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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 am very pleased to write to you as the Chair of the General Practice Section. Although many say there are no longer general practitioners, it seems clear that a substantial number of New York lawyers practice either in small firms or as solo practitioners. The majority of our members appear to practice in the areas of real property, trusts and estates, elder law or business affairs and the litigated matters that arise from those areas, all of which have overlapping problems. As a result they must be familiar with the law in these and many areas in order to serve the needs of their clients.

The mission of the General Practice Section has increasingly changed to serve the needs of larger firms as well as those of the small firm and solo practitioner. As a solo practitioner for the past 13 years as well as spending over 30 years in a small or medium firm environment, I am well aware of the value of the resources and opportunities to network with colleagues, which arise from active membership in the State Bar Association and particularly our Section.

In recent years the Section has made major steps to improve the benefits available to its members. With the rapid growth of technology and the increasing costs of travel, we are changing our CLE programs from site-based events to a concise teleconference format, which permits our members to remain in their offices and participate in discrete topics, each program lasting about two hours. In so doing we may offer our mem-

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bers programs they truly need without spending time on topics of less value to their practice.

Our listserve is highly prized by our members for the professionalism, civility and generous assistance offered by their colleagues. It is a valuable tool for members to receive guidance from their peers in recognizing and solving problems in areas outside their normal practice. It also enables the members to meet and get to know practitioners in other areas of the state.

As part of our drive to increase membership, we are beginning a program to expand participation at the level of our district representatives so that our members will be able to benefit in their local region without having to take undue time from their practice. We are also considering a number of other projects designed to benefit our members as well as improving our section blog and continuing to bring you *One on One*, our Section journal.

While I am excited by the prospects and challenges of the future, I know that improving the Section is a long-term goal whose success requires the efforts of all of its members. I hope you will participate fully and enhance the benefits for all. I look forward to working with you in the coming year.

Paul J. O'Neill, Jr.

From the Editor

It's that time of year again when our Section has a transition in its leadership. Harriette Steinberg had served us well as our Chair and we want to thank her for all her time and effort that she devoted in the past year to support and build our Section. We now look forward to our new administration with Paul O'Neill at the helm and a new set of supporting officers. One of the primary goals we have set for this year is to enhance the awareness of the importance of membership in our Section and seek to make us the largest Section of the State Bar.

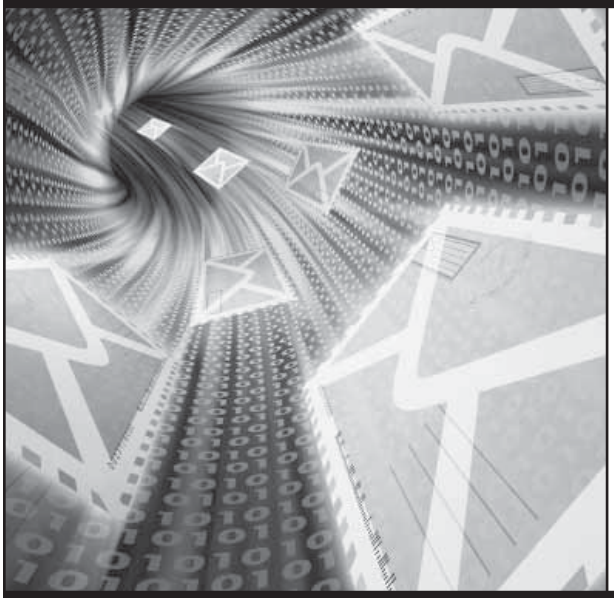
This publication has a varied list of topics and we hope you will have found that it may be not only of interest but also of significance in your practice.

We are again continuing to report the opinions of the State Bar Ethics Committee, which have been issued since the last edition of *One-on-One*.

We again welcome any comments you may have with regard to this publication and appreciate any criticism that you may wish to express. As noted in the past editions, we welcome any articles that you have written or would like to write which you believe may be of interest to the general practitioners.

Martin Minkowitz

Request for Articles



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

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Dangers Lurk for Providers of Professional Services to Fiduciaries, Even After They Have Been Paid in Full

By Stephen Hochhauser

I. Introduction

If you think you are home free when you receive a check from a fiduciary in full payment of your bill for services to an estate or trust, you are mistaken. There are dangers lurking in the SCPA that practitioners should know about. This is especially true where it has been many years since the services were rendered and payment was received, and the practitioners who performed the services may be dead, retired or otherwise incapable of assisting in the preparation of an affidavit of services.

Unless or until the Surrogate has entered a decree approving the fees, the providers of services face a risk that the fees might not be approved, and that a refund of some or all of the fees may have to be made. Even if the fiduciary and all the beneficiaries do not protest the fee, the Surrogate, *sua sponte*, can examine the matter and rule against the provider.[1]

Modest estates with modest expenditures for professional services are not likely to be bothered either by the Surrogate or by the beneficiaries. But, when a fiduciary accounts for a substantial estate or trust,[2] and lists substantial legal or other professional fees that have been approved and paid, the provider may have to defend the fees whether or not the beneficiaries object.

When a judicial accounting is filed, professional providers of services to the fiduciaries can be required to submit affidavits that justify the fees they received from estates or trusts.[3] The only statutory time limit on judicial accountings is that they may not be rendered less than a year from the date of a decree judicially settling a prior accounting.[4] Guardians appointed under Article 81 of the Mental Hygiene Law must submit annual reports.[5] Final accounts for decedents' estates typically span only a few years from the date of death until the estate is distributed, although in cases where litigation or tax proceedings prolong the administration of the estate, the account may span many years.

However, in the case of trusts which can last as long as permitted under the rule against perpetuities,[6] the costs and expenses of preparing accountings in judicial format militate against rendering frequent judicial accountings. Therefore, voluntary intermediate accountings are not normally filed until the occurrence of an event that warrants an accounting, such as the death or resignation of a trustee, or the death of one of several beneficiaries. Thus, a trustee's account may span several decades.[7]

In view of *Stortecky* (*supra* note 1) and *Lafferty* (*supra* note 1) informal accountings may not serve to protect either fiduciaries or professional providers of services from a subsequent review by the Surrogate of the fairness or reasonableness of their fees. Moreover, since the release provided with informal accountings is only as good as the accounting itself,[8] the release may not serve to protect the fiduciary or the provider if the informal account does not include an affidavit of professional services that provides the beneficiaries with the information they need to evaluate the fees shown as administration expenses.[9]

Where the services were performed many years prior to the accounting proceeding, some or all of the providers' time records and files may have been purged or otherwise lost or destroyed, and there may not be any witnesses with personal knowledge who can explain and justify the services that were rendered. In such a case, if a beneficiary or the Surrogate, *sua sponte*, objects to the fees, and the providers are unable to present adequate evidence to justify what they received, the fiduciary may be in jeopardy of a surcharge, and the service provider may be in jeopardy of a decree directing a refund.[10]

This article will discuss the scope of the Surrogate's right to review and approve professional fees, and, in particular, the problems faced by providers whose services were rendered during an accounting period that spans a decade or more.

II. The Surrogate's Right to Review and Approve Professional Fees

Under SCPA 2110(1) the Surrogates have been given express statutory authority to fix and determine attorneys' fees for services rendered to fiduciaries or other parties interested in the estate, including beneficiaries.[11] SCPA 2110(2) permits the attorney, the fiduciary or an interested party to initiate the proceeding.

There is no special statutory authority permitting the initiation of a proceeding by accountants or other non-attorney providers of services to trusts and estates to fix and determine their fees. Indeed, an attempt by an executor to fix and determine an accountant's fees under SCPA 2110 was dismissed by the Nassau County Surrogate's Court for want of statutory authority.[12]

However, accountants or other providers of professional services who have not been paid can bring an action in Supreme Court or initiate proceedings as

creditors to compel payment of their fees.[13] Otherwise, non-attorney providers of professional services have to wait until an accounting proceeding is filed by the fiduciaries pursuant to Article 22 of the SCPA before they can have their fees reviewed and approved by the Surrogate. In 1994, a New York County Surrogate held that even though a will expressly authorized the engagement of a particular accountant, where the aggregate of the attorneys' and accountants' fees was determined to have been unreasonable, approval of part of the accountant's fee was denied.[14]

Fiduciary accountings can be instituted voluntarily by the fiduciary under SCPA 2210. Fiduciaries can also be compelled to account under SCPA 2205(2) by any one or more of a host of specified individuals, namely: creditors; any interested party; public administrators; a person on behalf of an after-born infant who claims an interest in the estate; the estate of a deceased fiduciary; the surety of a fiduciary required to account; a successor fiduciary or remaining fiduciary after the predecessor fiduciary's letters have revoked; co-fiduciaries who have petitioned for the settlement of their own accounts; or by the Attorney General if any part of the estate may escheat to the state.

Judicial accountings are comprehensive. They set forth all of the estate's or trust's financial transactions, including the payments to all providers of professional services. The petition requests a decree approving all of the acts of the accounting fiduciary, including the fees paid to those providers. If the fiduciary has used estate or trust funds to pay substantial fees to an accountant, the dates of payments and the amounts paid will be listed as administration expenses in the accounting, and the petition and citation seeking court approval of the accounting can and should identify and cite the providers of the services and expressly request that the Surrogate approve those payments. Indeed, some Surrogates will refuse to entertain a fiduciary's petition to settle its account unless the petition and citation name the providers, request that their fees be approved and attach affidavits of services that conform to § 207.45 of the Uniform Rules—Surrogate's Court (22 N.Y.C.R.R. § 207.45).[15]

The fiduciary's failure to cite the service providers will leave the court with no choice other than to surcharge the fiduciary if the fees paid are found to have been unreasonable and excessive.[16]

Thus, unless the estate or trust and the professional fees are relatively small, the attorneys and accountants or their firms who received the fees will be cited and required to file affidavits of services even if many years have elapsed since the services were rendered and payment was made in full. If the service providers no longer have the files and documents that they need in order to support approval of the fees, they are at risk of being directed to refund the fees, and the fiduciary is at risk of being surcharged.[17]

Under SCPA 2110(3), the Surrogate has the express right to direct attorneys to refund amounts paid that are found to be excessive. Article 22 of the SCPA does not contain such express authorizations to direct the refund of unreasonable or excessive accountant or other professional fees. However, under EPTL 11-1.1(b)(22), the fiduciary is authorized to pay only "reasonable and proper expenses of administration," and implicit in the Surrogate's power to approve the fiduciary's account is the right to review those expenditures. Thus, notwithstanding the absence of an express authorization, courts have directed accountants to refund fees that were found to have been excessive or of no value to the estate.[18] Other courts have held that they have broad powers including the power and authority to enter a decree directing refunds to the estate or trust.[19]

The Surrogate's right to review professional services is without regard to the existence of retainer agreements and without regard to the consent of the fiduciaries and beneficiaries.[20] Moreover, there is an implied covenant in all professional agreements with fiduciaries that the fees be reasonable and fair.[21] If the professional fees paid by an estate or trust are found to have been unfair or unreasonable, the Surrogate either compels a refund from the provider or simply surcharges the fiduciary without compelling a refund.[22]

The authority of the Surrogate to disregard retainer agreements is a modification of the general rule that absent fraud, over-reaching or unconscionability, agreements by clients to pay professional fees are enforceable by courts.[23] Thus, if a fiduciary is surcharged for having paid fees that are determined to have been unfair and unreasonable, the fiduciary could seek a refund under a claim of breach of an implied covenant that the fees be fair and reasonable.[24]

III. Special Issues Regarding Payment for Accountants' Services

EPTL 11-1.1(b)(9) and (10) authorize fiduciaries to engage banks or trust companies to serve as custodians for their portfolios of securities. As part of their custodial services, banks and trust companies typically perform routine bookkeeping functions with respect to the securities and cash assets that they hold for the estate or trust, and provide monthly and year-end statements. Thus, there is a high threshold that must be met before accountants' fees can be justified as reasonably necessary.[25] Accountants also have to overcome the general principle adopted in case law that routine tax and financial matters are the responsibility of the fiduciary and the attorneys engaged by the fiduciary.[26]

The engagement of accountants and payments to them will be approved if the services are not routine and require special accounting skills, usually in situations in which the assets include closely held corporations or otherwise require the special knowledge of an accountant.[27] The fact that the accountants were the decedent's accountants appears to be relevant because of their presumed familiarity with the decedent's assets.[28]

If the fiduciary or the attorney elects to engage an accountant to perform routine duties, pays for those services with estate or trust funds and lists the payments as administration expenses in the accounting, unless the services are clearly warranted by the complexity of the trust or estate, a duly diligent beneficiary's attorney is likely to object to those payments, and courts have sustained such objections.[29]

IV. The Criteria for Approval of Fees in a Judicial Accounting Proceeding Are More Extensive Than in an Action for Damages for a Client's Breach of a Retainer Agreement

In an action to recover professional fees from a client for services not involving a trust or estate, "traditional contract principles" apply, although courts do take special care to make sure that the attorney did not take unfair advantage of the client.[30]

In proceedings seeking the Surrogate's approval of professional services paid by a fiduciary, however, the criteria extend beyond contract principles.[31] Judge Brietel's opinion in *In re Freeman* set forth the factors to be considered as follows:

> [T]ime and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability and reputation; the amount involved, and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained, and the responsibility involved.

Many of those factors might not be relevant in a plenary action for the payment of professional fees.

Unless the retainer agreement promises a particular result, or unless the issue is *quantum meruit*, absent fraud, over-reaching or unconscionability, the provider suing for his fees would not have to demonstrate that he produced a favorable result,[32] which is one of the criteria that Surrogates consider.[33]

Whereas private parties are entitled to request and should have to pay for professional services whether or not a court deems them to be reasonably necessary, EPTL 11-1.1(b)(22) authorizes a fiduciary to pay only "reasonable and proper administrations expenses . . . and any reasonable counsel fees he may necessarily incur." However, where a litigious or uncooperative beneficiary causes the fiduciary's counsel to perform extra legal services that would not be required under normal circumstances, that party will not be heard to object to the extra legal fees caused by his or her actions and behavior.[34]

Whether the services were of any particular value to the estate or trust is an issue considered by Surrogates.[35] In a dispute over fees with private parties, however, the fact that the services turned out to be of little or only modest value to the client would not warrant a reduction in an agreed-upon fee.[36]

Similarly, a private party is perfectly free to hire and pay an accountant to perform routine bookkeeping services, but if fiduciaries hire accountants to keep the books of account, reconcile bank and brokerage statements and check the daily fluctuations of the estate's or trust's securities, functions which the fiduciaries are expected to perform themselves, the fiduciaries will be required to absorb the cost out of their commissions.[37]

Whether the fees, though reasonable in the abstract, might be deemed excessive in relation to the size of an estate or trust is an issue which the Surrogate considers.[38] If a private party elects to secure professional help for a relatively minor matter, the fee he contracts to pay will not be reduced based on the amount involved unless the fee in context is deemed to be unconscionable.[39]

Other criteria applicable to the Surrogate's review that would not normally be an issue as between private parties are whether the provider exhibited such skill in performing those services as to warrant the fees it received;[40] whether the provider had particularly impressive professional credentials;[41] and whether the efforts involved any particular difficulties.[42]

If a private party engages an attorney to provide services to a third party, the provider's right to be paid by the party who engaged him is not normally affected. However, where a fiduciary asks an attorney to perform services for the benefit of a beneficiary, the Surrogate would be likely to sustain an objection to the use of trust or estate funds to make that payment.[43]

V. The Statute of Limitations

In New York, the statute of limitations does not start to run against a beneficiary's right to object to the fiduciary's payment of professional fees unless or until the fiduciary's account is submitted for judicial settlement or the fiduciary otherwise repudiates the trust.[44] Even the resignation of a trustee does not commence the running of the statute of limitations unless it is accompanied by a repudiation of the trust.[45]

The obvious reason for this rule is that the trust beneficiaries are not charged with knowledge of the fiduciary's transactions until the fiduciary states and renders an account. While corporate fiduciaries typically provide beneficiaries with monthly statements that reflect the fees paid during that period to attorney or accountant providers of services, the mere fact that an amount was billed and paid does not provide the beneficiary with the kind of information needed to evaluate whether the fees were fair and reasonable.

In order to provide the beneficiaries with the information they need to evaluate professional fees, Surrogates require affidavits of services to be filed along with the fiduciary's account.[46]

An SCPA 2110 proceeding can be commenced at "any time" during the administration of an estate or trust. Thus, attorneys are in a position to protect themselves against having to defend dated services. However, as noted above, trust accountings often span one or more decades, and accountants are not in a position to demand judicial approval of the fees they received except as part of the fiduciary's judicial accounting.

VI. Can Providers Avoid Having to Defend Their Fees Many Years After the Services Have Been Performed Pursuant to Criteria That Are Not Applicable to Their Work for Other Clients?

Under SCPA 2110, attorneys have the statutory right to petition the Surrogate to review and approve their fees whether or not they have been paid. While the statute provides that the petition can be filed "at any time during the administration of an estate," in practice, the Surrogate may refuse to entertain the petition until an accounting is filed, allowing the fees of each attorney to be evaluated in relation to all of the other professional fees paid or sought.[47]

Attorneys are not entitled to compensation for their time in seeking approval of their fees.[48] Thus, the down side of an SCPA 2110 application is that counsel will have to absorb the charges for the preparation of their petition and affidavit of services.

Accountants who do not wish to be in that predicament may protect themselves by demanding at the outset of their engagement that they be allowed to bill and be paid by the fiduciaries or by counsel, who can then treat the accountants' fees as disbursements without listing them as separate administration expenses.

If the attorneys' fee application includes payments to accountants as a disbursement, or if the accounting shows that the fiduciary was reimbursed from the estate for amounts paid to an accountant, and the Surrogate refuses to allow the reimbursement, the attorney or the fiduciary will be at risk, and may be required to absorb some or all of the fees in the same way as other items of expense that are not approved for reimbursement, such as postage, photocopying and the like.[49]

Fiduciaries and attorneys can protect themselves by including in the engagement letter with the accountant a proviso that the fees are subject to approval by the Surrogate. Then, if the Surrogate disallows the disbursement, the fiduciary and the attorneys may seek a refund from the accountant.

Retainers and letters of engagement with fiduciaries and beneficiaries sometimes contain provisions stating that if the Surrogate does not approve the fee for reasons other than the fair value of the services (i.e., a limitation based on the size of the estate, the results achieved or the value to the estate), the provider could seek the balance due from the fiduciary or from the beneficiary-client.

A 1997 decision in the First Department noted that a decision on fees by the Surrogate did not collaterally estop counsel from seeking the balance due from the client individually.[50] However, if there is a hearing with testimony from parties and witnesses, and the Surrogate makes findings of fact, there is every reason to believe that the factual findings will carry over to an action against the client, individually, especially if the rejection is based on findings that the provider exaggerated his time or was guilty of some other transgression.

Settling an account informally with receipts and releases will not prohibit the Surrogate from later examining the fees *sua sponte*. Therefore, in order to bind the beneficiaries, the informal accounting should include affidavits of services with time records and bills attached that describe the services in sufficient detail to warrant a court's enforcement of the releases.

However, if counsel and the fiduciaries incur the cost and expense of preparing an accounting in judicial format with that degree of data and detail regarding professional fees, they might as well prepare a petition and citation and submit it for court approval rather than simply securing beneficiary consent.

VII. Conclusion

Unless or until the Legislature enacts changes to the current state of the law, professional providers of services should understand that their fees are subject to court approval, and should recognize that they have to retain their records and bills, and be prepared to defend their fees, no matter how many years elapse from the performance of the services to the filing of an accounting.[51]

A few helpful practical suggestions in light of the current state of the case law are:

A) Firms which provide professional services should require that before retirement or with-

drawal each member execute affidavits of services for each matter that the member handled for the firm where the firm's fees have not yet been judicially approved. Those affidavits should be stored and maintained together with the retainer agreements, engagement letters, bills and time records. Such a requirement is obviously burdensome and may not be practical if the departure is sudden or unexpected. However, firms with an extensive trust and estate practice should consider the nightmare of having to justify more than a hundred thousand dollars of legal fees without an affidavit of services from anyone with knowledge, and take such precautions as they deem appropriate.

B) If the fees paid to non-attorney professional providers of services are not likely to raise any eyebrows, the cost and expense to the providers of having to prepare affidavits detailing those services might be avoided, at least at the outset, if payments of the fees are treated as disbursements and made with checks drawn on the counsel's or the fiduciary's bank accounts, and not on the trust's or estate's bank accounts. Thus, when the accounting is ultimately filed, the fact that such fees will not be separately identified as administration expenses on Schedules C or C-1, will avoid the need to include affidavits from those providers, at least at the outset. However, if objections are raised to the fiduciary's or counsel's request for approval of their fees (which will result in disclosure of those payments as disbursements), or if the total of fees and disbursements is sufficient to warrant the *sua sponte* intervention of the Surrogate, then the fees may ultimately have to be justified and supported by affidavits.

C) Retainer agreements with professional providers of services should, therefore, be explicit with respect to what the parties' rights are in the event the Surrogate disapproves of all or any part of the professional fees and disbursements.

Endnotes

1. *Stortecky v. Mazzone*, 85 N.Y.2d 518 (1995). *See also In re Lafferty*, 297 A.D.2d 469 (1st Dep't 2002) (sustaining the Surrogate's right to review fees even though they were the result of a negotiated agreement in which the Attorney General participated).
2. Under SCPA 209(6), the Surrogate's Court is given jurisdiction "to determine any and all matters relating to lifetime trusts."
3. *In re Colangelo.* N.Y.L.J., 9/7/06, p. 31, col. 3 (Surr. Ct., Westchester Co) (Accountants required to file an affidavit of services). *See also In re Goodstein*, N.Y.L.J., 2/14/96, p. 35, col. 5 (Surr. Ct., Westchester Co.) (Surrogate reviews all professional fees).
4. SCPA 2208(1)(d) and 3(b).
5. MHL § 81.31.
6. EPTL 9-1.1 (lives in being plus 21 years).
7. *See In re Valente*, 24 A.D.2d 945 (4th Dep't 1965) (the accounting covered a period of 26 years).
8. *In re Capone*, 258 A.D.2d 581 (2d Dep't 1999).
9. *See In re Fechter's Estate*, 25 Misc. 2d 229 (Surr. Ct., N.Y. Co. 1960); *In re Amuso's Estate*, 18 Misc. 2d 936 (Surr. Ct., N.Y. Co. 1959).
10. *See In re James' Estate*, 86 N.Y.S.2d 78 (Surr. Ct., N.Y. Co. 1948) (Surrogate could order refund and was not required to surcharge the fiduciary responsible for the overpayment of fees). In *In re Lange's Estate*, 172 Misc. 437 (Surr. Ct., N.Y. Co. 1939), a payment to an estate creditor in excess of his correct share subjected the executor to a surcharge, but the decree instead directed the executor to secure a refund.
11. SCPA 209 provides for the Surrogate's jurisdiction over lifetime trusts and Surrogates entertain SCPA 2110 petitions dealing with lifetime trusts.
12. *In re Kottle's Estate*, 13 Misc. 2d 220 (1958).
13. *In re Musil*, 254 App. Div. 765 (2d Dep't 1938) (In a proceeding commenced under § 217 of the Surrogate's Court Act, the predecessor to 2101 and 2102 of the SCPA, the Surrogate was directed to determine whether the engagement of accountants was reasonably necessary).
14. *In re Steel*, N.Y.L.J., 4/12/94, p. 24, col. 4.
15. *See In re Colangelo, supra; In re Goodstein, supra; In re Steel, supra.*
16. *In re Acker,* 128 A.D.2d 867 (2d Dep't 1987).
17. *Stortecky v. Mazzone, supra; In re Lafferty, supra; In re Colangelo, supra*; *In re Goodstein, supra*; *In re Steel, supra.*
18. *In re Middagh*, 267 A.D.2d 593 (3d Dep't 1999); *In re Steel, supra.*
19. *See In re James' Estate, supra. See also In re Lange's Estate, supra; In re Stern, supra; In re Dewar's Estate. supra.*
20. *Stortecky v. Mazzone, supra*; *In re Lafferty, supra; In re Meng*, 227 N.Y. 264, 269-270 (1919); *In re Schanzer*, 11 Misc. 2d 893 (Surr. Ct., N.Y. Co. 1958), *rev'd*, 7 A.D.2d 275 (1st Dep't 1959), *aff'd*, 8 N.Y.2d 972 (1960); *In re Nicastro*, 186 A.D.2d 86 (2d Dep't 1992); *In re Gomez, supra; In re Colangelo, supra.*
21. *In re Meng, supra* (retainer agreements with fiduciaries must be fair and reasonable). See Turano & Radigan, N.Y. Estate Administration (1993) § 13.04, p.445 ("No retainer agreement can bind an estate to more than a reasonable fee"). *See also In re Steel, supra.* In *In re Gomez*, 5 Misc. 3d 534 (Surr. Ct., N.Y. Co. 1994), the court directed counsel to file an affidavit of services in support of the fee claimed under a contingent fee agreement between counsel and survivors of the terrorist attack on 9/11 who secured awards from the Victim's Compensation Fund established by Congress. The opinion noted that the creation of the Fund eliminated the contingency and required counsel to prove the value of their services.
22. *In re Badenhausen*, 38 Misc. 2d 698 (Surr. Ct., Richmond Co. 1963) (Executor surcharge for payments to bank for routine record keeping); *In re Acker, supra* (Trustee surcharged for payments to accountant found to be unwarranted).
23. Judiciary Law § 474; *Greenberg v. Remick & Co.*, 230 N.Y. 70 (1920).
24. *See In re Lange's Estate, supra,* where the decree directed the executor to secure a refund. *See also In re Meng, supra*; *In re Steel, supra. See* Turano & Radigan, N.Y. Estate Administration (1993), *supra*.
25. *See In re Valente, supra*, where the Fourth Department acknowledged that the 26 years covered by the accounting might have involved matters that justified the retention of the accountant, but remanded the case to the Surrogate for further review because the accountant's affidavit of services failed to show that the services were reasonably necessary in light of the fact

that a custodian bank had been engaged and received fees for handling the trust's securities.

26. *In re Schoonheim*, 158 A.D.2d 183 (1st Dep't 1990) (routine accounting services are charged against the amounts allowed for attorneys' fees); *In re Acker*, 128 A.D.2d 867 (2d Dep't 1987) (denying approval for accountants' fees that involved routine matters); *In re Oikile*, N.Y.L.J., 12/1/99, p. 31, col. 3 (Surr. Ct., N.Y. Co.) (absent a showing of necessity, counsel must bear the expense of the accountants' fees); *In re Smith*, N.Y.L.J., 1/15/98, p. 36, col. 6 (Surr. Ct., Nassau Co.) (even if there are no objections, the Surrogate can review and charge accountants' fees against the attorneys' compensation); *In re Nugent*, N.Y.L.J., 4/17/95 p. 35 col. 5 (Surr. Ct., Westchester Co.) (absent a showing of special difficulty, there is no cause for counsel to retain an accountant to prepare the accounting whether or not it is in judicial format); *In re Paris*, N.Y.L.J., 9/22/94, p. 33, col. 4 (Surr. Ct., Kings Co.) (routine tax returns are the responsibility of counsel); *In re Steel*, *supra* (despite express authority in the will to engage the accountant, his fee when added to the attorneys' fees could not exceed a reasonable attorney's fee and the Surrogate disallowed a portion of the accountant's fee).

27. *In re Tuttle's Estate*, 4 N.Y.2d 159 (1958) (tax proceedings with the IRS); *In re Berg*, 91 Misc. 2d 939 (Surr. Ct., N.Y. Co. 1977) (the accountant's affidavit of services showed that the services involved the valuation of the estate's interest in a stock brokerage firm, which was beyond the normal scope of the attorney's or fiduciary's function); *In re Greene*, 47 Misc. 2d 140 (Surr. Ct., N.Y. Co. 1965) (allowing some of the accountant's fees based on the nature of the estate's assets, but rejecting fees for tasks that normally could have been performed by fiduciaries or their counsel); *In re Cohen*, N.Y.L.J., 12/5/97, p. 35, col. 1 (Surr. Ct., Nassau Co.) (the estate included shares in real estate limited partnerships but the Surrogate held that approval required a showing that the attorneys did not also charge for those same services); *In re Hanover*, N.Y.L.J., 6/19/98, p. 29, col. 2 (Surr. Ct., Kings Co.) (the court approved some of the accounting fees and applied the rest against the allowance for legal fees).

28. *In re Jadwin*, 58 Misc. 2d 809 (Surr. Ct., Suffolk Co. 1969) (decedent's accountant and his familiarity with the estate assets was a factor to be considered, but the court determined that the bulk of his fee was for services that were personal to the deceased executor and denied those fees).

29. *In re Schoonheim*, *supra*; *In re Acker*, *supra*; *In re Oikile*, *supra*; *In re Hanover*, *supra*.

30. *King v. Fox*, 7 N.Y.3d 181,191 (2006).

31. See *In re Freeman*, 40 A.D.2d 397 (4th Dep't 1972), *aff'd*, 34 N.Y.2d 1 (1974) and *In re Potts*, 123 Misc. 346 (Surr. Ct., Columbia Co. 1924), *aff'd*, 213 App. Div. 59 (4th Dep't 1925), *aff'd without opinion*, 241 N.Y. 593 (1925), and their progeny.

32. *See Summit, Solomon & Feldesman v. Matalon*, 216 A.D.2d 91 (1st Dep't 1995), *appeal denied*, 86 N.Y.2d 711 (1995).

33. *See In re Kaufmann*, 26 A.D.2d 818 (1st Dep't 1966).

34. *In re Matrone*, N.Y.L.J., 4/15/02, p. 23, col. 1 (Surr. Ct., Bronx Co).

35. *In re Middagh*, 267 A.D.2d 593 (3d Dep't 1999) (accountants directed to refund payments for services that were of no value to the estate).

36. *Summit Solomon & Feldesman v. Matalon*, *supra.*

37. See cases cited above in note 20.

38. *In re Kaufmann*, 26 A.D.2d 818 (21st Dep't 1966), *aff'd*, 23 N.Y.2d 700 (1968) (the size of an estate operates as a limitation on the amount approved); *see also In re Wallace*, N.Y.L.J., 7/26/90 p. 29, col. 3 (Surr Ct., Westchester Co.).

39. See 7 NY Jur 2d Attorneys at Law § 178.

40. *In re Brehm*, 37 A.D.2d 95 (4th Dep't 1971); *In re Kentana*, 170 Misc. 663 (Surr. Ct., Kings Co. 1939).

41. *In re Warhol*, 165 Misc. 2d 726 (Surr. Ct., N.Y. Co. 1995), *modified on other grounds*, 224 A.D. 2d 235 (1st Dep't 1996).

42. *In re Gans*, N.Y.L.J., 5/4/93, p. 22, col. 5 (Surr. Ct., N.Y. Co.).

43. *In re Baxter*, 196 A.D.2d 186 (4th Dep't 1994), *leave to appeal denied*, 84 N.Y.2d 808 (1994).

44. *In re Barabash*, 31 N.Y.2d 76, 80 (1972); *In re Taylor's Estate*, 30 A.D. 213 (2d Dep't 1898); *In re Walls' Guardianship*, 179 Misc. 924 (Surr. Ct., Nassau Co. 1942); *In re Beard's Estate*, 141 Misc. 888 (Surr. Ct., Kings Co. 1931).

45. *In re Singer*, 12 Misc. 3d 621 (Surr. Ct., N.Y. Co. 2006), *aff'd*, 30 A.D.3d 211 (1st Dep't 2006).

46. *In re Valente, supra; In re Colangelo*, *supra; In re Goodstein*, *supra*; *In re Berg*, *supra*; *In re Gomez*, *supra*.

47. *In re Will of Mergentime*, 155 Misc. 2d 502 (Surr. Ct., Westchester Co. 1992) (where co-fiduciaries each retained separate counsel the aggregate allowance should not exceed the fee that would have been charged by a single attorney representing both); to the same effect *see In re Kentana*, *supra*; *see also In re Cohen*, *supra*; *In re Steel*, *supra*.

48. *See Estate of Dorothy Kaplan*, N.Y.L.J., 5/15/00, p. 32, col. 6 (Surr. Ct., Kings Co.) (Attorneys are not entitled to charge the estate for the application for approval of their fees); *see also to the same effect Estate of Catherine Gallagher*, N.Y.L.J., 2/2/93, p. 22, col. 4 (Surr. Ct., Bronx Co.).

49. *See In re Diamond*, N.Y.L.J., 10/23/92, p. 26, col. 6 (Surr. Ct., Westchester Co.), *aff'd*, 219 A.D.2d 717 (2d Dep't 1995); *In re Zalaznick*, N.Y.L.J., 11/19/76, p. 11 col. 1 (Surr. Ct., Bronx Co.), *aff'd*, 61 A.D.2d 772 (1st Dep't 1976).

50. *Bomba v. Silberfein*, 238 A.D.2d 261.

51. *In re Middagh*, 267 A.D.2d 593 (3d Dep't 1999) (attorneys' failure to keep good records of their time resulted in a reduced fee).

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Video Surveillance on Public Streets: A New Law Enforcement Tool for Local Governments

By Paul Humphreys

I. Introduction

Since the early 1970s, municipalities across the United States have experimented with video surveillance of public places.[1] Of those municipalities that have implemented public surveillance systems, many dismantle the system after it fails to result in a significant reduction in crime or increase in arrests.[2] Somewhat ironically, increasingly more United States cities are installing large scale public video surveillance systems.[3] Aided by the Federal government, grant money to bolster homeland defense has made implementing video surveillance in public places even more enticing for some municipalities.[4] Although more cities now than ever utilize public video surveillance systems, few cities actually regulate their use.

II. The Law in the Area of Public Surveillance

New York's Attorney General has opined that no laws prevent a municipality from installing a public surveillance system.[5] New York has criminalized unlawful surveillance, but exempts video surveillance systems where the presence of such a system is "clearly and immediately obvious" or where "a written notice is conspicuously placed on the premises stating that a video surveillance system has been installed for the purpose of security."[6] New York also prohibits business owners from installing or maintaining video surveillance in a restroom, toilet, washroom, shower, or hotel room.[7] The legislature does allow for video surveillance of a fitting room, provided that written notice has been conspicuously posted and, in cities with one million or more residents, the notice is in English and in Spanish.[8]

To date, it appears that no state or federal court has addressed the constitutionality of a large scale public video surveillance system. The Fourth Amendment of the U.S. Constitution and article 1, section 12 of the New York State Constitution guarantee that an individual will not be subject to unlawful searches and seizures.[9] Most of the case law interpreting video surveillance focuses on whether an individual who was the target of government surveillance had a reasonable expectation of privacy. The Supreme Court has made clear its test to determine whether a person has a "reasonable expectation of privacy," and generally, a person has no reasonable expectation of privacy in a public space.[10] Although the Court has not specifically opined about large scale video surveillance, its Fourth Amendment jurisprudence suggests that large scale video surveillance of public places may not present a colorable Fourth Amendment challenge.[11] For example, the Supreme Court has stated that "a person . . . on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another."[12] The Southern District of New York has also held that what a person knowingly exposes to the public receives no Fourth Amendment protection.[13]

Although Hawaii's state courts have not outright endorsed a video surveillance system in public places, a Hawaii appeals court did make it clear that it would admit evidence in legal proceedings gained through such a system. The Hawaii Intermediate Court of Appeals refused to suppress evidence captured on Honolulu's public video surveillance system that the defendant claimed constituted an unlawful search under Hawaii's constitution.[14] In *Augafa*, a police officer noted on a public surveillance camera the presence of the defendant, whom he had on a prior occasion arrested on drug charges, sitting in front of a bar but not engaged in any suspicious activity.[15] The officer conducted an outstanding arrest warrant search and discovered that defendant had several outstanding traffic warrants.[16] During the arrest, a cocaine rock fell from the defendant's hands.[17] The Intermediate Court of Appeals of Hawaii rejected the defendant's "fruit of the poisoned tree" argument and overruled the district court's holding that in the absence of state or local enabling legislation for this type of technology, the court had to suppress the evidence.[18] The appellate court reasoned that even if the defendant had had a subjective expectation of privacy, his expectation was not objectively reasonable because he was in public view on a public street where the presence of others could have reasonably been anticipated.[19] Since the defendant's expectation of privacy was not objectively reasonable, the court refused to suppress the video surveillance tapes or any evidence gained as a result of viewing the defendant on the public surveillance camera.

No New York case law addressing the implementation of a municipality's video surveillance program has been found, but the Third Department has held that one has no reasonable expectation of privacy when actions he exposes to the plain view of the public are recorded on video.[20] In *Wemette*, the defendant's neighbor videoed the defendant on his front porch with his genitals exposed and wearing only his socks.[21] At his trial for public lewdness, the County Court denied the defendant's motion to suppress, in which he argued that because his neighbor, acting as an agent of the police, had filmed him without a video surveillance warrant, the court must suppress the video evidence.[22] The Third Department upheld the trial court's decision and reasoned that regardless of whether the neighbor

had acted as an agent of the police, because the neighbor had merely videoed actions that the defendant had exposed to the public, "there was no infringement of any reasonable expectation of privacy."[23]

While statutory provisions regarding public video surveillance are scant, New York, along with other states, has legislated in a similar area of the law by empowering municipalities to develop and maintain traffic cameras.[24] New York Vehicle and Traffic Law provides that a city with a population of one million or more may "install and operate traffic-control signal photo-monitoring devices at no more than fifty intersections within such city at any one time."[25] Any city that adopts such a traffic management system must submit a report to the governor that includes the location of the traffic cameras, the number of violations recorded, the amount of fines collected, the number and results of violations adjudicated, and the quality of the adjudication process.[26] The legislature first enacted this traffic law in 1988, and the law has not yet been challenged in court. Even though traffic cameras and public surveillance cameras serve different functions, the traffic camera legislation may provide a snapshot of what components the state might one day include in public video surveillance legislation—reporting requirements, location limitations, and evaluation criteria.

III. Issues Related to Public Surveillance

While public video surveillance is becoming commonplace for many large and small municipalities, legal scholars and civil libertarians have voiced concerns about video cameras located in public places. As technology advances and allows for better quality images, digital storage of images for an indefinite period of time, and possibilities of biometric identification systems, scholars and concerned citizens have expressed the need for government regulation of video surveillance systems.[27]

A. The Fourth Amendment and the Right to Privacy

Much of the criticism of public surveillance systems focuses on the right to privacy built into the Fourth Amendment's prohibition against illegal search and seizure. As noted above, most case law in this particular area deals with individualized surveillance rather than public video surveillance. Video surveillance of public spaces doubtfully violates any Fourth Amendment principles because, as noted in *Katz*, one has no reasonable expectation of privacy in public.[28] "Where defendants have complained of being filmed in public environments, courts have almost always found the Fourth Amendment inapplicable."[29] State courts interpreting their own constitutions have also adopted a similar stance that a person enjoys no right to privacy in public.[30]

B. Public Surveillance and the First Amendment

Another area of concern for scholars and civil libertarians includes the opportunity for a public video surveillance system to infringe upon one's First Amendment rights, namely, the right to free expression and the right to free association. The American Civil Liberties Union (A.C.L.U.), the New York Civil Liberties Union (N.Y.C.L.U.), and The Constitution Project have noted that the current state of technology that allows video information to be kept and indexed allows local governments to track individuals of interest. Rights groups also fear that because cameras are generally located in public places where people may freely associate, may protest and may engage in free speech, the idea that a person's acts are being recorded might chill a person's ability to engage in constitutionally protected activities.[31] Other scholars also caution that video surveillance systems and the ability to track someone's movements throughout an entire city threaten the right to remain anonymous.[32]

C. Bias and Public Video Surveillance

"Zoom" and "tilt" features on modern cameras in a large surveillance network present opportunities for system operators to act either consciously or subconsciously on their own biases. The fact that one's movements may be closely tracked by modern video equipment coupled with the potential for abuse give rise to civil libertarians' demands that public video surveillance systems have strict monitoring and oversight procedures.[33]

D. Effectiveness of Public Video Surveillance

Several studies and reports have suggested that public video surveillance systems are not as effective at deterring crime as may have once been thought. The N.Y.C.L.U. reported in its report "Who's Watching?" that the effectiveness of public surveillance cameras in New York City may have had a negligible effect in lowering the crime rate.[34] In its 2003 Video Surveillance Report to the U.S. House of Representatives, the United States General Accounting Office also questioned the effectiveness of public video surveillance and noted that most of the data about effectiveness is largely anecdotal, not empirical.[35] This report further stated that because so many other factors affect the crime rate, it is very difficult to state with any certainty a causal connection between a decline in criminal activity and the presence of video cameras.[36]

IV. What Other Cities Have Done

A handful of municipalities have passed legislation that enables the police department or other city officials to establish and regulate a public video surveillance system. The Washington, D.C., City Council has enacted comprehensive regulations to govern the Metropolitan Police Department's (MPD) use of the

city's video surveillance system. Cameras may be used to "help manage public resources during major public events and demonstrations" and to help coordinate traffic.[37] Section 2502 provides that the MPD must notify the public when it plans to deploy video surveillance cameras and allows a 30-day period for the public to submit comments to the Chief of Police regarding placement of the cameras.[38] The MPD must provide at semi-annual meetings updates to the public pertaining to the video surveillance system.[39] The District has also provided system usage guidelines that detail what an operator may actually view while using the video surveillance system. Operators may not target or observe individuals based solely on their race, gender, sexual orientation, ethnicity, disability, or other classifications protected by law.[40] Additionally, operators may not use audio in conjunction with the video surveillance system in the absence of the appropriate court orders or focus on handbills, fliers, or other materials being distributed or carried by individuals exercising their First Amendment rights.[41] Operators who violate any of the usage policies may be subject to criminal prosecution and/or administrative sanctions, which may include termination.[42] In the absence of written approval by the Chief of Police, the MPD may only keep video recordings for 10 business days and then recordings must be either destroyed or recorded over.[43] Reasons for which recordings may be kept include use in training exercises, use as evidence of criminal activity, and use as evidence of an occurrence that may subject the MPD to civil liability.[44]

The San Francisco City Council has developed the Community Safety Camera Ordinance, which includes limitations on the location of cameras, notice requirements, reporting requirements, and procedures for law enforcement to gain access to video recordings.[45] The San Francisco ordinance also creates a balancing test for whether a camera may be installed in a particular location. To gain approval to install a camera, the city must show that the camera will be placed in an area of substantial crime where "the potential to deter criminal activity outweighs any concerns asserted by the affected community, and there exists significant support from the affected community for the camera."[46] The Police Commission must notify citizens at least 20 days before a public hearing to consider installing a new camera.[47] Notice of a hearing and placement of the camera must be posted in the neighborhood of the proposed camera location.[48] Only San Francisco Police Department members may obtain copies of video recordings through a written requisitioning process.[49] Other agencies requiring access to video recordings must obtain a court order.[50]

Stamford, Connecticut, has enacted legislation similar to San Francisco's. The Stamford ordinance creates a Public Safety Camera Review Committee that consists of various elected and appointed local government officials. The Committee may approve a camera if the purpose of installing a camera in a public place falls within three limited categories—traffic monitoring, homeland security, and law enforcement and crime prevention.[51] The Stamford ordinance provides that video feeds may be obtained by court order, subpoena, or proper Freedom of Information Act request.[52] Finally, until a policies and procedures manual has been adopted and approved by various city officials and the city Board of Representatives, cameras may be used only for traffic monitoring.[53]

Other cities have installed public video surveillance system in the absence of enabling or regulatory legislation. For example, Chelsea, Massachusetts, partnered with the United States Department of Homeland Defense to install cameras throughout town to monitor criminal activity as well as highly trafficked bridges that could be of interest to terrorists.[54] According to Chelsea's city manager, the city did not need to enact legislation to enable the city to undertake implementing a video surveillance network.[55] Through approving the funding, the Chelsea City Council enabled the city to install its surveillance cameras.[56]

V. Conclusion

Currently, no federal or state statute prohibits a municipality in New York State from creating a public video surveillance network. While neither the New York state courts nor the United States federal courts have fully considered a public surveillance network, the courts have made it clear that one's right to privacy in a public place is severely limited. Interests to consider surrounding public surveillance systems include access to recorded data, oversight, notice, and effectiveness. San Francisco's Community Safety Camera Ordinance and Washington, D.C.'s video surveillance regulations seem to most effectively address each of the aforementioned concerns.

Endnotes

1. Quentin Burrows, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, Note, 31 VAL. U.L. REV. 1079, 1103-1111 (1997).
2. *Id.*
3. David A. Fahrenthold, *Federal Grants Bring Surveillance Cameras to Small Towns,* WASH. POST, Jan. 19, 2006, at A1.
4. Fahrenthold, *supra* note 3, at A1.
5. 1997 N.Y. Op. Att'y Gen. (Inf.) 1112 (1997). Updated research has revealed no legislative action in the area of large scale video surveillance in public places. *But cf.* S.B. 4157, 2007 Leg., 230th Sess. (N.Y. 2007) (amending New York education law and traffic law to mandate installation of video cameras on all new New York City school buses); A.B. 4628, 2007 Leg., 230th Sess. (N.Y. 2007) (amending New York education law to require New York City high schools to install video surveillance cameras at entrances).
6. N.Y. PENAL LAW §§ 250.45, 250.65 (McKinney 2007). The legislature characterizes unlawful surveillance as viewing, broadcast-

ing, recording, selling, or disseminating images of a person's "intimate parts" at a time or place when the person has a reasonable expectation of privacy and without consent. A place where one has a reasonable expectation of privacy is defined as a place where a "reasonable person would believe that he or she could fully disrobe in privacy." *See also* S.B. 2838, 2007 Leg., 203th Sess. (N.Y. 2007). Senate Bill 2838 seeks to expand the definition of public surveillance and to criminalize the unlawful sale or distribution of public surveillance images.

7. N.Y. GEN. BUS. § 395-b(2-a) (McKinney 2007).
8. *Id.* at § 395-b(3)(b).
9. U.S. CONST. Amend. IV; N.Y. CONST. Art. I, § 12.
10. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J. concurring). The Supreme Court has subsequently used the test from *Katz* developed in Justice Harlan's dissent. To determine whether a person has a right to privacy in a public place, the court undertakes a two-part inquiry: 1) did the person exhibit a subjective expectation of privacy? and 2) was the person's expectation objectively reasonable based on societal standards of privacy?
11. *But cf.* Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 252–3 (2002). A public video surveillance system might not present a Fourth Amendment challenge, but a public video surveillance network with the capacity to record *audio* in addition to visual material would have both First and Fourth Amendment implications. *See* 1997 N.Y. Op. Att'y Gen. (Inf.) 1112 (1997) ("Any surveillance that includes an audio component would fall within the definition of [eavesdropping] and the warrant requirements for eavesdropping would apply.").
12. *United States v. Knotts*, 460 U.S. 276, 281 (1983).
13. *United States v. Glisson*, 2003 U.S. Dist. LEXIS 12633, at *5 (2003) (refusing to suppress video surveillance of a liquor store that recorded defendant's alleged drug activities).
14. *Hawaii v. Augafa*, 992 P.2d 723, 728 (Haw. Ct. App. 1999).
15. *Id.* at 726–8.
16. *Id.*
17. *Id.* at 727.
18. *Id.* at 726–9.
19. *Id.* at 733–5.
20. *People v. Wemette*, 285 A.D.2d 729, 728 N.Y.S2d 805, 807 (3d Dep't 2001).
21. *Id.* at 729, 728 N.Y.S.2d at 806.
22. *Id.* at 729, 728 N.Y.S.2d at 807.
23. *Id.*, 728 N.Y.S.2d at 807.
24. *But see generally* N.H. REV. STATE ANN. § 236:130 (2007) (prohibiting the state of New Hampshire or its subdivisions from using a camera or imaging device to determine the ownership of a motor vehicle or the identity of the vehicle's occupants on the state's roadways); *Minnesota v. Kuhlman*, 729 N.W.2d 577 (Minn. 2007) (holding the Minneapolis ordinance that created a system of photo enforcement of traffic signals invalid because the ordinance was preempted by a Minnesota state act).
25. N.Y. VEH. & TRAF. LAW § 1111-a(a) (McKinney 2007). Photo-monitoring device includes videotape or other recorded images.
26. *Id.* § 1111-a(m)(1)–(7).
27. *See generally* GUIDELINES FOR PUBLIC VIDEO SURVEILLANCE: A GUIDE TO PROTECTING COMMUNITIES AND PRESERVING CIVIL LIBERTIES, THE CONSTITUTION PROJECT (2006); aclu.org, What's Wrong with Public Video Surveillance?, http://www.aclu.org/privacy/spying/14863res20020225.html (last visited June 1, 2007).
28. 389 U.S. at 360.
29. Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1378-80 (2004).
30. *Id.*
31. GUIDELINES FOR PUBLIC VIDEO SURVEILLANCE: A GUIDE TO PROTECTING COMMUNITIES AND PRESERVING CIVIL LIBERTIES, THE CONSTITUTION PROJECT, *supra* note 27, at 11.
32. Slobogin, *supra* note 11, at 237–312.
33. NEW YORK CIVIL LIBERTIES UNION, WHO'S WATCHING? VIDEO CAMERA SURVEILLANCE IN NEW YORK CITY AND THE NEED FOR PUBLIC OVERSIGHT at 13–16.
34. *Id.* at 5–6.
35. GENERAL ACCOUNTING OFFICE, GAO-03-748, VIDEO SURVEILLANCE, INFORMATION ON LAW ENFORCEMENT'S USE OF CLOSED-CIRCUIT TELEVISION TO MONITOR SELECTED FEDERAL PROPERTY IN D.C. 30-1 (2003).
36. *Id.*
37. D.C. MUN. REGS. tit. 24, § 2500.1 (2007); 49 DCR 11443 (2007).
38. D.C. MUN. REGS. tit. 24, §§ 2502.1, 2502.3; 49 DCR 11443.
39. D.C. MUN. REGS. tit. 24, § 2502.8; 49 DCR 11443.
40. D.C. MUN. REGS. tit. 24, § 2501.4; 49 DCR 11443.
41. D.C. MUN. REGS. tit. 24, §§ 2501.6, 2504.4; 49 DCR 11443.
42. D.C. MUN. REGS. tit. 24, § 2503.3; 49 DCR 11443.
43. D.C. MUN. REGS. tit. 24, § 2505.5; 49 DCR 11443.
44. D.C. MUN. REGS. tit. 24, § 2505.6; 49 DCR 11443.
45. SAN. FRAN., CAL., ADMIN. CODE, § 19 (2006).
46. *Id.* at § 19.4 (a)–(d).
47. *Id.* at § 19.4 (b).
48. *Id.* at § 19.5.
49. *Id.* at § 19.6.
50. *Id.* at § 19.6(d).
51. STAMFORD, CONN., CODE ch. 7, sec. 2 (2007).
52. *Id.* at ch. 7, sec. 2 (E).
53. *Id.* at ch. 7, sec. 4.
54. Suzanne Smalley, *Chelsea to Mount Security Cameras Citywide*, BOSTON GLOBE, June 4, 2005, at A1.
55. Telephone interview with Jay Ash, City Manager, City of Chelsea, MA (June 1, 2007).
56. *Id.*

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Understanding Your Jury's Point of View

By Harry Plotkin

Perhaps the most important and simplest principle of juror decision-making is the reality that every juror enters the courtroom with a unique point of view. At the very least, this point of view will color how that juror views a case and will influence how likely he or she is to believe certain types of cases. At the worst, a juror's point of view will limit the types of case elements he or she is able to believe and may make it nearly impossible for even the best attorney to sway that juror to accept a world that conflicts with the juror's point of view. Though some jurors are more open-minded and pliable than others, every juror's point of view creates predispositions that strongly influence how he or she will view your trial in a way that your evidence and best efforts at persuasion cannot.

Although rarely simple, understanding juror predispositions and becoming adept at selecting a jury are skills that trials are won and lost upon. In this article, I will discuss some ways to understand juror predispositions and decision-making and will offer some insights on understanding how jurors might react to your case.

The first, and most important, lesson to understand about jurors is that their predispositions and biases will always outweigh your best evidence. One of the most common (and fatal) miscalculations made in trial strategy is relying heavily on the persuasive power of evidence and underestimating the power of juror bias and cognitive decision-making in the first moments of trial, when jurors are the most open to persuasion.

Never assume that jurors make informed decisions on the basis of the evidence. In reality, juror attitudes and verdicts are shaped much more by the biases they bring into the courtroom that predispose them to choose one side's case over the other.

The trial is ultimately about jurors making choices between the versions of reality offered by the plaintiff and the defense. Although the justice system demands that jurors make these choices based solely on an objective view of the evidence presented, cognitive psychology understands that this is impossible; in interpreting information and making judgments and decisions, jurors are forced to rely on their cognitive framing of the case to make these choices, and the jurors' framework of the case colors their interpretation of the evidence to fit their preconceived ideas.

For example, if a juror goes into trial believing that doctors are honest, benevolent, highly trained and competent, this juror will almost certainly justify plaintiff's evidence of malpractice in a manner favorable for the doctor. To this juror, it is more likely that the evidence was manufactured, taken out of context, has a reasonable explanation, or is the result of an honest mistake than convincing evidence of malpractice.

Because the presentation of evidence comes long after the jurors have heard what the case is about and who is involved, the jurors build the framework that determines how they view the evidence based largely on biases and predispositions. As illogical as it may seem, jurors determine what happened on the basis of what they believe is more likely to have happened in a given situation rather than waiting for the evidence to speak for itself.

Take the example of an insurance bad-faith case. Logically speaking, everyone would agree that there are some situations in which insurance companies mistreat policy holders and some situations in which policy holders mistreat their insurer. Anyone would agree that the best way to determine who is at fault in any given case would be to examine the evidence: the insurance policy, the claims, and evidence of damage and how both parties interacted. In practice, jurors never evaluate the evidence objectively; having formed impressions of credibility and what is more likely to have happened before they view the evidence, jurors use their predispositions to make the evidence fit their framework.

In insurance bad-faith cases, some jurors are predisposed to trust insurance companies and mistrust plaintiffs. These jurors may have positive experiences with insurance companies, may work for an insurance company, may have negative attitudes toward plaintiffs, view lawsuits as "frivolous," or may belong to a personality type known as "authoritarian" that blindly trusts institutions. If asked prior to trial, these jurors would tell you that it is far more likely for a claims holder to exaggerate claims and defraud an insurance company than for an insurance company to refuse to pay claims they are entitled to pay. Another group of jurors will be predisposed to distrust the insurance company; they likely have had negative experiences with insurance companies and negative attitudes toward large corporations in general. These jurors likely view corporations as greedy, unethical, and profit-driven, and will find it much more likely for an insurance company to defraud its policy holders than vice versa. These pre-trial attitudes will be far more influential in shaping the verdict than the evidence itself. These prior experiences and deep-seated beliefs determine what a juror will readily believe. Once predisposed, a juror is very difficult—if not impossible—to rehabilitate and to persuade to believe something that does not fit his or her view of the world.

In your next trial, think about your case not in terms of the evidence, but instead in terms of the arguments involved, and think about the type of experiences and attitudes that would predispose a person to find

your account of what happened a more likely scenario than that of opposing counsel.

A second important lesson to understand about jurors is that in order to understand their point of view, you need to ask probing questions in *voir dire* and avoid making assumptions.

Never assume that all jurors are logical. Many are anything but. No matter how strong your case may be and how airtight your evidence in supporting or disputing liability, there will be jurors out there who are strongly predisposed to be against you. Never assume that all jurors will agree with your strongest points, even if your evidence is compelling and the opposition has nothing to dispute it. All it takes for a juror to disagree with you is for your case to clash with their version of reality, skewed by a single fluke experience. As illogical as it may be, your strong evidence itself can destroy your credibility, in that juror's mind, by conflicting with their skewed vision of how the world works.

How can your credibility be breached, even in a slam-dunk case with strong, undisputed evidence? If a juror has had any experience that tells him or her reality is different from the one your evidence suggests—perhaps they survived a car crash at 50 mph without a scratch, while your client is paralyzed from a low-speed fender bender—your logical evidence seems illogical to them. If your juror has any reason to mistrust your honest client—perhaps you represent one of Fortune 500's top companies to work for, yet the juror has had a string of bitter employment experiences—your honest company will be assumed to be dishonest (along with their evidence and testimony) by the juror.

Notice, however, that the key to understanding juror bias and predisposition is not the experiences themselves, but rather how jurors interpret those experiences, how they feel about them, and how they react to and deal with them. Not all jurors who survive violent car crashes are pro-defense; those who recognize that lesser crashes often cause serious injury, understand how lucky they are, and drive much more carefully now may very easily be pro-plaintiff. Not all jurors who have been fired and discriminated against are pro-plaintiff. Some may recognize that they had uncommonly bad managers and maintain an optimistic view of employers and the world. Some may be practical or optimistic by nature and shrug off any trauma or resentment. Some might take some personal blame for those negative experiences—perhaps they shouldn't have taken the job in the first place, or should have quit their job earlier—learned from them, and now expect others to do the same. All three of these jurors may be strongly pro-defense, despite their negative experiences, simply because of their outlook.

By the same token, never make assumptions about your jurors based on superficial traits. Although occupation, age, education, income, political and religious views, and even personality type may provide clues to how a juror might think, it is much more important to gain an understanding of your jurors' approach to the issues and situations that come up in trial. If your juror has a vastly different set of experiences, values, or approaches to the issues and situations at trial than you might expect from someone like him or her, that juror will have a vastly different set of biases and predispositions too.

Don't always expect your jurors to follow the "industry standard" within their fields. Most real estate developers are strongly protective of the principle of due diligence and are highly critical of plaintiffs with fraud claims who barely looked at a piece of property and refused to hire a professional inspector or appraiser, but some aren't. Make sure to ask them what their approach is to buying or selling property, because any whose approach matches the plaintiff's more so than the defendant's will, obviously, have pro-plaintiff dispositions.

How is a surgeon going to judge a pathologist's diagnosis in a medical malpractice trial? How is a personnel manager going to judge claims of employment discrimination or wrongful termination? How is a secretary, waitress, or flight attendant going to judge allegations of sexual harassment? As tempting as it may be to fall back on assumptions and stereotyping, the best way to make an informed decision about a juror is to ask about his or her unique approach to a given situation. Perhaps the stereotype might fit, or perhaps that juror has a wildly different philosophy.

In the latter example, there are a variety of approaches to sexual harassment by jurors who are exposed to high levels of it. Some have experienced it and are outraged; some brush it off and minimize the emotional impact. Some have been exposed to the worst kinds of harassment and yet never bring it to court, preferring to deal with it in other ways; these jurors may be outraged by the plaintiff's litigious approach. Some may believe that they can prevent harassment by changing their dress or tone and may blame victims for failing to be equally pro-active ("look at what she was wearing!"), while others may feel completely powerless and non-judgmental toward victims. In every type of case, the key is in finding out which jurors agree with your client's approach and which diverge.

The lesson to be learned here is to never judge your jurors based on a superficial examination of their experiences or traits. Experiences are just the jumping-off point in *voir dire* and in gaining an understanding of how your jurors think. Much more important is to dig deeper and probe how they feel about those experiences, how they dealt with them, and what they have learned from them. Not all car crash victims, accountants, jurors who have been fired, homeowners, or even tort-reform jurors think alike.

A third and final lesson to understand about jurors is that some jurors are less open-minded than others, and it is important to identify these jurors during jury selection.

On any given panel of potential jurors, there will be a handful of jurors who may be so hyper-predisposed against the facts of your case that they might be impossible for you to win over. Beyond biased, there are jurors on every *venire* panel whose view of the world is so inflexible that they literally cannot accept the POSSIBILITY of situations that conflict with their worldviews. Identifying and removing these jurors from your panel is essential, but the identifying part is trickier than it may seem.

Jurors who have biases against certain types of people and situations—a juror who has a distaste for corporations or lawsuits, for example—are relatively easy to identify because people are usually consciously aware of things they DISLIKE. With these jurors, the identifying is easy but the removing part is challenging.

On the other hand, jurors whose worldviews are uncompromisingly rigid—we'll call them "inflexible jurors"—are rarely if ever aware that their view of the world is a constructive bias that will color how they view a trial. These jurors don't dislike the litigants or what they represent, but when one side presents a situation that conflicts with their view of the world, an inflexible juror will be completely unable to imagine and accept the possibility of that situation being a reality and will reject it as false, no matter how strong the evidence. My favorite example is the juror who can never imagine a doctor making a mistake in judgment; these jurors hold doctors in such high esteem that they are literally incapable of second-guessing doctors and rendering plaintiff verdicts in medical malpractice trials. And yet most (if not all) inflexible jurors are completely unaware that their worldview is a constructive bias and unaware of how uncompromising their worldview is. As such, inflexible jurors are challenging to identify during *voir dire*. You cannot simply ask them if they could find against a doctor, a corporation, or an injured plaintiff because they are completely unaware that they cannot, let alone why.

Instead, ask potential jurors questions about their view of the world. Are corporations honest? Do plaintiffs exaggerate or lie? Have you ever seen a co-worker fake an injury or disability to get out of work? Have you ever heard of a police officer arresting and charging someone with insufficient evidence? Ask jurors about their experiences and impressions of the world to get a sense of what they believe is likely and prevalent and what is rare or impossible. In criminal trials, you'll find that some inflexible jurors are incapable of believing that a police officer could make an error in judgment, intentionally or not, or that the justice system may be flawed. Such a juror may not be able to admit it directly, but they won't be able to cite a single example of police abuse, a false arrest, inappropriate charging of a defendant, or a single law that they would change, and you'll find that they cannot conceive that a good person could ever commit a crime.

An even more insightful way of identifying inflexible jurors on your panel is to ask questions about your jurors' approaches to case issues. Inflexible defense jurors in medical malpractice cases are those who have never sought a second opinion, double-checked or disagreed with a doctor's diagnosis or treatment plan, or asked a doctor for alternative options or to explain his or her reasoning. Instead, they tend to follow their doctors' instructions implicitly without questioning, and their approach reveals a blind trust in doctors that suggests a worldview that doctors don't make mistakes.

The blinders that handicap inflexible jurors go far beyond the standard predispositions that every juror has. Again, every juror is guilty of determining what happened in a given trial on the basis of what they believe is more likely to have happened in a given situation rather than waiting for the evidence to speak for itself. For most jurors, these predispositions can be overcome with overwhelming evidence or persuasive trial presentations (although with great difficulty, so it's much wiser to remove them in jury selection). Inflexible jurors cannot be rehabilitated. They believe that certain situations are not only less likely but are actually not realistically possible. For example, there are inflexible defense jurors in auto accident cases who truly believe that a cautious, defensive driver should be able to avoid or prevent accidents in any situation; these jurors will actually construct a theory that the plaintiff was somewhat responsible for the accident without any supporting evidence.

Keep in mind that inflexible jurors are not so much a demographic group as a view of the world on a particular topic. Every juror is capable of being an inflexible juror given the right set of facts and situations, and a juror who is inflexible in one type of case may not be on a different case. Some types of jurors—conventional personality types, especially—are more prone to inflexibility, but you should treat every juror as potentially inflexible in any given case.

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Civil RICO: What the Mob Movies Never Told You

By Alexandra Harrington

As is frequently the case among aspiring lawyers, many of the impressions and assumptions that I brought with me to the first day of law school orientation were based on dramatic scenes from television and the movies. Over the years, most of these impressions are either dashed as creative works of fiction or tempered to reflect the reality of courtroom decorum, procedure, and the elements of various crimes. Interestingly, there is one concept from any mob movie which haunts most law school graduates well after the ink on their bar exam essays has dried: RICO is useful only to prosecute mobsters and the occasional drug lord. The goal of this article is to change this common belief about the Racketeer Influenced and Corrupt Organizations Act laws, particularly as they relate to civil actions, and their use in litigation.

Perhaps the best way to understand RICO as a whole is to understand what it is not. RICO is not purely criminal or purely civil—there are separate laws codifying conduct which rises to the level of criminal RICO and which qualifies as civil RICO. The use of civil RICO in litigation is not necessarily tied to a criminal RICO prosecution of the same actors for the same conduct.[1] Although it is certainly possible for a civil RICO litigation to occur after convictions have issued under the criminal RICO laws, it is not necessary.[2] Civil RICO does require the allegation of a qualifying criminal act; however, this allegation is not held to the same standard as a criminal prosecution for the same alleged violation and there is a lower threshold of criminality necessary to sustain a civil RICO action.[3] The use of civil RICO in litigation is neither easy nor a guaranteed path to victory, but it is a viable option, even in unlikely cases, and provides a diligent and successful proponent treble damages for his client's trouble.[4]

"RICO is not purely criminal or purely civil—there are separate laws codifying conduct which rises to the level of criminal RICO and which qualifies as civil RICO."

The elements of a civil RICO case are fairly straightforward. No matter how well crafted, no civil RICO case will stand unless there is a successful allegation of two or more predicate offenses.[5] The list of qualifying predicate offenses is set out in 18 U.S.C. § 1961 and is lengthy. Two of the most common predicate offenses are mail fraud under 18 U.S.C. § 1341 and wire fraud under 18 U.S.C. § 1343. As will be discussed below, the willingness of courts such as the United States Court of Appeals for the Second Circuit to include electronic communications within the scope of these predicate offenses has expanded the types of cases in which it is feasible and reasonable to examine including a civil RICO charge in litigation.

In addition to two or more qualifying predicate offenses, the elements of civil RICO are: 1) the allegation of a "person" involved in the conduct complained of, meaning either individuals or a corporate entity; 2) a pattern of predicate acts, meaning that these acts were committed within a certain time frame; and 3) a qualifying "enterprise," meaning the collaboration of the persons involved in order to further and / or accomplish the predicate acts alleged.[6] If these elements are established, 18 U.S.C. § 1862 provides several avenues of wrongful conduct which can be alleged to take the complaint from theoretical creation of a civil RICO violation to a legitimately alleged violation of the RICO laws.[7] Again, it bears repeating that in order to successfully litigate a civil RICO claim, it is not necessary to have a criminal conviction or ongoing prosecution for the qualifying predicate offenses alleged. However, a civil RICO case which alleges predicate offenses for which the defendants have been tried and not convicted is likely to be dismissed and threatens counsel and plaintiff with court-imposed sanctions.[8]

By now, many readers will wonder what types of cases have been successfully brought under civil RICO laws. Although much civil and criminal RICO prosecution is brought to counter organized crime and drug-related activities, it is interesting to note that a great many civil RICO cases have been successfully brought in the areas of white collar crime. Notable examples include banking and bank fraud[9] and commercial transactions gone wrong.[10] Successful civil RICO claims are not limited to the realm of large corporations, well-heeled clients, or large law firms; in fact, one of the more interesting civil RICO cases was brought by a single woman, without ample means, against a large banking operation.

This is not to suggest that a civil RICO case should be entered into lightly—the risk of court-imposed sanctions exists and civil RICO claims require involved pleadings which evidence thorough research of the evidence available to plaintiff's counsel. Nor should the lure of treble damages be enough to entice you to file a civil RICO claim which is at all dubious in your own mind. These caveats aside, the civil RICO laws exist to

punish all manner of concerted wrongful conduct and are an important tool in any litigator's overall tool box.

As mentioned previously, civil RICO's predicate crimes are changing in a way which makes it imperative for lawyers—particularly young lawyers, who are often more involved in reviewing client documents and general discovery—to be aware of the potential application of civil RICO across a broad spectrum of conduct. In the "electronic age," commercial and business transactions have changed dramatically. In-person meetings between merchant and customer, banker and account holder—to name just a few relationships—have increasingly devolved into quick exchanges over e-mail and text messaging. Discussions during in-person meetings, which were once subject to the limits of personal recollection and often became a matter of he-said-she-said proof at trial, are memorialized through electronic transmission on a routine basis. It is now easier for businesses to send and receive purchase orders, contracts, and other commercial papers via facsimile than to physically deliver them. As counselors in the Second Circuit, lawyers must know that the Second Circuit takes a very liberal view of the application of mail and wire fraud statutes to e-mail, Internet usage generally, and the use of facsimile transmissions. Given that the crux of your client's claims will likely be demonstrated through retained e-mails and attachments, electronic communications generally, and facsimiles now and in the future, a basic understanding of the civil RICO laws will allow you to evaluate these records—which were often the stumbling block to civil RICO claims surviving motions to dismiss in the past—with an eye toward whether they could be used to support a civil RICO claim.

"[T]here are advantages and dangers to the use of a civil RICO claim, but they are only advantages and disadvantages if you know how to use a civil RICO claim."

In sum, there are advantages and dangers to the use of a civil RICO claim, but they are only advantages and disadvantages if you know how to use a civil RICO claim. In practice, there are very few times when law mirrors its portrayal on television and in the movies. But, just like you would not rule out a murder defense because you saw it in "Matlock," you should not rule out the potential application of a civil RICO charge for your client because you saw it in a movie.

Endnotes

1. *See* 18 U.S.C. §§ 1962, 1964 (2006).
2. *See id.*
3. *See id.*; *see also* PAUL A. BATISTA, CIVIL RICO PRACTICE MANUAL 2d ed. § 2.4.
4. 18 U.S.C. § 1964 (2006).
5. 18 U.S.C. § 1962 (2006); *see also* BATISTA, *supra* note 3 at § 2.5.
6. *See* 18 U.S.C. § 1962; BATISTA, *supra* note 3 at § 2.
7. 18 U.S.C. § 1962.
8. *See* Fed. R. Civ. P., Rule 11; BATISTA, *supra* note 3 at §§ 2.10, 2.14.
9. *See* BATISTA, *supra* note 3 at § 1.1.
10. *See* BATISTA, *supra* note 3 at § 1.1.

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Is Your Client Using Illegal Immigrant Workers?

By Elizabeth M. Hijar and Staci M. Jenkins

There are very few issues that are as divisive as immigration—illegal and legal. However, no matter where one stands on this issue, the law prohibits the hiring of illegal immigrant workers. Until a few years ago, the government's enforcement of the law was lax and far from routine. But since the events of September 11, 2001 and the emergence of illegal immigration as a hot-button issue, the government has been stepping up enforcement and investigations on businesses that employ unauthorized workers. Based on the investigations of Immigration and Customs Enforcement (ICE), the largest investigative arm of the Department of Homeland Security, many employers (including supervisors and executives) have either been sued, arrested, indicted, fined, and imprisoned for criminal and civil charges ranging from the unauthorized employment of illegal immigrants to engaging in fraud and falsification of documents, and harboring illegal immigrants for commercial advantage. Further, countless employees have been detained and deported for being in the United States illegally.

Some specific ICE investigations have resulted in the following:

- The detention of 1,282 workers for immigration violations employed at plants of Swift & Company, one of the nation's largest processors of fresh pork and beef;
- The guilty plea and payment of fines totaling $300,000 by two corporate executives of the Golden State Fence Company for the hiring of unauthorized alien workers; and
- The arrest of seven current and former managers of IFCO Systems North America, Inc. for conspiring to transport, harboring, encouraging and inducing illegal aliens to reside in the United States for commercial advantage and private financial gain, and other charges related to fraudulent documents.

An Employer's Obligation

These examples underscore the high stakes for employers who fail to comply—wittingly or unwittingly—with their obligations under the immigration laws. In 1986, the Immigration Reform and Control Act (IRCA) was passed into law. IRCA requires employers to verify the identity and work eligibility of all employees hired after the passage of IRCA. In order to fulfill the requirements of IRCA, employers and employees must fill out the Form I-9. Completing the Form I-9 requires that the newly hired employee provide the employer with documentation that confirms the employee's identity and authorization to work in the United States. Employment of illegal workers often results from the employer's exercising a less-than-careful eye over the completion of the I-9 Form.

Unfortunately, a properly completed Form I-9 does not ensure that an employer is not hiring an illegal immigrant worker because it cannot detect cases of stolen identity. Currently, the only indication an employer has from the government that an employee may have stolen the identity of an authorized worker is when it receives a letter from the Social Security Administration (SSA) indicating that the employee's name or social security number does not match the name or social security number on file with the SSA. Adding to the complexity of an employer's obligation, the government has not issued final guidance on how to respond to these "no-match" letters.

The Pitfalls of Using Temp Agencies and Contractors

Even if a company's own employees are properly authorized to work, a company can find itself in legal jeopardy because of its use of contractors or temporary workers. Part of ICE's enforcement strategy includes investigating the hiring practices of temp agencies and contractors that provide workers to other businesses. In many cases, these companies provide workers that are vital to other businesses' production and successes. Recently, ICE searched the Portland, Oregon offices of American Staffing Resources, Inc. ("ASR"), a commercial staffing firm, and Fresh Del Monte Produce, Inc. ("Del Monte"), the well-known fresh produce company. One of the ASR offices was located at the Del Monte plant. According to an ICE press release, warrants were issued to search for evidence of "hiring illegal aliens; harboring illegal aliens; encouraging illegal aliens to reside in the United States; identity theft; immigration document fraud; and Social Security fraud." More importantly, about 170 ASR employees who were production workers at the Portland Del Monte plant were detained for possible deportation hearings, and three managers from ASR were arrested and charged with knowingly hiring illegal workers. Undoubtedly, the searches and detentions caused great disruption to Del Monte's production and operations.

Fortunately for Del Monte, neither it nor any of its supervisors have been charged with knowingly employing illegal immigrants. Yes, it is not only the com-

pany that can be held liable, but individual supervisors also risk liability for having knowledge of employing unauthorized workers. Knowledge is defined broadly to include actual and constructive knowledge. Constructive knowledge is present where an employer is aware of circumstances in which he or she should have known that an employee was not authorized to work and failed to investigate. For example, it would be difficult to argue that no constructive knowledge exists where an employer is aware that an employee goes by two entirely different names (one at work and one socially), and yet fails to investigate.

The problems that a company can face because of the workers used by a contractor or employment agency are aggravated if there is a finding of joint employment. When determining who is the employer and who is the employee, ICE looks beyond payroll and applies the IRS guidelines for defining employment. According to the IRS, determining who is an employer is based on several factors. The most important one is control. The more control a business has over a worker (e.g., control over how, when, and where the worker performs services), the greater the likelihood that an employer-employee relationship exists.

Even when a business does not have an employer-employee relationship with its contract workers, it cannot knowingly use employment agencies or contractors that employ illegal immigrants. As a consequence, an employee or company cannot turn a blind eye to the work authorization of anyone working on its behalf. Wal-Mart knows this all too well. As a result of allegations that it knowingly contracted with janitorial companies that employed illegal aliens, Wal-Mart paid a record $11 million settlement to the government in March 2005. Additionally, part of the settlement directed Wal-Mart to establish a system that verifies that its independent contractors are taking reasonable steps to comply with immigration laws in their employment practices and to cooperate truthfully with any investigation of these matters.

How to Best Avoid Hiring Unauthorized Immigrant Workers

As the government continues to increase enforcement through the efforts of ICE, many companies find themselves asking what steps can be taken in order to avoid hefty fines and potential jail sentences. Large companies that use contract agencies to supplement their workforce ask how they can ensure that they will not be held responsible for the actions of these agencies. ICE has established a Hiring Guide for Employers that provides guidelines as to what steps employers can take to prevent the hiring of undocumented workers. Although some of these steps are somewhat simplistic—such as providing annual training on completion of the I-9 Form and detection of fraudulent documents, only allowing those trained to complete the I-9 Form, and requiring a secondary review of each employee's verification—other suggestions place serious responsibilities on the employer and cannot be taken lightly.

The most onerous suggestion by ICE in its Hiring Guide for Employers is that the employer should utilize the Basic Pilot Program for all hiring. The Basic Pilot Program is a voluntary program that involves verification checks of the Social Security Administration and the Department of Homeland Security databases. The program uses an automated process to verify the employment authorization of all newly hired employees. However, to utilize the Basic Pilot Program, an employer must enter into a Memorandum of Understanding ("MOU") that requires the employer's agreement to utilize this program for every new employee at the location and to grant the government the right to come on-site to review Basic Pilot documentation (including I-9 Forms) as well as interview employees. Many employers find that this agreement opens the door too wide for government oversight. The trade-off, though, is a rebuttable presumption that the employer did not knowingly hire unauthorized workers if all steps are followed in the Basic Pilot Program.

Employers must keep in mind that it is possible to take things too far in attempting to diminish the risk of hiring illegal workers. For example, requesting more documentation than allowed on the I-9 Form or refusing to hire individuals who have a foreign accent could easily result in national origin discrimination claims.

They Work for a Contractor; What Can I Do?

Although the above suggestions are acceptable when dealing with a company's own employees, exerting this much control over a contractor may push the company into a joint employer situation. In other words, if an employer were to train the employees of a contract agency on how to complete the I-9 Forms or to review all of the agency's I-9 Forms, the employer is heading towards establishing an employer-employee relationship with the contractor's employees. This would subject the employer to liability. Instead, when an employer utilizes contract or employment agencies, it should set policies or standards in place that the contractor must meet. This allows the employer to maintain a distance in terms of control. Some options could include that an employer require all contractors to:

- Provide training by an outside source for its employees completing the I-9 Forms;
- Guarantee that only trained employees will complete the I-9 Forms;

- Submit to a yearly review of a small portion of I-9 Forms from a random selection of workers placed at the employer's facility; and / or
- Participate in the Basic Pilot Program.

Any or all of these suggestions could be included in a company's contract with the contract or employment agency. By doing so, the company begins to protect itself from being considered the contractor or agency's employee's co-employer.

Changes on the Horizon for Employment Verification

The recent Comprehensive Immigration Reform Bill, referred to as the "Grand Bargain," and recent laws passed in a handful of states provide insight as to the direction that workplace enforcement is headed in the near future. The Grand Bargain proposed to require all employers to electronically verify all new hires within eighteen months of the enactment of the bill. The bill also proposed that all current employees would need to be verified in the system within three years. Although the electronic verification program proposed by this bill was not defined, many believe it would have had many similarities with the Basic Pilot Program.

"Increased enforcement by ICE, closer scrutiny of employers utilizing contractors, and the push towards electronic verification of employees on both the federal and state level leave employers no choice but to take a detailed look at their I-9 policies and employment practices."

In the past, employment verification was an area of law that was left to the federal government. Yet, several states are now stepping forward with laws of their own that will require companies to take additional steps to ensure that their employees are authorized to work. Some states that have already passed laws include Colorado, Georgia, and the most recent addition, Arizona. The Arizona bill that was signed into law by Governor Janet Napolitano on July 2, 2007 requires that all employers participate in the Basic Pilot Program by January 1, 2008 and imposes aggressive consequences to employers who knowingly or intentionally hire undocumented workers. For example, a second offense may result in a permanent revocation of the employer's licenses to do business in the State of Arizona. In a written statement from the Governor to the Arizona Speaker of the House, the Governor stated that "Because of Congress' failure to act, states like Arizona have no choice but to take strong action . . . [and] other states are likely to follow . . . [T]he United States Congress must act swiftly and definitively to solve this problem at the national level."

Increased enforcement by ICE, closer scrutiny of employers utilizing contractors, and the push towards electronic verification of employees on both the federal and state level leave employers no choice but to take a detailed look at their I-9 policies and employment practices. One way to do so is to have your immigration counsel perform an I-9 audit to identify any problem areas. A detailed audit will help companies and supervisors to best protect themselves from severe business consequences, such as permanent revocation of business licenses, fines and even imprisonment.

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Discovery and Admissibility of Peer Review Materials and Department of Health Investigations in Medical Malpractice Litigation

By Meghann N. Roehl and Patrick B. Curran

In an effort to curb the rise in liability insurance rates in 1985, the New York State Legislature enacted Section 2805-g of the Public Health Law. This statute provided comprehensive reform of the medical and dental malpractice adjudication system, and the continued availability and affordability of quality health services. This malpractice prevention program required every hospital to maintain a coordinated program for the identification and prevention of medical, dental, and podiatric malpractice. Hospitals must establish a committee to address negative health care outcomes, incidents injurious to patients or patient grievances, among other things. These committees have come to be known as Quality Assurance and Peer Review committees.

Neither the proceedings nor the records relating to performance of a medical or quality assurance review function or participation in a medical and dental prevention program shall be subject to disclosure in a malpractice action.[1] Section 2805-m requires that the collection of information and reports from peer review meetings be kept confidential, as they are designed to improve practices which address specific incidents and patient grievances. Limited access to this information is given to the Department of Health to the extent necessary to verify there has been compliance with statutes. This information is not discoverable in a malpractice action. A Freedom of Information Law request may be used to obtain a redacted copy of the Department of Health's investigation and to ascertain whether any findings were made. However, courts will usually preclude or limit a plaintiff from offering these reports as evidence of negligence.

Statements of a defendant physician made before a peer review board or for quality assurance evaluation are not privileged when they relate to the subject matter of the litigation. A physician against whom a medical malpractice action had been brought could be compelled to answer questions during examination before trial which related to statements he had made before a peer review board or for quality assurance evaluation; but the physician could not be compelled to answer questions concerning whether he reviewed a quality assurance evaluation, as any such report is not discoverable.[2]

In *Smith v. Delago*,[3] a complaint was made to the Department of Health as a result of care the plaintiff received from the defendant hospital and the plaintiff's treating physician. The Department of Health conducted an independent investigation, a copy of which the plaintiff obtained from a Freedom of Information Law request. The Department of Health's report included redacted interviews with the hospital staff and the Department of Health's independent review of the medical care provided. Following commencement of a medical malpractice action, defendants moved to prohibit plaintiff's use of the documents obtained from the Department of Health, contending they were confidential under the Education Law and the Public Health Law. Plaintiff cross-moved for production of further documents including peer review documents. The hospital's vice president of risk management submitted an affidavit stating that the requested documents were provided to the Department of Health in furtherance of its internal quality assurance review obligation. The trial court found that the documents generated by the Department of Health were privileged, and plaintiff appealed. The Appellate Division, Third Department held that "the plaintiff was entitled to the production of Department of Health's statements of deficiencies (see Public Health Law § 10 [2]) redacted to remove conclusions of law and the opinions of the Department of Health . . . ," and that "the defendants met their burden of establishing that the other documents were entitled to statutory confidentiality."[4] Hence, reports generated by a peer review investigation were held to be protected. The purpose of this discovery exclusion is to "enhance the objectivity of the review process" and to assure that medical review committees "may frankly and objectively analyze the unity of health services rendered" by hospitals.[5] By assuring confidentiality, these peer review meetings will be thorough and conducted without fear of legal repercussions, thereby improving the quality of medical care.[6]

In cases where the Department's findings related to the very conduct that is the subject of the malpractice lawsuit, New York courts have held that the findings are admissible because of their significant probative value.[7] When administrative findings do not directly relate to allegations in the suit, courts have refused to allow their introduction into evidence because the potential for prejudice is too great. It is improper to prove that a healthcare provider acted in a certain manner on a particular occasion by showing that it acted in a similar manner on a different occasion.

A healthcare provider's documents are not cloaked by statutory protection merely by being characterized as quality assurance or peer review material. It is the burden of the party invoking the protection to establish that the items being requested "were generated in connection with a quality assurance review function pursuant to Education Law § 6527(3) or a malpractice prevention program pursuant to Article 28 of the Public Health Law."[8] A hospital may waive its privilege by sharing the confidential reports with a disinterested third party.[9] Waiver of this privilege requires the "intentional relinquishment of its known right of confidentiality."[10] Sharing the records, reports and documents with a person interested in the hospital review, such as an employee at the Department of Health, does not waive the privilege.[11]

In *Swanson v. University of Rochester (Strong Memorial Hospital),* plaintiff requested the disclosure from defendant hospital of four reports made to a patient relations representative of the hospital and the identity of the source of the reports. The hospital maintained that all four reports were privileged, as they were generated following a quality assurance review. The plaintiff argued that the hospital waived its confidentiality because the patient relations representative issued a letter to the plaintiff setting forth certain conclusions regarding the plaintiff's care, which were made after reviewing the reports. The court found that the letter was sent to a patient, in response to his request, who had complained about his care at the hospital. Since a hospital is required to notify the patient by a written response of the findings from the investigation,[12] "the letter sent to the plaintiff by the hospital is clearly part of the program required by the statute for the identification and prevention of medical malpractice" and is protected from disclosure.[13] Moreover, the court determined that the plaintiff was not a disinterested party. The court held that in order "to waive the privilege afforded by the Public Health Law and the Education Law, the hospital must intentionally relinquish its known right of confidentiality."[14]

In determining what is or is not protected by the confidentiality provisions of the statute, the Court is not only weighing the probative value versus the prejudicial effect of the evidence, but also examining whether the hospital invoking the privilege has guidelines and a review procedure for generating these documents.[15] In *Kivlehan v. Waltner,* the injured plaintiff suffered a nearly fatal Group A streptococcal infection after giving birth at the defendant hospital. The plaintiff and her husband commenced a malpractice lawsuit alleging she was infected by her obstetrician. During discovery, plaintiffs moved to compel various records kept by the defendant hospital, which opposed the discovery items on the grounds that they were privileged. The Second Department determined that since the hospital did not make a showing that the information for which the exemption is claimed was obtained or maintained in accordance with the review procedure, the information was subject to disclosure.[16] An *in-camera* review may be conducted in order to ascertain whether the reports and statements were actually generated as a result of a formal peer review meeting, and what review procedure was followed.[17]

"The basic statutory principle remains intact, that peer review and quality assurance materials as well as Department of Health investigations are to remain confidential."

An allegation that defendant hospital improperly credentialed a physician is sometimes the basis for a demand to produce the physician's credentialing file. In *Logue v. Velez, supra,* plaintiff attempted to obtain a physician's application for privileges to perform a particular procedure. Counsel sought to discover what the hospital considered before granting privileges. The hospital approved the physician's application. The physician performed the procedure upon a patient who later brought a malpractice lawsuit against him claiming that the procedure had been done improperly and that the physician lacked the proper qualifications to perform it. Plaintiff's attorney claimed the application was a statement of the doctor made in the context of a peer review or quality assurance function of the hospital. The Court of Appeals held that plaintiff's attorney was not entitled to a copy of the application because the application preceded the alleged malpractice and, therefore, any peer review or quality assurance meeting which took place could not have discussed the care and treatment rendered to the patient which resulted in the malpractice claim against the physician. While the conclusion reached by the Court of Appeals may seem obvious, lower courts were interpreting the exception for statements very broadly and the Court of Appeals' decision in *Logue* served to curb such an interpretation. It is now clear from the holding in *Logue* that a physician's application for privileges are protected from disclosure by the Education Law and the Public Health Law, and that the exception for statements has no application to these documents.

The basic statutory principle remains intact, that peer review and quality assurance materials as well as Department of Health investigations are to remain confidential. Exceptions are limited to discoverability of a defendant physician's statements, and the Health Department's findings which pertain to the matter in suit.

Endnotes

1. Public Health Law Article 28.
2. *Bryant ex rel. Bryant v. Bui*, 265 A.D.2d 848, 849, 695 N.Y.S.2d 790 (4th Dep't 1999).
3. 2 A.D.2d 1259, 770 N.Y.S.2d 445 (3d Dep't 2003).
4. *Id.* at 1261, 447.
5. *See* Mem. of Assembly Rules Committee Bill Jacket L. 1971, Ch. 990 at 6.
6. *Brazinski v. New York Chiropractic Coll.*, 284 A.D.2d 647, 648, 725 N.Y.S.2d 457 (2001); *Logue v. Velez*, 92 N.Y.2d 13, 677 N.Y.S.2d 6 (1998).
7. *See Cramer v. Benedictine Hosp.*, 190 Misc. 29 191 (Sup. Ct., Ulster Co. 2002) (redacted copy of Department of Health report prepared after investigation of incident underlying plaintiff's medical malpractice lawsuit admitted into evidence); see also *Smith v. Delago, supra.*
8. *Swanson v. University of Rochester (Strong Memorial Hospital*), 10 Misc. 3d 1076(a), 814 N.Y.S.2d 893 (Sup. Ct., Monroe Co. 2005).
9. *See Nga Le v. Stea*, 286 A.D.2d 939 (4th Dep't 2001); *Scinta v. VanCoevering*, 284 A.D.2d 1000 (4th Dep't 2001).
10. *See Khan v. New York State Department of Health*, 17 A.D.2d 938, 794 N.Y.S.2d 145 (3d Dep't 2005).
11. *See Smith v. Delago, supra.*
12. 10 N.Y.C.R.R. § 405.7(b)(23).
13. *Swanson, supra.*
14. *Id.*
15. *See Kivlehan v. Waltner*, 36 A.D.3d 597, 827 N.Y.S.2d 290 (2d Dep't 2007).
16. *Id.* at 599.
17. *Kivlehan v. Waltner, supra.; Williams v. Brookhaven Memorial Hospital Center*, 13 Misc. 3d 1204(a) (Sup. Ct., Suffolk Co. 2006).

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Erosion of Employers' Rights to Reimbursement

By Martin Minkowitz

It is generally understood that the Workers' Compensation Law provides necessary medical and wage replacement benefits to injured workers. Its benefit structure is crafted by statute to avoid that payment awarded be "windfall" or double payment. The provision of the law designed to effectuate this goal is in Section 29 WCL. When there is a third party responsible for the injury to the claimant, the law recognizes it is that party who should ultimately bear the responsibility for the payments made to, or on behalf of, the claimant. It is a just and equitable resolution.

The employer or its workers' compensation carrier is the primary payor, looked to by the Workers' Compensation Board to satisfy its award to the claimant for the stated injury and resulting medical and wage replacement payments. Then the employer, or its carrier, can look for reimbursement from third parties. If the claimant has brought an action to recover from the one who caused the injury, other than the employer, a recovery in that action is available to reimburse the employer for benefits paid, or to be paid, for compensation benefits.[1] So far nothing we didn't know.

It becomes a little more complicated when the question is what injury was claimed and paid for in the worker's compensation case compared to what injury was claimed and paid for in the third-party action.

To demonstrate the issue, let me present the following scenario: Claimant is exposed to asbestos and sustains a lung injury. He files the claim and is awarded benefits by the Workers' Compensation Board. He also brings a third-party action and recovers for that injury. The "accident" which caused the injury was the exposure to the asbestos. The same accident 8 years later causes the claimant to develop cancer and he files another workers' compensation claim.

As noted above, when a recovery is made from a tort action for the same injury that was the predicate for the workers' compensation award, the employer, or its carrier, is entitled to reimbursement or an offset against future payments. A general release in that action prevents another suit for an injury from the same accident. Such a settlement is prejudicial to the employer or its carrier and requires its consent before it is made. Therefore, should the recovery from the third party tort action be available to indemnify the employer for all injuries for which it must pay workers' compensation benefits which arose from the same accident? The court has said no.

"It becomes a little more complicated when the question is what injury was claimed and paid for in the worker's compensation case compared to what injury was claimed and paid for in the third-party action."

While not discussing the prejudicial effect of the settlement upon the employer, the court has reasoned that not to make the recovery in the tort action available to reimburse the employer for payment of benefits for the subsequent injury would not be a double recovery for the claimant. It relied upon a representation by counsel that had the claim for cancer been included as an additional injury in the tort action, the recovery in that action would have been greater. Therefore, it concluded that the recovery was only for the lung injury, not the cancer, and the tort recovery was therefore only available to reimburse the employer for the former and not the latter.[2]

The result, of course, is that the employer and its carrier, through no fault of its own, seems to have lost the statutory right to reimbursement or offset for the second injury. It appears in such cases, since the employer's rights against the third party tortfeasor are derivative from the claimant's rights and if the claimant has released that right, it will pay the benefits for the second injury without recourse because of the release or a statute of limitations.

Endnotes

1. Section 29(4) WCL.
2. *Kirk v. Central Hudson G&E*, __ A.D.3d __ 4/11/08.

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Ethics Opinion No. 819

Committee on Professional Ethics of the New York State Bar Association
12/18/07

Topic: Settlement of fee arrangements and improper fee splitting.

Digest: A lawyer may agree with a client to accept less than the judicially-determined fee in a domestic relations matter, as long as doing so is not inconsistent with any statements the lawyer has made to a tribunal or any such inconsistent statements are corrected.

Code: DR 1-102(A)(4), DR 2-106(C)(2), DR 3-102(A), DR 7-102(A)(5), DR 9-102 (C)(4).

Question

1. After a court awards legal fees to a lawyer pursuant to section 237 of the Domestic Relations Law, none of which the other party has yet to pay to the lawyer, may the lawyer, as part of a settlement with the lawyer's own client, agree with the lawyer's client to accept less than the full award of legal fees and, in the event the responsible party later pays any part of the award, to reimburse the client for amounts collected from the responsible party up to the amount of the agreed settlement?

Background

2. A lawyer enters into a fee agreement with a client for the provision of legal services relating to the New York Domestic Relations Law. The fee agreement provides for the client to pay an initial retainer to be credited against total hourly charges. At the conclusion of the matter, the court awards the lawyer an amount equal to the lawyer's total hourly charges pursuant to section 237 of the Domestic Relations Law, which the adverse party is obliged to pay to the lawyer. The adverse party does not pay.

3. To settle the debt created by the fee agreement between the lawyer and the client, the lawyer agrees to accept, in full satisfaction of the amounts owing by the client, an immediate payment equaling the initial retainer plus an additional amount that is less than the lawyer's total time charges (and hence less than the judicial award). In return, the client seeks the lawyer's agreement that, if the adverse party pays the lawyer any amount up to the settlement amount, then the lawyer will remit such sums to the client to make the client whole. The lawyer is concerned whether the reimbursement of such amounts would constitute an illicit fee-sharing arrangement with a non-lawyer.

Opinion

4. In our view, no such concern is warranted. We assume for our purpose that the arrangement with the client comports with DR 2-106(C)(2), which governs fee agreements in domestic relations matters, as well as Part 1400 of the Rules of the Appellate Divisions, entitled "Procedure for Attorneys in Domestic Relations Matters." Because our charter is limited to addressing matters of ethics and not questions of law, nothing here is meant to be a legal opinion on the meaning of section 237 of the Domestic Relations Law. Subject to the foregoing, and to the caveat below, we do not believe that the proposed settlement is an unethical fee-sharing compact.

5. Section 237 of the Domestic Relations Law authorizes a court, in circumstances set forth there, to order a party to a matrimonial action to pay counsel fees "directly to the attorney of the other spouse to enable that spouse to carry on or defend the action or proceeding as, in the court's discretion, justice requires." The purpose of the statute is to "redress the economic disparity between the monied spouse and the non-monied spouse" by investing the court with the discretion "to make the more affluent spouse pay for the legal expenses of the needier one."[1] Although the statute provides for the payment to be made directly to the attorney, courts may direct the payment to be made to the party if that party has already advanced funds to his or her counsel.[2]

6. When a court awards a fee under section 237, the amounts that may be paid by the responsible party are to replace those that may have been paid by the client, but the award does not release the client from liability from the full amount of any fee agreement if the responsible party does not pay. Thus a court is not permitted, in granting an award under that section, to preclude the lawyer "from seeking to recover payment of the full amount of the attorneys' fees in [a] separate action based on the retainer agreement entered into by" the lawyer and cli-

ent.[3] Likewise, a court may direct a lawyer, and the lawyer would be required in the absence of an overriding contractual arrangement, to refund to the client any amounts previously paid to the lawyer by the client that the lawyer receives from the adverse party in satisfaction of a section 237 award.[4] The settlement proposed here is consistent with the fee award: the client will end up paying an agreed amount in fees, but only to the extent the responsible party fails to pay the awarded amount.

7. We conclude that the proposed settlement does not violate any Disciplinary Rule, and in particular DR 3-102(A). "The purpose of the rule against fee sharing is to remove any incentive for non-lawyers to engage in undesirable behavior such as (1) interfering with a lawyer's professional judgment in handling a legal matter, (2) using dishonest or illegal methods . . . in order to win a case . . . , or (3) encouraging or pressuring a lawyer to use such improper methods."[5] Such perils typically arise from the sharing of fees with non-client third parties.[6] None of these concerns exists in the allocation of fees between a lawyer and a client, and certainly not in the context of a fee-shifting statute that is designed to ensure that the client is made whole for fee amounts the client may have paid.

8. We caution that the arrangement with the client must be consistent with any statements or submissions made to the court in connection with the application for an award of counsel fees. A lawyer may not engage in conduct involving fraud or dishonesty,[7] and shall not make any knowingly false statement of law or fact in the course of representing a client.[8] It is essential that the lawyer comply with any representation made to the court concerning the use of the funds awarded, or amend any such statement if needed.

Conclusion

9. Subject always to a lawyer's obligation to avoid false or misleading statements to a tribunal, a lawyer may settle a fee agreement with a client by accepting less than the judicially-determined fee in a domestic relations matter and agreeing to reimburse the client for amounts the lawyer later receives pursuant to a fee award up to the amount of the agreed-upon settlement.

Endnotes

1. *O'Shea v. O'Shea*, 93 N.Y.2d 187, 190, 711 N.E.2d 193, 195, 689 N.Y.S.2d 8, 9-10 (1999) (footnote omitted).
2. *Ross v. Ross*, 90 A.D.2d 541, 542, 455 N.Y.S.2d 113, 115 (2d Dep't 1982).
3. *Law Firm of Joel R. Brandes, P.C. v. Ferraro*, 257 A.D.2d 610, 610, 685 N.Y.S.2d 83, 84 (2d Dep't 1999); *accord Seth Rubenstein, P.C. v. Ganea*, 41 A.D.3d 54, 65, 833 N.Y.S.2d 566, 574 (2d Dep't 2007) ("an award of attorney's fees to a spouse pursuant to Domestic Relations Law § 237(a) does not preclude attorneys from seeking, from their own client, the balance of fees earned if the retainer agreement permits it").
4. *Tarr v. Tarr*, 45 A.D.2d 1050, 1050, 358 N.Y.S.2d 172, 173 (2d Dep't 1974); *see* DR 9-102(C)(4) (A lawyer shall "[p]romptly pay or deliver to the client . . . as requested by the client . . . funds . . . in the possession of the lawyer which the client . . . is entitled to receive.").
5. R. Simon, SIMON'S NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY ANNOTATED 532 (2007 ed.).
6. *See, e.g.*, N.Y. State 727 (2000); N.Y. State 705 (1998).
7. DR 1-102(A)(4).
8. DR 7-102(A)(5).

Ethics Opinion No. 820

Committee on Professional Ethics of the New York State Bar Association 2/8/08

Topic: Use of e-mail service provider that scans e-mails for advertising purposes.

Digest: A lawyer may use an e-mail service provider that conducts computer scans of e-mails to generate computer advertising, where the e-mails are not reviewed by or provided to human beings other than the sender and recipient.

Code: DR 4-101; EC 4-3.

Question

May a lawyer use an e-mail service provider that scans e-mails by computer for keywords and then sends or displays instantaneously (to the side of the e-mails in question) computer-generated advertisements to users of the service based on the e-mail communications?

Opinion

Our starting point is N.Y. State 709 (1998), which addressed the use of Internet e-mail. We concluded based on developing experience that there is a reasonable expectation that e-mails will be as private as other forms of telecommunication and that therefore, under DR 4-101,[1] a lawyer ordinarily may utilize unencrypted e-mail to transmit confidential information. We also noted, however, that a lawyer may not transmit client confidences by e-mail where there is a heightened risk of interception, and that "[a] lawyer who uses Internet e-mail must also stay abreast of this evolving technology to assess any changes in the likelihood of interception as well as the availability of improved technologies that may reduce such risks at reasonable cost."[2]

In recent years, some e-mail providers have offered free or low-cost e-mail services in which, in exchange for providing the user with e-mail services—sending and receiving e-mail and providing storage on the provider's servers—the provider's computers scan e-mails and send or display targeted advertising to the user of the service. The e-mail provider identifies the presumed interests of the service's user by scanning for keywords in e-mails opened by the user. The provider's computers then send advertising that reflects the keywords in the e-mail. As an example, an e-mail that referred to travel to a particular locale might be accompanied by an advertisement for travel service providers in that locale.

Under the particular e-mail provider's published privacy policies, no individuals other than e-mail senders and recipients read the e-mail messages, are otherwise privy to their content or receive targeted advertisements from the service provider. Consequently, when the e-mail service provider sends or generates instantaneous computer-generated advertising based on computer scans of the lawyer's e-mails with clients, the risks posed to client confidentiality are not meaningfully different from the risks in using other e-mail service providers that do not employ this practice. We conclude, therefore, that the obligation to preserve client confidentiality does not preclude using such a service.[3]

We would reach the opposite conclusion if the e-mails were reviewed by human beings or if the service provider reserved the right to disclose the e-mails or the substance of the communications to third parties without the sender's permission (or a lawful judicial order). Merely scanning the content of e-mails by computer to generate computer advertising, however, does not pose a threat to client confidentiality, because the practice does not increase the risk of others obtaining knowledge of the e-mails or access to the e-mails' content. A lawyer must exercise due care in selecting an e-mail service provider to ensure that its policies and stated practices protect client confidentiality.[4] Unless the lawyer learns information suggesting that the provider is materially departing from conventional privacy policies or is using the information it obtains by computer-scanning of e-mails for a purpose that, unlike computer-generated advertising, puts confidentiality at risk, the use of such e-mail services comports with DR 4-101.

Conclusion

A lawyer may use an e-mail service provider that conducts computer scans of e-mails to generate computer advertising, where the e-mails are not reviewed by or provided to other individuals.

Endnotes

1. Under DR 4-101 of the New York Lawyer's Code of Professional Responsibility, lawyers are required to preserve the confidences and secrets of their clients, subject to certain exceptions, and to exercise reasonable care to prevent their employees, associates and others whose services they utilize from disclosing such confidences and secrets.
2. N.Y. State 709.
3. DR 4-101(B)(3) of the New York Code provides that a lawyer may not "knowingly . . . [u]se a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure." It might be argued that, under the literal text of this provision, using such an e-mail provider would constitute improper "use" of a client's confidences

or secrets for the benefit of a third partynamely, the e-mail service provider that sells the advertising. We do not believe that the incidental "use" here, or the benefits derived therefrom, are within the contemplation of the rule anymore than the profits earned by other providers of services to lawyers, such as litigation support companies, which handle or are exposed to client confidences. *See* EC 4-3 (quoted below). We note as well that the advertisements go only to e-mail recipients who are themselves users of the e-mail service provider and presumably chose to receive the advertising. The use therefore also does not "disadvantage" clients within the meaning of DR 4-101(B)(2) by subjecting them to "junk mail" that the clients have not elected to receive.

4. *Cf.* EC 4-3 ("Unless the client otherwise directs, it is not improper for a lawyer to give limited information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided the lawyer exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.").

Ethics Opinion No. 821

Committee on Professional Ethics of the New York State Bar Association 2/11/08

Topic: Threat by prosecutor of criminal prosecution to aid enforcement of civil claim.

Digest: A prosecutor who suggests a civil resolution in lieu of a criminal prosecution must have probable cause to support the criminal charge.

Code: DR 7-102(A)(1), (2); DR 7-103(A); DR 7-105(A); EC 7-13; EC 7-21.

Question

1. May a prosecutor, in aid of civil efforts to recoup alleged overpayments of welfare benefits, communicate to an alleged recipient of such an overpayment that the prosecutor will defer criminal prosecution to allow time for civil resolution but will be required to consider prosecution further if there is no satisfactory civil resolution?

Opinion

2. An assistant district attorney ("ADA") assigned to the welfare fraud bureau in the district attorney's office in which the ADA serves has been asked by the Department of Social Services ("DSS") in the county to send a letter, drafted by DSS, to persons suspected of having received welfare benefits for which they were not eligible. The letter would state that the District Attorney's office has received a report "prepared by the Investigative/Fraud Unit" that the recipient had received welfare benefits for which the recipient was not eligible. The letter would further state that the District Attorney's office "has accepted this case for proposed review for criminal prosecution," but suggests "as an alternative to prosecution," that the recipient contact a DSS fraud investigator to work out a civil resolution of the claim. The letter invites the recipient to discuss with the DSS investigator any concerns the recipient may have that the complaint is in error or unfounded but goes on to state: "Should this procedure be followed [administrative resolution of the complaint as a civil matter], my office intends to defer any possible prosecution. However, unless the situation, which led to the filing of this complaint, is satisfactorily resolved, I will be required to review this matter again to determine if prosecution is then warranted."

3. The proposed letter, which can be readily characterized as a "we won't prosecute if you pay up" letter, will likely have a coercive effect on its recipient. As such, the letter may be seen to implicate DR 7-105(A), which states, "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter," and EC 7-21, which cautions against using "the criminal process to coerce adjustment of private civil claims."[1]

4. In carrying out his or her special responsibilities as a public prosecutor, a prosecutor needs to be quite careful in suggesting civil resolution as a means of avoiding criminal prosecution. In the Committee's view, the letter proposed here does not fulfill those special responsibilities. In coming to that conclusion, however, we need not and do not reach the applicability of EC 7-21 or of DR 7-105(A). Rather, we look to DR 7-102(A)(1) and (2) and DR 7-103(A).

5. DR 7-102(A)(1) and (2) enjoin all lawyers not to assert or "advance," *inter alia*, an unwarranted position or claim. Under DR 7-103(A), public prosecutors, in particular, are barred from instituting criminal charges that are not supported by probable cause. EC 7-13 explains: "The responsibility of a public prosecutor . . . is to seek justice, not merely to convict." If there is no probable cause or a case is unprovable, a prosecutor must refrain from instituting charges or, once having done so, must drop the charges and do so without exacting any price.[2] Thus, before making a charge of unlawful conduct against anyone, and throughout the maintenance of that charge, a public prosecutor has a responsibility to investigate the facts and circumstances and to confirm that there is and continues to be probable cause to believe that the target of that charge is guilty and that the charge is provable.

6. Even though the proposed letter states only that the District Attorney's office may "review" the case for criminal prosecution, and invites the recipient to discuss why the complaint is in error or unfounded, we believe that the clear import of the letter is that the ADA who signs it believes that the recipient has committed a crime ("it appears from the report [of the Investigative/Fraud Unit] that you received benefits . . . you were not eligible to receive") and that the recipient will be prosecuted if he or she doesn't pay.

7. In N.Y. State 770, we opined that it would be "clearly not ethical" for a prosecutor to reach an agreement not to bring charges on condition that the person who would be charged make a donation to a non-profit organization, "unless there is probable cause that the person committed an offense."[3] We conclude that the same is true here, where the proposed letter would seek to extract a settlement of a claimed civil liability to DSS.

9. As the Court of Appeals said in *Cowles v. Brownell*, "The prosecutor's obligation is to represent the people and to that end, to exercise independent judgment in deciding to prosecute or refrain from prosecution."[4] If the District Attorney or an ADA has investigated a matter sufficiently to have formed an opinion that there is probable cause, he or she would be, as a general matter, ethically free to seek lawful dispositions other than prosecution to judgment. In that event, the ADA could, for example, write a letter such as the one at issue here calling upon the recipient to pay, or to explain why he or she should not be required to pay, to avoid the commencement of a formal prosecution.

10. Needless to say, if upon investigation the prosecutor is not able to form an opinion that there is probable cause, he or she would be ethically bound not to prosecute and not to seek a *quid pro quo* for abstaining from doing so. *A fortiori*, if a prosecutor has not conducted an investigation sufficient to support an opinion one way or the other, that prosecutor would not be ethically free to charge the would-be recipient with any unlawful conduct or to propose a disposition alternative to prosecution as in the proposed letter.

Conclusion

11. A prosecutor may propose an alternative civil disposition to a criminal charge, but only if, after due investigation, the prosecutor has formed an opinion that there is probable cause to support the charge and that it is provable.

Endnotes

1. *Cf. Cowles v. Brownell*, 73 N.Y.2d 382, 388, 389, 538 N.E.2d 325, 328, 329, 540 N.Y.S.2d 973, 976, 977 (1989) (Titone, J., concurring in the result) (agreements in which criminal charges are dismissed in exchange for a release from civil liability "offend public policy" because, among other reasons, they "encourage prosecutors to violate" DR 7-105 and EC 7-21).
2. N.Y. State 770, at 3 (2003) ("A prosecutor . . . should not seek a plea to reduced charges unless there is probable cause to believe that the defendant has committed an offense."); *Cowles*, 73 N.Y.2d at 387, 538 N.E.2d at 327, 540 N.Y.S.2d at 975 (if the defendant is innocent or the case is unprovable "the prosecutor [is] under an ethical obligation to drop the charges without exacting any price for doing so").
3. N.Y. State 770, at 10.
4. 73 N.Y.2d at 387, 538 N.E.2d at 327, 540 N.Y.S.2d at 975.

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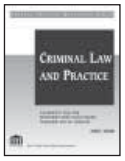

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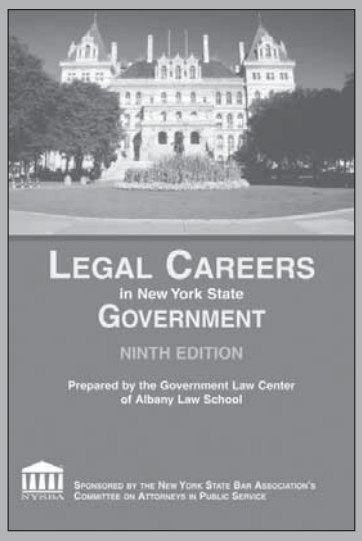

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