publication was issued merely on the affirmation of plaintiff's counsel supported by an unsworn letter from a title company claiming that there was no record of any estate proceedings, and the affidavit of a process server who visited the mortgaged premises and spoke to a neighbor who stated that the aforementioned property had been unoccupied for several months. The Court held that the efforts expended in attempting to locate and serve the defendants prior to publication did not constitute the due diligence necessary to support an order of publication, which the Court vacated, and the plaintiff's causes of action were dismissed for lack of jurisdiction. ***First Union National Bank v. Estate of Robert L. Bailey, deceased, et al.,*** 7 Misc. 3d 1027, 2005 N.Y. Slip Op. 50793(U), (Sup. Ct., Kings Co., Justice Kramer, 5/26/05).

New trial ordered in contested estate accounting; burdens of coming forward and proof explained.

At the commencement of a hearing on objections to an accounting, petitioner was directed to put in his proof to address respondent's objections, which was held to be error and the case remanded for a new trial. The Court held that an accounting and the objections thereto constituted the pleadings of the parties, defining the issues to be tried. The Court stated that if left uncontested, the account stood proved *pro confesso* except insofar as it might be patently contrary to law. The Court noted that where an account is contested, the objectant has the initial burden of coming forward with evidence to establish that the amounts set forth are inaccurate or incomplete. Upon satisfaction of that burden, the fiduciary then has the ultimate burden of proving that the account is accurate and complete. The Court found that inasmuch as the petitioner had submitted the petition, the supporting accounting and his affidavit as the accounting party, the contesting respondent then initially had the burden to present evidence in support of its inaccuracy. The Court held that only upon satisfaction of that burden by the contestant would petitioner be required to prove, by a fair preponderance of the evidence, that the account was accurate and complete. Since respondent presented no evidence in support of her objections, and Surrogate's Court improperly placed the initial burden of proof upon petitioner, thereafter granting a directed verdict at the close of petitioner's proof, the Court reversed and remitted the matter for a new hearing. ***In re Curtis,*** 16 A.D.3d 725 (3d Dep't 2005).

A life estate for the decedent's spouse contained in the decedent's will was restricted to the apartment in which decedent resided at the time of his death, and the eviction of the decedent's daughter from the other apartment in the decedent's two-family house by her stepmother was prohibited.

The decedent was the sole owner of a two-family house, where he and his wife lived for approximately 22 years. Under his will he left a life estate to his wife "in the real property which I occupy as my primary residence at my death. . . ." One of the decedent's three children from a prior marriage, who had lived in the house for approximately 44 years, resided at the time of the decedent's death in the first floor apartment as she had for approximately 23 years prior thereto, paying monthly rent in a relatively nominal sum. After the will

was probated, the second wife brought an eviction proceeding against her stepdaughter. The Court restricted the life estate to the upstairs apartment occupied by the decedent at the time of his death. ***In re D'Elia,*** N.Y.L.J. 9/14/05, p.14, c. 4 (Surr. Ct., Kings Co., Surr. Tomei).

Upon the application by the life tenant there was a forced sale of the subject property, and the court directed that his interest be distributed to him outright and that the valuation of the life estate percentage of the proceeds be made by the superintendent of insurance, rather than by using Internal Revenue Service tables.

After the sale, two issues remained: (1) whether the life tenant was entitled to a sum in gross (outright), representing the present value of the life estate upon the sale of the life tenant's and remainderman's interests in the property, or whether the life tenant was entitled only to the income generated from the investment of the proceeds of sale of the property, and (2) the manner by which the respective life tenancy and remainder interests should be valued. The Court held that the life tenant was entitled to his interest outright, and that it should be valued by the New York Superintendent of Insurance. The court pointed to RPAPL § 968 which provides that the power to determine whether the owner of the particular estate shall receive, in satisfaction of his estate or interest, a sum in gross or shall receive the earnings, as they accrue, of a sum invested for his benefit in permanent securities at interest, rests in the discretion of the court, and that the application of the owner of any such particular estate for the award of a sum in gross shall be granted unless the court finds that unreasonable hardship is likely to be caused thereby to the owner of some other interest in the affected real property. As to the method of valuation, the Court recognized that the IRS actuarial and interest rate tables are the proper methods for valuing such interests for estate, gift and income taxes, but found that the preferred method for allocating net proceeds of sale between a life tenant and a remainderman is to have the values calculated by the Superintendent of Insurance based upon the life tenant's age at the date of the sale, which is the statutory method set forth in RPAPL §§ 403 and 406. ***In re Strohe,*** 7 Misc. 3d 853, (Surr. Ct., Nassau Co., Surr. Riordan, 3/16/05).

Where the remainderman of a trust predeceased the life income beneficiary, the remainder interest was held to be vested and payable to the estate of the remainderman and to pass under his will, rather than by intestacy to the heirs of the remainderman.

The decedent's will provided for a trust for his spouse, paying her the net income for her life. Upon her death the remaining trust assets were to be paid to his son. The decedent's son died before the trust terminated. The son's will left half his estate to *his* wife and half to his daughter. The daughter claimed to be entitled to the entire remainder. The Court held that the trust remainder vested in the son upon the father's death, and consequently was payable to the son's estate upon the trust's termination. ***In re Hobert,*** 7 Misc. 3d 447 (Surr. Ct., Westchester Co., Surr. Scarpino, 9/15/04).

Where a respondent fails-to-file a responsive pleading in surrogate's court, the relief sought in the petition can be granted without hearing or inquest.

A proceeding was brought to revoke Letters of Administration previously granted and to appoint a new administrator, alleging that the respondent suffered a complete nervous breakdown after the decedent's death and was unable to discharge her fiduciary duties to the estate and to effectuate the settlement for a cause of action for the wrongful death of the decedent. Respondent did not appear in any manner to dispute the allegations or to object to the relief requested. The Court held that pursuant to SCPA 509, in the absence of any response disputing the allegations or objecting to the requested relief, the petition was deemed due proof of the facts therein stated, and consequently, based upon the uncontested facts alleged, the Court found that the respondent's inability to discharge her fiduciary duties rendered her unfit for her office and provided a basis for the revocation of her letters, without the necessity of conducting a hearing. ***In re Arrington,*** N.Y.L.J. 8/2/05, p. 26, c. 3 (Surr. Ct., Kings Co., Surr. Tomei).

Under statute, the right of election is a personal right which dies with the surviving spouse if not exercised.

The decedent's spouse survived her and filed numerous objections to her will. During the pendency of the probate proceeding he died, and the Surrogate's Court rejected his executor's attempt, on a theory akin to the Domestic Relations Law's equitable distribution, to exercise the surviving spouse's right of election. The Surrogate denied the application, determining that the executor of the husband's estate did not have the authority to exercise the husband's right of election. On appeal the Appellate Division held that it deemed the Legislature to have specifically and intentionally excluded the right of the estate of a surviving spouse to exercise the right of election, and concluded that Surrogate's Court properly determined that the notice to exercise the right of election was invalid. ***In re Fellows,*** 16 A.D.3d 995 (3d Dep't 2005).

Over the objections of the decedent's parents, his wife's application was granted to disinter his body and bury him in a Catholic cemetery so that she and their children could be buried with him.

Petitioner-wife sought disinterment of her husband's remains on the grounds that her husband was not buried in Catholic cemetery and that she and their children would not be able to be buried with him, alleging that at the time she consented to his burial she was under extreme emotional distress. The Court held that as decedent's spouse, petitioner had a right superior to that of the decedent's parents to select his final place of burial, and that the wife had demonstrated good and substantial reasons to disinter the remains. ***In re Kelly,*** 16 A.D.3d 587 (2d Dep't 2005).

After providing for the payment of funeral and administration expenses and other priority claims against the estate, the court directed that the balance of the estate be held for approximately eleven months, and that in the event that the negligence plaintiff's claim was not resolved by that time, a reduced reserve in the sum of $75,000 be retained for a further four months.

The plaintiff-claimant alleged that she suffered severe injuries as a result of her exposure to lead-based paint while residing in an apartment owned by the decedent. No insurance policy could be located. There were three other co-defendants who were alleged to be jointly and severally liable. The estate alleged prejudice in the minor plaintiff's ten-year delay in commencing the action since the decedent no longer was available to assist in finding an insurance policy or in defending against the complaint. The Court stated that there were five factors to be considered in determining the amount to be retained: 1) the probable value of the negligence recovery and the likelihood that any applicable insurance will be sufficient to pay the recovery; 2) in the event that the reserve is insufficient to pay the recovery, the plaintiff's chances under Article 12 of the EPTL of obtaining a recovery from the beneficiaries, individually, of any sums that they received from the estate; 3) the percentage of the estate assets for which the reserve is sought; 4) the needs of the beneficiaries who were dependent upon the decedent; and 5) any other factors that might be probative in a particular case. The Court added that the factors to be considered in determining the length of time that the assets should be retained are 1) the period that has elapsed between the date of the decedent's death and the accounting proceeding in which the claim is being considered; 2) the period that has elapsed between the accrual of the cause of action and the commencement of the negligence lawsuit; 3) the plaintiff's diligence in prosecuting the negligence action; and 4) the time frame within which the negligence action is likely to be concluded, based upon its position on the calendar or the likelihood of obtaining a preference. ***In re Hall,*** 7 Misc. 3d 1005(A), 2005 N.Y. Slip Op. 50459(U) (Surr. Ct., Bronx Co., Surr. Holzman, 4/5/05).

A proponent in a will contest was required to provide "HIPAA" medical record authorizations to a respondent, prior to the filing of objections, in connection with the SCPA 1404 examinations.

The Court pointed to the statutory language that there should be made available to the party conducting such an examination all rights granted under article 31 of the Civil Practice Law and Rules with respect to document discovery. The Court held that discovery at the pre-objection stage is as broad as that permitted after objections are filed, that these examinations should not be treated perfunctorily, and that full preparation is in order, including acquiring as much advanced information about the decedent as possible. ***In re Ettinger,*** 7 Misc. 3d 316, 2005 N.Y. Slip Op. 25017 (Surr. Ct., Nassau Co., Surr. Riordan, 1/21/05).

A mutual will was found not to be binding on the survivor in the absence of "contractual language."

The plaintiff brought an action to declare a constructive trust on the property of her uncle by marriage or to require him to abide by his alleged promise to her aunt as to the testamentary disposition of his property. The Court found that there was insufficient evidence to support the conclusion that the defendant validly promised never to alter or revoke his will, and held that he was free to dispose of his assets as he saw fit. The Court stated that the defendant's alleged promise to renounce his right of testamentation was never clearly and unambiguously delineated, and the mutual wills under review contained no express contractual language, certainly no express statement that the provisions thereof were intended to constitute a contract between the parties, as the statute and common law require. ***Schloss v. Koslow,*** 20 A.D.3d 162, 800 N.Y.S.2d 715 (2d Dep't 2005).

Court allows DNA testing to go forward in paternity proceeding over objections of respondents who wanted other elements of proof to be established first.

In a proceeding to establish the right of inheritance to real property owned by a decedent at the time of his death, petitioners contended that respondents must first demonstrate that the decedent openly and notoriously acknowledged them as his children before DNA testing may proceed. The Court stated that to establish their

alleged inheritance rights under EPTL 4-1.2(a)(2)(C) respondents were required to establish paternity by clear and convincing evidence and to show that the decedent openly and notoriously acknowledged them as his children. The Court noted that the results of DNA testing may be used to satisfy their burden of establishing paternity and that there was no basis in the language of the statute or the circumstances of the proceeding requiring respondents to demonstrate first that decedent openly and notoriously acknowledged them as his children before the DNA testing might proceed. ***In re Morningstar,*** 17 A.D.3d 1060, 794 N.Y.S.2d 205, 2005 N.Y. Slip Op. 03418 (4th Dep't 2005).

DNA testing after death was permitted to support a finding of paternity.

Petitioner alleged he was the son and sole heir of the decedent. Petitioner introduced nuclear DNA test results utilizing the decedent's toothbrush, comparing it to a tissue sample from petitioner. These results concluded that the DNA from the toothbrush had a 99.79 percent probability of being from the biological father of petitioner. The Court opined that a non-marital child is the legitimate child of his father if paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own. The Court held that petitioner had established that the decedent had openly and notoriously acknowledged that he was the father of petitioner and that the nuclear and mitochondrial DNA test results constituted clear and convincing proof of his paternity. ***In re the Estate of Kenneth V.,*** 7 Misc. 3d 250, 2004 N.Y. Slip Op. 24543 (Surr. Ct., Rockland Co., Surr. Weiner, 12/31/04).

Children born as a result of a surrogacy arrangement were held not to be adopted and consequently not to be excluded from sharing in a trust.

One of the settlor's daughters and her husband became the parents of fraternal twins by virtue of a surrogacy arrangement, using an anonymous donor egg, fertilized in vitro with the sperm of the daughter's husband, and carried to term by an unrelated surrogate mother. After the twins' birth, with consent of the surrogate mother, the daughter and her husband obtained a judgment of parental relationship from the Superior Court of California to establish them as the twins' sole legal parents. The trusts created for the benefit of the issue of settlor's eight children, required that "adoptions shall not be recognized." The Court held that surrogacy is not the same as adoption and the children should not be excluded from sharing in the trusts. ***In re John Doe,*** 7 Misc. 3d 352 (Surr. Ct., New York Co., Surr. Preminger, 1/25/05).

Duty of estate fiduciary to seek court guidance if it becomes aware that a beneficiary is not legally competent.

An action was brought against the bank fiduciary on the grounds that it had failed to act appropriately in the course of the estate's accounting and distribution by reason of the incompetence of a trust's sole beneficiary. The Court stated that while an estate trustee's fiduciary duties to estate beneficiaries persist until the affairs of the estate are finally wound up, and the defendant trustee would have been obligated to seek court guidance if, in the course of concluding the estate's accounting and distribution, it became aware that the plaintiff, the estate's sole beneficiary, was not legally competent, the record established that the defendant had no such notice. ***Knox v. HSBC,*** 16 A.D.3d 199 (1st Dep't 2005).

An Article 81 guardianship proceeding brought in order to provide grounds to disavow a 9/11 settlement agreement is dismissed.

A petition was brought for the appointment of a guardian of the person and property of an alleged incapacitated person (AIP) by her husband. The AIP escaped from the World Trade Center attack and received approximately $5,000 from the Federal Victim's Compensation Fund. She reported to the court evaluator that her husband brought the petition because he was upset that she had signed the waiver without advising him, and he testified that he brought the article 81 proceeding in order to have his wife declared incompetent, so he could nullify the waiver and obtain a greater financial award from the fund or in a court of law by commencing a lawsuit. The court evaluator concluded that the AIP was not in need of a guardian and asked that the petition be denied. The Court allowed the petitioner to withdraw his petition, but held that any costs incurred in bringing the petition should be borne by the petitioner, who admitted to the Court that his wife was not incapacitated and that he consented to withdraw the petition only after he was informed by his attorney of the court evaluator's recommendation. ***In re W.E.,*** 8 Misc. 3d 1029(a), 2005 NY Slip Op 51344(U) (Sup. Ct., Bronx Co., Justice Hunter, 3/31/05).

An application by a family member to be substituted for a community-based agency as an article 81 guardian was denied, despite the general rule that a stranger will not be appointed as guardian of an incapacitated person unless it is impossible to find within the family circle or their nominees one who is qualified to serve.

The Court stated that given the most difficult circumstances under which they had to perform, the

Court felt that the community-based agency guardian had more than adequately fulfilled its responsibilities. It held further that the preference for a relative may be overridden by a showing that the proposed guardian-relative has rendered inadequate care to the IP, has interests adverse to the IP or otherwise is unsuitable to exercise the powers necessary to assist the incapacitated person. ***In re Murray F.,*** 7 Misc. 3d 1011(A), 2005 N.Y. Slip Op. 50562(U) (Sup. Ct., Kings Co., Justice Cutrona, 4/11/05).

Jurisdiction found in New York surrogate's court to hear a discovery proceeding involving a New York condominium jointly owned by a Florida decedent and the respondent.

Petitioner brought a discovery proceeding in the Surrogate's Court, Westchester County, to recover funds allegedly generated by the decedent's one-half interest in certain real property located in Hartsdale, New York, and for an accounting. Respondent moved to dismiss on, among other grounds, that the surrogate's court lacked subject matter jurisdiction. The Court stated that the pertinent statute, SCPA 206(1), unambiguously provides that the surrogate's Court of any county has jurisdiction over the estate of any non-domiciliary decedent who leaves property in the state. ***In re Sbuttoni,*** 16 A.D.3d 693 (2d Dep't 2005).

An application to entertain a petition for original probate in New York of the will of a non-domiciliary was denied because extensive proceedings already had been conducted in the decedent's domiciliary jurisdiction.

The Westchester Surrogate declined to entertain petitioner's application for original probate. The Court stated that in determining whether to accept an application for original probate of a will of a non-domiciliary which had not yet been admitted to probate in the decedent's domicile, the nature of New York's contacts with the decedent and his/her estate must be examined, including: (1) the location of the decedent's assets; (2) the residence of the nominated fiduciaries and beneficiaries; (3) the expense of proving the will in the decedent's domicile; (4) the decedent's request, if any, for New York probate; and (5) the good faith of the proponents. Additionally, the Court considered what weight should be given to the fact that the decedent's domicile had already assumed jurisdiction over the decedent's estate. In denying the application, the Court found that since objections and extensive discovery demands had already been filed in Florida, it would have been unduly prejudicial to all parties to have to litigate the same objections in two competing jurisdictions, with the possibility of conflicting outcomes. The Court also was unpersuaded that petitioners, who were legatees under the instrument, would be denied a full and fair opportunity to defend against the objections to the instrument already filed in the Florida proceeding. ***In re Nevai,*** 7 Misc. 3d 188, 2005 N.Y. Slip Op. 25038 (Surr. Ct., Westchester Co., Surr. Scarpino, 1/19/05).

The revocation of later will which was not found after death would not revive an earlier will.

A 1979 will was propounded. Objections were filed based upon an alleged 1989 will which could not be found after the decedent's death, but which apparently revoked the 1979 will. On a motion to dismiss the objections, the Court pointed out that even though the original of the 1989 will had not been produced, it was possible that the copy filed might be admitted to probate as a lost will. Additionally, even if the objections were dismissed, the Court would have to conduct an inquiry as to whether the 1989 will was duly executed at a time when the decedent was competent to make a will and not under restraint, because if the 1989 will was a valid will when it was executed and it revoked the 1979 will, the fact that it was thereafter revoked did not, of itself, revive the prior will or any provisions thereof. ***In re Pegues,*** 7 Misc. 3d 1030, 2005 N.Y. Slip Op. 50818(U) (Surr. Ct., Bronx Co., Surr. Holzman, 6/2/05).

A motion for summary judgment dismissing objections to a will is entertained even though jurisdiction had not yet been obtained over the will beneficiaries pursuant to SCPA 1411.

Proponent moved for summary judgment seeking to have the objections to probate dismissed and the propounded instrument admitted to probate. Among other things, the objectant opposed the motion on the ground that the Court should not entertain the motion because under the Uniform Rules for the Surrogate's Court, all pretrial procedures or proceedings are stayed until the proponent has complied with the jurisdictional requirements of SCPA 1411, which requires the proponent to cause a citation to be issued and to obtain jurisdiction over (1) each person named or referred to in the propounded instrument who had not appeared in the proceeding and whose interests would be affected by the outcome of the proceeding, and (2) such other persons as directed by the Court. The Court rejected the objectant's reliance upon SCPA 1411 as a bar to its entertaining the motion and granted summary judgment dismissing the objections. Among other things, the Court pointed out that whatever the outcome of proponent's motion, the beneficiaries would not be prejudiced. The Court emphasized that if the *objectant* were the party who was seeking summary judgment, the Court would not entertain the motion until SCPA 1411 jurisdiction

had been completed because SCPA 1411 provides that beneficiaries who are not served with the SCPA 1411 citation are not bound by any determination denying probate to the propounded instrument. ***In re Wimpfheimer,*** 8 Misc. 3d 538 (Surr. Ct., Bronx Co., Surr. Holzman, 5/3/05).

After a hung jury in a contested probate the court granted proponent's motion for a directed verdict over objections alleging forgery and a failure of due execution.

The Court found that objectants failed to adduce sufficient evidence, as a matter of law, to support their objections. The Court stated that the supervision of the execution of the propounded will by the attorney-draftsperson created a presumption of regularity that the will was properly executed in all respects, and that the self-proving affidavit of the attesting witnesses constituted prima facie evidence of the facts therein attested to by the witnesses, which the objectants had failed to overcome. Additionally, according to the Court, the testimony of the objectants' expert did not, as a matter of law, establish that the will was forged. ***In re James,*** 17 A.D.3d 366, 792 N.Y.S.2d 601, 2005 N.Y. Slip Op. 02664 (2d Dep't 2005).

Court declines to order the sale of the real estate held in decedent's real estate corporation, and the liquidation of the corporation as requested by estate beneficiary.

The decedent's children were the equal residuary beneficiaries of her estate, which held 100 percent of the shares of a corporation which owned three rental properties. The son asked the Court to order the sale of the properties and liquidation of the corporation. The Court dismissed the petition and held that absent their mutual agreement, the parties' options for the relief requested in the Surrogate's Court petition were found in either Business Corporation Law article 10, non-judicial dissolution of a corporation, or article 11, judicial dissolution of a corporation. ***In re Kagan,*** 7 Misc. 3d 791 (Surr. Ct., Duchess Co., Surr. Pagones, 2/7/05).

The petitioner's motion to suppress a disputed passage in the deposition of the attorney-draftsman was denied after a hearing. Petitioner in a probate proceeding moved for an order suppressing the transcript of the deposition of the attorney-draftsman pursuant to CPLR 3116(e). The Court stated that in order to suppress an allegedly improper transcription, the movant must show that the disputed passage clearly was in error and that he would be prejudiced unless the passage were suppressed. If there are any doubts, the Court determined that the passage should be corrected by way of an errata sheet. The Court found that the petitioner had failed to meet his burden and the attorney-draftsman was given additional time to provide an errata sheet, but the questioned portion of the transcript was not suppressed. ***In re Mancuso,*** 196 Misc. 2d 897, 764 N.Y.S.2d 800, 2003 N.Y. Slip Op. 23717 (Surr. Ct., Kings Co., Surr. Feinberg, 8/14/03).

Some Brief Briefs:

In a case involving the wrongful death of their parents, the children were awarded damages for loss of advocacy as separate and distinct from and in addition to an award for loss of nurture and guidance. ***Lamendola v. New York State Thruway Authority***, 7 Misc. 3d 388, (Court of Claims, Justice Minarik, 11/1/04).

Court dismissed a music corporation's attempt to sue for the wrongful death of its principal asset, the contract entertainer Aaliyah. ***Barry & Sons v. Instinct***, 15 A.D.3d. 62 (1st Dep't 2005).

Compiled by Hon. Bruce M. Balter, Justice of the Supreme Court, State of New York, and Chair, Brooklyn Bar Association, Surrogate's Court Committee, and Paul S. Forster, a solo practitioner in New York City, who practices in the areas of trusts and estates and guardianships, and is Chair of the Brooklyn Bar Association, Decedent's Estates Section.

Ethics Opinion No. 787

Committee on Professional Ethics of the New York State Bar Association
(6/9/05)

Topic: Conflict of interest; missing client

Digest: A lawyer who represents a wife in a personal injury matter and her husband on a loss of consortium claim cannot continue to represent either if the wife wishes to accept a settlement offer that would bar the husband's claim. If the husband has disappeared, the lawyer must take all reasonable steps to protect the client's interests and to locate the husband client. After exhausting all reasonable efforts to locate the husband, the lawyer may withdraw from the representation.

Code: DR 2-110, DR 5-105, DR 5-108, DR 7-101(A)(1); EC 5-15.

Question

May a lawyer who agreed to represent a wife in a personal injury matter and her husband on a derivative loss of consortium claim continue to represent the wife where settlement of her claim would prejudice the husband's interests? How should the lawyer proceed if the husband has disappeared?

Opinion

A lawyer was retained to represent concurrently a married woman with respect to a personal injury claim and her husband on a derivative loss of services claim. The husband later abandoned the wife and she obtained a divorce. Although no lawsuit was commenced with respect to either claim, a settlement offer has been made to the wife that she would like to accept. Both the wife and the lawyer have lost contact with the former husband.

Differing Interests

A lawyer may represent multiple clients in the same or related matters unless (i) the exercise of independent professional judgment on behalf of one client will be or is likely to be adversely affected by the lawyer's representation of another client, or (ii) the multiple representation would likely involve the lawyer in representing differing interests. DR 5-105(A).[1] In cases where multiple representation would involve an adverse effect on independent professional judgment or representation of differing interests, a lawyer may undertake or continue the multiple representation if a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implications of the simultaneous representation and the advantages and risks involved. *See* DR 5-105(C).

If assisting the wife to effect the settlement would prejudice the husband's separate claim,[2] the lawyer must withdraw from both representations.[3] Continuing to represent both parties would involve a simultaneous representation of "differing interests." Specifically, the lawyer would be forced to choose between settling the wife's claim and thus barring the husband from pursuing his loss of consortium claim,[4] or advising the wife to reject the settlement offer that she wishes to accept in order to preserve the husband's claim. In this situation the lawyer could proceed only with the husband's informed consent, which would require explaining to the husband the risk that the loss of consortium claim may be compromised.

Missing Client

Because the lawyer has not been discharged by the husband nor withdrawn from the husband's representation, he or she is obligated to continue to protect the husband's interests through reasonably available means.[5] However, the lawyer's inability to communicate with the client makes it difficult to protect the husband's interests. For example, if the client has not authorized the lawyer to file suit, the lawyer cannot know whether the client wishes to pursue the matter. A lawyer may withdraw from a representation if *either* "withdrawal can be accomplished without material adverse effect on the interests of the client"[6] or "if the client [b]y other conduct renders it unreasonably difficult for the lawyer to carry out employment effectively."[7] DR 2-110(A)(2) requires the lawyer, when withdrawing, to take "steps to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules."

Before withdrawing, the lawyer must take all reasonable steps to locate the client. Such steps might include sending a letter via certified mail to the last known address, a personal visit to the last known address, or a search of telephone directories, public records or the Internet to determine the client's current address.[8] If the lawyer has exhausted all reasonable

steps and decides to withdraw, the lawyer must send written notice of intent to withdraw to the client's last known address, warning the client that the client's claim may be prejudiced by delay, and suggesting that the client obtain other counsel.

Even if the lawyer withdraws from representation of the husband in accordance with DR 2-110(A)(2),[9] the lawyer would be unable to continue to represent the wife if settling her claim would prejudice the interests of the now-former husband client.[10] Absent consent from the former client (the husband), the lawyer could not continue to represent the wife in the same or a substantially related matter where her interests are materially adverse to the former client.

Conclusion

A lawyer who agreed to represent a wife in a personal injury matter and her husband on a derivative loss of consortium claim may not continue to represent the wife absent both clients' informed consent where settlement of her claim would prejudice the husband's claim for loss of consortium. The lawyer may seek to withdraw from representing the missing client subject to the considerations discussed above.

Endnotes

1. DR 5-105(B); *see also* EC 5-15 ("The lawyer should resolve all doubts against the propriety of the representation.")
2. Whether settling the wife's claim would prejudice her former husband's claim is a question of law beyond this Committee's jurisdiction.
3. If the lawyer withdrew from only one representation, the remaining representation would be adverse to the former client "in the same or [a] substantially related matter," a violation of DR 5-108.
4. *See, e.g., Buckley v. National Freight*, 90 N.Y.2d 210, 681 N.E.2d 1287, 659 N.Y.S.2d 841 (1997) (settlement of the injured spouse's claim and release generally bars the other spouse's pursuit of loss of consortium claim).
5. DR 7-101(A)(1); *see* Rhode Island Opinion 1992–94 (attorney must continue to protect missing client's interests).
6. DR 2-110(C).
7. DR 2-110(C)(1)(d).
8. *See, e.g.*, ABA Inf. Op. 1467 (1981) (if after reasonable inquiry and effort the client cannot be located, and problem is not caused by the lawyer's neglect, the lawyer has no duty to file a lawsuit to toll the statute of limitations for a client who has disappeared); Arizona Opinion 01-08 (reasonably diligent search necessary); Philadelphia Opinion 98-8 (if after reasonable efforts to locate the client, the client cannot be found, the lawyer has no further obligation); South Carolina Opinion 98-07 (if after reasonable diligence, the client cannot be found, the lawyer can assume representation has terminated); Wisconsin Opinion E-96-2 (the lawyer must make a reasonable effort to locate the client before withdrawing); Rhode Island Opinion 91-82 (steps to be taken).
9. Taking "steps necessary to the extent reasonably practicable to avoid foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules."
10. DR 5-108.

(1-05)

Request for Articles

If you have written an article, or have an idea for one, please contact *One on One* Editor:

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Articles should be submitted on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

Ethics Opinion No. 788

Committee on Professional Ethics of the New York State Bar Association
(10/21/05)

Topic: Part-time prosecutor represents criminal defendant in a civil matter, conflict of interest, imputation.

Digest: A lawyer who has a private practice and serves as a part-time assistant district attorney may not represent a client in a civil matter where the client is being prosecuted by the district attorney's office. The conflict cannot be cured by consent.

Code: DR 2-110(B)(2), 5-105(B), 5-105(D), 5-108(A)(1).

Question

1. The inquirer is a lawyer in private practice who also serves as a part-time assistant district attorney in a small district attorney's office. He shares an office in the district attorney's office and attends staff meetings at which cases are discussed. In his private practice, the inquirer represents a husband and wife in revising their wills. After an initial interview, which resulted in the inquirer requesting certain additional information, the inquirer learns that the district attorney's office in which he works has begun a prosecution of the husband. May the inquirer continue to represent the husband? If there is a conflict of interest, may the conflict be cured by consent?

Opinion

2. The Committee concludes that the inquirer may not continue the representation of the husband when the district attorney's office in which the inquirer works is prosecuting the husband. We also conclude that the conflict cannot be cured by consent of the district attorney's office and the private client.

3. DR 5-105(B) bars a lawyer from concurrent representation of two or more clients if it would "involve the lawyer in representing differing interests," unless each client consents. We have held that part-time prosecutors are limited by DR 5-105 from undertaking certain kinds of work in their private practice: for example, they may not represent criminal defendants in New York State courts[1] or in suing the governmental entity that employs them.[2] Such conflicts are imputed to partners and associates of the part-time prosecutor.[3] This inquiry involves the reverse situation: whether the conflicts of other prosecutors in the office are imputed to the part-time prosecutor so as to bar the part-time prosecutor from conflicting representations in his or her private practice.

4. DR 5-105(D) imputes conflicts under DR 5-105(B) to all lawyers "associated in a law firm." A law firm is defined in the Code of Professional Responsibility (the "Code") to include "the legal department of a corporation or other organization." This Committee has repeatedly held that a district attorney's office should be treated as a law firm for purposes of DR 5-105(D).[4] We recognize that a part-time prosecutor's affiliation with the district attorney's office may not be as extensive as that of a typical partner or associate in a law firm. However, the part-time prosecutor has full access to the office's information, attends staff meetings and carries on the work of the office in much the same way that other prosecutors do. His or her affiliation with the district attorney's office is at least as extensive as most of-counsel lawyers' affiliation with their law firms,[5] which this committee and others have held gives rise to imputation.[6] *A fortiori*, because of a greater need to avoid the appearance of impropriety in government, the imputation of conflicts that applies to most "of counsel" lawyers applies to a part-time prosecutor.[7]

5. Given that there is a conflict of interest, may it be waived?[8] In N.Y. State 657 (1993), we stated that the conflict arising from a part-time prosecutor's acting as criminal defense counsel in New York State courts was not waivable. In that opinion we said, "Because the role of the prosecutor and the defense lawyer are inherently incompatible and the prosecutor has special responsibilities to the public, consent cannot cure the conflict because it is not obvious that the lawyer can adequately represent the Town and the private client."[9] While the inquirer does not seek to act as defense counsel in criminal cases, we believe the same conclusion applies. The risk of the public perceiving favoritism at the prosecutor's office precludes waiver of the conflict.

6. The Code does not prescribe which representation a lawyer must withdraw from when presented with a non-waivable conflict,[10] but we have said that "[a]s a general rule, disqualification of the entire District Attorney's office is warranted only upon a finding of actual prejudice, a real conflict of interest or the risk of misusing confidences."[11] In this case, where the withdrawal of the entire dis-

trict attorney's office would require appointment of a special prosecutor to prosecute the husband, and where the estate-planning representation is at an early stage, we believe the inquirer should withdraw from representing the husband. If the facts were different, as when withdrawal from representing the private client would cause substantial prejudice to the client, the lawyer may be required to withdraw from the district attorney's office.

7. There are also situations in which withdrawal from representing the husband or withdrawal from the district attorney's office might not be sufficient, so that the district attorney's office would be required to withdraw from the prosecution. Under DR 5-108(A)(1), if the representation of the husband and the criminal prosecution are "substantially related," the inquirer would have a disqualifying conflict of interest that would be imputed to the district attorney's office under DR 5-105(D) and would prevent the entire district attorney's office from proceeding against a former client of one of its prosecutors. "The most important factor [in determining whether two matters are substantially related] is whether the . . . lawyer did or could have obtained confidences and secrets in the former representation that should be used against the former client in the current representation."[12] If the criminal prosecution involves allegations of secreting assets, for example, an estate-planning representation might be substantially related to that prosecution, requiring appointment of a special prosecutor.[13] If the alleged crime is a traffic offense, however, that is unlikely.

Conclusion

8. The questions are answered in the negative.

Endnotes

1. N.Y. State 544 (1982).
2. N.Y. State 218 (1971).
3. *See, e.g.*, N.Y. State 450 (1976) ("If the [part-time] town attorney is unable to represent private clients by reason of the foregoing considerations, his partners and associates would similarly be disqualified."); N.Y. State 40 (1966); *see also* N.Y. State 672 (1995) (part-time prosecutor who is partner of judge's law clerk cannot appear before that judge, conflict not imputed to other prosecutors where conflict did not arise from one of enumerated provisions in DR 5-105[D]).
4. N.Y. State 672 (1995) ("the District Attorney's office is the functional equivalent of a law firm"); N.Y. State 670 n.3 (1994); N.Y. State 638 (1992); N.Y. State 492 (1978) (disqualification for a small DA's office, did not reach the question of "[w]hether that analogy is appropriate *vel non* to the structure and operation of a district attorney's office in a major metropolitan community"); N.Y. State 476 (1977) ("all public offices which exercise prosecutorial duties are treated as private law firms" for purposes of DR 5-105(D) disqualification); N.Y. State 419 (1975); *see also* N.Y. City 2003-03 (the Code's definition of law firm "of course encompasses large law firms, corporate legal departments, government legal departments, and non-profit law firms"); ABA Model R. 1.0 cmt. 3 ("With respect to the law department of an organization, *including the government*, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct") (emphasis added).
5. "We have interpreted the 'of counsel' relationship to mean that the of counsel lawyer is 'available to the firm for consultation and advice on a regular and continuing basis.'" N.Y. State 773 (2004) (*quoting* N.Y. State 262 [1972]).
6. N.Y. State 773; *see also* ABA 90-357; N.Y. City 1995-8; *Nemet v. Nemet*, 112 A.D.2d 359, 360, 491 N.Y.S.2d 810, 811 (2nd Dep't) (of counsel relationship leads to imputed disqualification), *appeal dismissed*, 66 N.Y.2d 602, 490 N.E.2d 554 (1985); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. c(ii) (1998) (same). *But see Hempstead Video, Inc. v. Incorporated Village of Valley Stream*, 409 F.3d 127, 135 (2d Cir. 2005) ("Given the wide variation in the nature and substance of relationships lumped together under the title 'of counsel,' a *per se* approach is ill-equipped to respect appropriately 'both the individual's right to be represented by counsel of his or her choice and the public's interest in maintaining the highest standards of professional conduct.'") (*quoting Hull v. Celanese Corp.*, 513 F.2d, 568, 569 [2d Cir. 1975]).
7. *Accord* Vermont 2003-4 (conflicts of all attorneys in Attorney General's office imputed to part-time Assistant Attorney General).
8 N.Y. State 629 (1992) (governmental entity is capable of giving consent).
9. *See also State v. Schrager,* 74 Misc. 2d 833, 346 N.Y.S.2d 101 (Crim. Term., Queens Cty. 1973) (court approved appointment of Special District Attorney when Assistant District Attorney was criminal defendant); N.Y. State 683 (1996) (The 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. DR 2-110(B)(2) (requiring lawyer to withdraw from employment if "continued employment will result in violation of a Disciplinary Rule"). *See also* N.Y. City 2005-05 (describing factors to be considered in deciding which matter a lawyer should withdraw from in the case of unforeseeable concurrent client conflicts).
11. N.Y. State 672 (1995); *accord* N.Y. State 670 (1994). While New York law provides for appointment of special prosecutors where an entire county office is disqualified, *see* N.Y. County Law § 701(1)(a) (2005) ("Whenever the district attorney of any county and such assistants as he or she may have . . . are disqualified from acting in a particular case to discharge his or her duties . . . a superior criminal court in the county may . . . appoint some attorney at law . . . to act as special district attorney"), the New York courts have shown reluctance in recent years to disqualify an entire office absent demonstrated prejudice. *Matter of Schumer v. Holtzman*, 60 N.Y.2d 46, 454 N.E.2d 522, 467 N.Y.S.2d 182 (1983) (district attorney should be disqualified only "under limited circumstances"); *People v. Rankin*, 149 A.D.2d 987, 540 N.Y.S.2d 628 (4th Dept. 1989); *Matter of Morgenthau v. Crane*, 113 A.D.2d 20, 22-23, 495 N.Y.S.2d 164, 166 (1st Dept. 1985); N.Y. State 638 n.10 (1992) (reviewing cases).
12. N.Y. State 723 (1999). Other factors include "an identity of issues in the two matters or a significant overlap of . . . contested facts," and whether "the issue in controversy in the second matter arose out of a transaction in which the lawyer represented the former client." *Id.*
13. We have said in the civil context that a lawyer's general knowledge of his or her former client's financial exposure does not make the two representations substantially related unless "there are peculiar aspects of the current representation making such information particularly relevant." N.Y. State 628 (1992); *accord* N.Y. State 723.

(11-05)

Ethics Opinion No. 789

Committee on Professional Ethics of the New York State Bar Association
(10/26/05)

Topic: Consultation with a law firm's in-house counsel on matters of professional ethics involving one or more clients of the law firm.

Digest: A law firm may form an attorney-client relationship with one or more of its own lawyers to receive advice on matters of professional responsibility concerning ongoing client representation(s), including on matters implicating the client's interests, without thereby creating an impermissible conflict between the law firm and the affected client(s). The law firm's duty to disclose its conclusions will vary with the circumstances of the matter.

Code: DR 1-102(A); DR 1-104; DR 1-106; DR 1-107; DR 2-101(E); DR 2-102(A); DR 2-103(D); DR 2-105(A); DR 3-102(A); DR 5-101(A); DR 5-105; DR 5-109; DR 9-102; EC 1-8; EC 5-18; EC 7-7; EC 7-8.

Question

1. When a law firm seeks advice from one or more of its own lawyers about the firm's legal and ethical obligations in connection with representing a client, without first obtaining the client's consent, does the consultation create an impermissible conflict between the interests of the law firm and those of the affected client?

Opinion

Background

2. A New York-based law firm has appointed a committee of partners charged with (1) advising the firm and its lawyers on legal and ethical obligations and issues of professional responsibility, (2) assuring the firm's compliance with the law governing lawyers, (3) counseling the firm concerning its systems to facilitate such compliance, and (4) representing the firm in challenges to its professional conduct. Included among the issues that these in-house advisors confront are considering the limits on a lawyer's duty of zealous representation, interpreting and applying the rules governing conflicts of interest, addressing a client's allegation that the firm behaved unethically, and assessing whether the firm has failed in the performance of professional duties to a client.

3. Many of these issues involve questions of law and ethics in which the interests of the law firm may not coincide with the interests of the client(s) whose matters occasion the consultation. For instance, in addition to the duties owed to the affected client(s), lawyers may owe potentially conflicting duties to other existing or former clients, to a court or a regulatory tribunal, to adverse counsel, or to the legal system as a whole. Assuring compliance with these multifaceted obligations may frequently present complex issues of law and ethics. The question here is whether a law firm's consultation with one of its own in-house lawyers on these types of issues creates a conflict of interest with the affected client under the Code of Professional Responsibility (the "Code"). We conclude that it does not.

Analysis

4. The question presented is new for this Committee and, as far as our research can find, any ethics committee in the country. Three recent cases—*VersusLaw, Inc. v. Stoel Rives, LLP*, 111 P.3d 866, 878, 127 Wash. App. 309, 332 (2005); *Koen Book Distrib. v. Powell, Trachtman, Logan, Carrle, Bowman & Lombardo*, 212 F.R.D. 283, 283-85 (E.D. Pa. 2002); and *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 220 F. Supp. 2d 283, 286-88 (S.D.N.Y. 2002)—suggest that an in-house legal counsel's advice to law firms may not be subject to claims of attorney-client privilege as against their then-clients based on the courts' view that the firm's consultation with its in-house lawyers introduced a conflict between the law firm and its clients.[1] The question of the applicability of the privilege is an evidentiary issue for the courts. The question of what constitutes a conflict of interest under Canon 5 of the Code is one on which we are free to opine.

5. We begin with consideration of the background in the Code against which lawyers in law firms seek advice from in-house ethics advisers—various provisions of the Code that provide for or envision a law firm's obtaining in-house advice about obligations to clients and construction of an ethical infrastructure to facilitate such consultation. We then consider whether seeking and giving such advice creates a personal conflict for the lawyers involved under DR 5-101(A), and

then whether the rendering of such advice to a colleague puts the lawyer in the position of representing two clients with conflicting interests under DR 5-105(A) and (B). Finally, we address the extent to which the law firm is obligated under the Code to disclose to the client the fact of its in-house consultations.

The Code's Support for an Ethical Infrastructure

6. The Code explicitly imposes obligations on a law firm as an institution—a departure from the traditional confinement of ethical codes to regulation of individual lawyers. For example, DR 1-104 requires a law firm to make "reasonable efforts" to assure that its lawyers comply with the Code, mandates adequate supervision of the lawyers in the firm, and allocates responsibility between supervisory and subordinate lawyers in the firm. Other Code provisions also apply to the firm, rather than solely to individual lawyers.[2]

7. These rules necessarily create an obligation to establish protocols, appropriate for the size and practice of the firm, to enable the firm to enforce these standards internally. To envision such a system without access to confidential advice on legal and ethical issues affecting the firm's obligations is difficult. EC 1-8 is but one suggestion to this effect:

> A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of the lawyers in the firm. Such measures may include informal supervision and occasional admonition, a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a senior lawyer or special committee, and continuing legal education in professional ethics.

8. These rules persuade us that the Code endorses and in some cases requires mechanisms within a law firm to promote obedience to a firm's obligations. Those ethical obligations frequently raise issues potentially or actually implicating the interests of one or more clients. Either a law firm must address these issues with one of its own lawyers, or else look to others for this advice. To hold that a law firm must always seek guidance outside its halls in order to preserve an attorney-client relationship—that is, to hire outside counsel (whose fiduciary duties may extend only to the firm) in every instance in which such an adversity arises—is simply impractical in the day-to-day life of many law firms, when issues of professional responsibility frequently require prompt responses most usefully provided by lawyers knowledgeable about the firm, its client relationships and its culture. It also imagines a world in which a lawyer must hire another lawyer to practice law, thereby depriving the firm of the well-recognized right to represent itself.[3]

9. Further supporting this conclusion is the substantial literature supporting an in-house ethical infrastructure. "[A] law firm that assumes some collaborative responsibility for the moral climate of the firm's practice can improve morale, the quality of work, and, perhaps, the moral standards of the firm's lawyers and other employees." CHARLES WOLFRAM, MODERN LEGAL ETHICS § 16.2.2, at 881 (1986). "Research in other organizational contexts shows that [in-house compliance] specialists tend to promote the development of compliance procedures within firms, and may play a leading role in defining industry standards for compliance." Elizabeth Chambliss & David B. Wilkens, *The Emerging Role of Ethics Advisors, General Counsel and Other Compliance Specialists in Large Law Firms,* 44 ARIZ. L. REV. 559, 560-61 (2002). "Many law firms already have an 'ethics committee' or 'ethics partner' to serve as the firm's internal resource for deciding ethics questions, and firms of more than a dozen lawyers that do not yet have an ethics committee ought to form one." ROY D. SIMON, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 68 (2005). "A lawyer confronting something that seems to be an ethics problem should consult a colleague about whether there is such a problem and, if so, how she should go about resolving it." Geoffrey C. Hazard, *The Legal Profession: The Impact of Law and Legal Theory*, 67 FORDHAM L. REV. 239, 247 (1998).[4]

10. We do not believe that the conflicts rules of Canon 5 were intended to prohibit ethics consultation when it is most helpful: during the client representation.

DR 5-101(A): Interests That May Affect Professional Judgment

11. DR 5-101(A) prohibits a lawyer from accepting or continuing employment if the exercise of the

lawyer's professional judgment "will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest." DR 5-105(D) imputes this prohibition to every lawyer in the firm. The issue is whether it is a conflict under DR 5-101(A) for a lawyer to seek or give advice on the firm's ethical obligations to its client *while* the firm is representing those clients.

12. We believe that a lawyer's interest in ensuring compliance with the lawyer's ethical duties or obligations, or considering the effects of a possible violation of those duties, does not generally raise issues under DR 5-101(A). A lawyer's interest in carrying out the ethical obligations imposed by the Code is not an interest extraneous to the representation of the client. It is inherent in that representation and a required part of the work in carrying out the representation. It is, in other words, not an interest that "affects" the lawyer's exercise of independent professional judgment, but rather is an inherent part of that judgment. The law firm is not only entitled, but required, to consider the ethical implications of what it does on a daily basis. That the law firm does so through consultation does not change the interest being pursued. Such consultation, moreover, has been a part of law practice for generations and indeed is encouraged by the Code.[5] It is too much a part of the fabric and tradition of legal practice to require specific disclosure and consent.

13. This is not to say that the firm's interest in protecting itself can never give rise to a conflict of interest under DR 5-101(A), or that the firm has no obligation to disclose to the client the conclusions resulting from its seeking or giving advice on its ethical obligations or exposure. A firm's conclusion that it has failed to comply with its ethical obligations might, in some circumstances, reasonably be expected to affect its exercise of professional judgment. As we discuss below, when a law firm learns that a client may have a claim against the law firm arising out of the law firm's rendition of legal services, or that the firm may need client consent in order to commence or continue another client representation, or in other circumstances where the client is called upon to act or decide, then the firm may need to disclose to the client the firm's conclusions with respect to the ethical issues.[6] But we do not believe that the consultation of an in-house ethics resource itself raises issues under DR 5-101(A).

DR 5-105(A) & (B): "Differing Interests"

14. DR 5-105(A) and (B) require a lawyer to "decline" or "not continue" multiple employment if the "exercise of independent professional judgment in behalf of a client will be or is likely to be adversely affected by" the lawyer's "acceptance" or "representation" of "another client," or "if it would be likely to involve the lawyer in representing differing interests, except to the extent" permitted by DR 5-105(C). This latter rule permits multiple employment "if a disinterested lawyer would believe that the lawyer can competently represent the interests of each and if each consents to the representation after full disclosure of the implications of the simultaneous representations and the advantages and risks involved." We here treat the relationship between an in-house ethics adviser and the lawyers whom he or she is advising like that of an in-house corporate legal officer. The Code treats lawyers who practice as retained advisers to a corporation no different from other lawyers, and it is clear that in-house advisers have an attorney-client relationship with the corporation that employs them.[7] Thus, the question is whether an in-house ethics advisor represents interests "differing" from those of clients.

15. We think not. The Code defines "differing interests" to mean "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be conflicting, inconsistent, diverse or other interest."[8] The key phrase is that the interest must be one that will "adversely affect *either the judgment or the loyalty of a lawyer to a client*." Because the Code requires adherence to its rules in service of the many duties a lawyer owes, a law firm's consideration of its own legal and ethical obligations in connection with its representation of one or more clients cannot be said to implicate a "differing interest" that will adversely affect the lawyer's exercise of professional judgment nor the loyalty due a client within the meaning of the Code.[9]

16. To suggest otherwise is counter to everything the Code embodies. The purpose of consultation on a lawyer's ethical and legal obligations is to facilitate the inquirer's adherence to applicable law and rules. Seeking advice from an in-house ethics advisor is intended to facilitate the

lawyer's proper exercise of professional judgment and a lawyer's appropriate discharge of the duty of loyalty owed to the client in the same way that an outside client's consultation with a lawyer in the firm is intended to facilitate the client's lawful achievement of legitimate objectives. Considering a lawyer's ethical obligation to represent a client within the bounds of the law, for instance, does not give rise to any rightful claim that such consideration alone adversely affects the lawyer's professional judgment or loyalty, for this is what lawyers are supposed to do. This is true whether the issue at hand is how to conduct oneself in the future or whether conduct in the past was a violation of the Code, for consideration of both questions is part of what clients and the legal system expect lawyers to do, serves to reinforce ethical behavior, and informs future conduct. Simply put, seeking advice on how best to accommodate a lawyer's multi-faceted obligations in service of one or more clients does not, without more, entail the kind of "differing interest" that DR 5-105(A) and (B) regulates. It follows that such consultation does not require compliance with DR 5-105(C) mandating, among other things, advance informed consent to the law firm's representation of itself.

Disclosure Obligations

17. Having concluded that a law firm need not obtain advance informed consent before consulting its own in-house counsel on matters that implicate a client's interests, we must resolve whether a law firm is obliged to advise the client that the firm has consulted with its in-house counsel about a matter of professional responsibility affecting the client. In our opinion, no such obligation exists. Rather, a law firm may in certain circumstances owe the client a duty to advise the client of the firm's *conclusions* about the firm's legal or ethical obligations, but the firm has no duty to advise the client that the law firm has consulted with its own in-house counsel in reaching those conclusions.

18. This result naturally flows from the conclusion preceding it. Clients are entitled to counsel who comply with applicable standards of professional responsibility. Those lawyers are entitled to seek advice on how best to comply with those standards, and to do so without apprehending that seeking the advice is itself a violation of those standards. The Code does not obligate a lawyer to tell a client how the lawyer has reached a conclusion concerning a particular matter of professional responsibility.

19. Whether a law firm has a duty to disclose the fact of its own internal consideration of ethical issues should not be confused with a law firm's duty, in many circumstances, to disclose the products of that consideration. Nothing in this opinion is intended to alter the lawyer's duty to advise a client of circumstances requiring a client to act. Thus, obviously, when a law firm concludes that the firm may not continue to represent the client under DR 5-101 or DR 5-105, then the firm must so advise the client. The timing and extent of a firm's disclosure obligations will vary with the circumstances. For example, if a firm is considering whether to represent differing interests, disclosure obligations arise when the firm determines that a client has a decision to make—that is, when the firm concludes that a client's informed consent is or later may become a prerequisite to its representation of this or another client. In that circumstance, the firm's duty is to provide the affected client(s) with all the information material to the client's decision whether to establish or continue the attorney-client relationship.[10]

20. Similarly, we have previously opined that "whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission."[11] Because "lawyers have an obligation to keep their clients reasonably informed about [a] matter and to provide information that their clients need to make decisions relating to the representation," lawyers have an obligation to a client to disclose "the possibility that they have made a significant error or omission."[12] Whether an error or omission must be disclosed depends on all the relevant facts, such as whether the error or omission gives rise to a colorable malpractice claim, is capable of correction or is injurious to the client.[13]

Conclusion

21. In considering its obligations to its clients, a law firm may consult with one or more lawyers in the Firm without thereby violating the Code's prohibition on the unauthorized representation of differing interests or the Code's prohibition on continuing employment if the exercise of the lawyer's professional judgment might be affected by personal interests. The law firm does not ordinarily need to disclose to the clients the fact of such consultation, but may need to disclose the conclusions reached, as when the firm concludes that it has a conflict or that it has made a significant error or omission.

Endnotes

1. The three cases all rest on *In re Sunrise Sec. Litig.*, 130 F.R.D. 560 (E.D. Pa. 1989), which held "a law firm's communication with in house counsel is not protected by the attorney client privilege if the communication implicates or creates a conflict between the law firm's fiduciary duties to itself and its duties to the client seeking to discover the communication." *Id.* at 597. The *Sunrise* court relied in part on the so-called "fiduciary exception" to the privilege, *see Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970). Other decisions applying that exception, however, such as *Beck v. Manufacturers Hanover Trust Co.*, 218 A.D.2d 1, 17-18 (1st Dep't 1995); *Hoopes v. Carota*, 142 A.D.2d 906, 910-11 (3d Dep't 1995) (dictum), *aff'd*, 74 N.Y.2d 716 (1989); and *United States v. Mett*, 178 F.3d 1058, 1064 (9th Cir. 1999), find that, when a fiduciary seeks legal advice concerning the fiduciary's *own* potentially conflicting obligations, including with respect to potentially different interests of beneficiaries, the fiduciary may assert privileges against the beneficiaries. *See also* RESTATEMENT (SECOND) OF TRUSTS § 173 cmt. b (1959).
2. *See, e.g.,* DR 1-102(A); DR 1-106; DR 1-107; DR 2-101(E); DR 2-102(A); DR 2-103(D); DR 2-105(A); DR 3-102(A); DR 9-102. *See also* DR 5-105(E) (requiring a system for checking conflicts); N.Y. State 715 (1999); N.Y. City 2003-3 (outlining minimal requirements for conflicts-checking system). Likewise, in issuing its Sarbanes-Oxley attorney conduct rules, the SEC declared that it expects law firms "to put in place procedures to comply with [its] requirements." Press Release, Securities and Exchange Commission 2003-13 (Jan. 23, 2003).
3. *See United States v. Rowe*, 96 F.3d 1294 (3rd Cir. 1996) (recognizing law firm's right to represent the firm *pro se*); *Hertzog, Calamari & Gleason v. Prudential Ins. Co.*, 850 F. Supp. 255 (S.D.N.Y. 1994) (same); *Lama Holding Co. v. Shearman & Sterling*, 1991 U.S. Dist. LEXIS 7987 (S.D.N.Y. June 17, 1991) (same). *See also In re Sunrise Sec. Litig.*, 130 F.R.D. 560, 595 (E.D. Pa. 1989) ("I am not willing to hold that a law firm may never make privileged communications with in house counsel.").
4. *See also* Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721 (2005); Jonathan M. Epstein, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011 (1994); Susan Saab Fortney, *I Don't Have Time To Be Ethical: Addressing the Effects of Billable Hour Pressure*, 39 IDAHO L. REV. 305 (2003); Susan Saab Fortney, *Ethics Counsel's Role in Combating the "Ostrich" Tendency*, 2002 PROF. LAW. 131 (2002); Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves?*, 19 GEO. J. LEGAL ETHICS 271 (1997); Barbara Gillers, *Preserving the Attorney Client Privilege for the Advice of a Law Firm's In-House Counsel*, 2000 PROF. LAW. 107 (2000); Peter B. Jarvis & Mark Fucile, *Inside an In-House Legal Ethics Practice*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 103 (2000); Milton R. Wessel, *Institutional Responsibility: Professionalism and Ethics,* 60 NEB. L. REV. 504, 512-13 (1981)*;* Gail Cox, *Some Firms Keep Own Counsel*, NAT'L L.J., June 30, 1997, at A1; Jonathan D. Glater, *In a Complex World, Even Lawyers Need Lawyers*, N.Y. TIMES, Feb. 3, 2004, at C1; Peter R. Jarvis, *Ethics Advisors Watch Over Firms*, NAT'L L.J., July 13, 1992, at A15; Gary Taylor, *Legal Costs Are Leading Law Firms, Like Their Clients, To Look Inside for Advice*, NAT'L L.J., July 18, 1994, at A1.
5. EC 1-8.
6. N.Y. State 734 (2000).
7. *See, e.g.,* Code, Definitions ("law firm" defined to include "the legal department of a corporation or other organization"); DR 5-109(A) ("lawyer employed or retained by an organization" has the same duty of loyalty to the organization as client); EC 5-18 (same); ABA Model Rule 1.13(a) ("lawyer employed or retained by an organization represents the organization"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. b ("A lawyer may represent an organization either as an employee of the organization [inside legal counsel] or as a lawyer in private practice retained by the organization [outside legal counsel]. In general, a lawyer's responsibilities to a client organization are the same in both capacities.") *See also Rossi v. Blue Cross and Blue Shield*, 73 N.Y.2d 588, 592, 542 N.Y.S.2d 508, 509 (1989) ("The privilege applies to communications with attorneys, whether corporate staff counsel or outside counsel. . . .")
8. Code, Definitions.
9. *See generally* Marc I. Steinberg & Timothy V. Sharp, *Attorney Conflicts of Interest: A Need for a Coherent Framework*, 66 NOTRE DAME L. REV. 1 (1990); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244 (1981); Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 GEO. J. LEGAL ETHICS 823 (1992).
10. *See* EC 7-8 ("A lawyer should exert best efforts to ensure that decisions of the client are made only after the client has been informed of relevant considerations."); CHARLES WOLFRAM, *supra*, § 7.2.4, at 343–46.
11. N.Y. State 734 (2000).
12. *Id.*; *see* N.Y. State 396 (1975); EC 7-7; EC 7-8.
13. N.Y. State 734.

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