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ONEONONE

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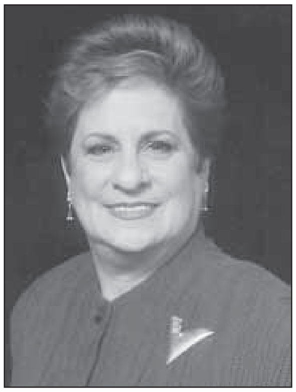
A Message from the Chair



The approximately 2,300 members who join this Section each year represent a strong indication that New York solo and small firm practitioners wish to maintain a separate and distinct voice in the New York State Bar Association. We will continue to be that voice and speak on behalf of our members' interests. We do, however, need to hear from you. To facilitate an ongoing dialogue we intend to use our Section Blog. You can reach us at http://nysbar.com/blogs/generalpractice/. Please add this site to your daily schedule and stay connected.

To those who know me it will come as no surprise that I am assuming my leadership role of this Section with a renewed sense of determination to bring value to our members. As our practices seem to reinvent themselves with continual shifts in client demographics, changes in service expectations and of course technology, our old views must keep pace. I expect that I, together with the other leaders of our Section, will find new paths that will bring value to our constituency.

Our past member surveys indicate that our solo and small firm practitioners want an efficient and reliable method to be kept abreast of changes in law or practice that affect their basic client services. We intend to respond to this need by sponsoring a series of interactive teleconference programs. These new programs will deliver short informational seminars and will be hosted by the leading practitioners of the Bar.

Our Section has also been designated to continue the work of the Association's Solo and Small Practice Committee, whose focus has been to identify areas of concern of the small firm and solo practitioner. I welcome the members of this Committee who have agreed to join our Section and continue to work with us.

Shortly, we will also be announcing a new diversity initiative for our Section. I expect that our Section will join with our dynamic Bar leaders to increase our Section's membership and diversity by spearheading a special program addressing these issues.

And finally, I am pleased to report that although our Section will be in the process of reinventing its focus and services, we will continue to bring you our *One on One* publication.

I am looking forward to an exciting new year. Please join us as we journey into the land of Change.

Harriette M. Steinberg

Inside

From the Editor

In this edition of *One on One*, our writers have addressed some areas that have not been touched on in the past several years. A hot topic in workers' compensation has been the status of illegal immigrants. We are, therefore, pleased to be able to present an article written by one of the leading workers' compensation defense attorneys on this topic.

There is an article relating to equitable estoppel of a mortgagee's claim and one on alternative dispute resolution.

This year, the State Legislature enacted significant revisions to the workers' compensation law. In my column, I briefly discuss what those revisions are and will be. The legislation itself being almost 100 pages and revising dozens of sections of the law would be worthwhile to review by those interested in the area. We hope you will enjoy reading all of our new articles and look forward to seeing your article in the next edition.

We conclude as always with a number of the most recent Ethics Opinions, which have, in the past, been a popular section of this publication.

We congratulate our new Chair, Harriette Steinberg, and look forward to her leadership for the coming year.

Martin Minkowitz

Illegal Immigrants and Workers' Compensation

By Hugh O'Boyle

May an immigrant illegally working in the United States while injured receive workers' compensation benefits under New York law?

The question draws our attention at this moment in history as America's attention is drawn to the presence of millions of persons living and working in this country without benefit of legal documentation.

The Appellate Division, Third Department, answered the question in the affirmative in 1960 in *Testa v. Sorrento Restaurant*, 10 A.D.2d 133, *app. den.*, 8 N.Y.2d 705. That decision has not been overruled.

While *Testa* continues to be good law in New York, changes in immigration and tort law have caused doubt and challenges to the entitlement holding.

> *"While the New York plaintiffs were in the country without authorization, the transgression of immigration law was insufficient to justify a denial of an award of damages."*

The Immigration and Reform Control Act of 1986 (IRCA) was an attempt by Congress to deal with the employment of illegal aliens. Under IRCA an illegal alien may not obtain employment without the employer or employee or both violating the statute. The Act contains a comprehensive scheme to regulate the problem. Given the enduring problem that continued despite IRCA, one may question its effectiveness in dealing with this deeply embedded problem.

In *Hoffman v. Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), the Supreme Court considered IRCA as it related to a National Labor Relations Board action awarding back pay to illegal immigrants based upon the employer's violation of the NLRA. The Court found such an award contrary to the national policy enunciated in IRCA. To award back pay to one working illegally would not only compensate employees working in violation of law but would also trivialize federal immigration policy.

What then of lost wages claims in tort litigation? New York courts traditionally have accepted such claims. See *Public Administrator of Bronx County v. Equitable Life Assurance Soc.*, 192 A.D.2d 325 (1st Dep't) Comes now *Balbuena v. I.D.R. Realty LLC* joined with *Majlinger v. Cassino Contracting Corp.*, 6 N.Y.3d 338 (2006), in which the Court of Appeals considered lost wages claims brought by plaintiffs for violations of Labor Law §§ 240 and 241. Plaintiffs were illegal aliens, injured while working, suing third parties for, among other things, lost wages. The Court rejected preemption as a basis to deny the claim for lost wages, past and future. Tort deterrence, the Court reasoned, provides a completely acceptable reason to allow damages against a tortfeasor. The Court found this to be so where the employers knew or should have known of the illegal employee's status. The Court found compatibility between federal immigration law and state labor law. The opinion reasoned that *Hoffman* did not require another result since the undocumented aliens in *Hoffman* criminally provided their employer with fraudulent papers purporting to be proper federal work documentation. No such allegations were made about *Balbuena* and *Majlinger*. This, the Court said, is a "critical point." While the New York plaintiffs were in the country without authorization, the transgression of immigration law was insufficient to justify a denial of an award of damages.

The extent to which employee fraud will become a bar to future awards remains to be seen. Under IRCA it is not a crime to be employed but undocumented. It is the presentation of false documentation inducing employment that may rise to the level of criminal prosecution. A stinging dissent in *Balbuena* remonstrated with the majority for rewarding illegal conduct.

Footnote 6 of the majority opinion refers to the "related context" of workers' compensation statutes. The Court cited cases both for and against awards of benefits in place of wages. In fact, a hefty majority of sister state decisions since *Hoffman* have awarded workers' compensation benefits to undocumented aliens injured while working. The decision in *Balbuena* is consistent with that of the U.S. Court of Appeals, Second Circuit, in *Madeira v. Affordable Housing Foundation*, 315 F. Supp 504, decided 11/14/2006. Both cases involved claims that defendants had violated N.Y. Labor Law § 240(1). The Second Circuit reached the same result as the N.Y. Court of Appeals, noting that a personal injury is not a wrong to be compensated under IRCA, and it was the employer rather than the plaintiff worker who knowingly violated IRCA in arranging for the employment.

Where does that leave us under the New York Workers' Compensation Law? In June of 2006 the Workers' Compensation Board awarded benefits to an illegal alien in case 00439394 (106NYWCLR100). The board relied on WCL § 17, which provides that compensation benefits are payable to nonresident workers in the same manner as paid to resident workers. (Section 17 makes no distinction between those who are legal and those who are not.) The decision does not address the culpability of employer or employee in arranging for the employment. The Third Department had an opportunity to address the question in *Hernandez v. Excel Recycling Corp,* 2006 N.Y. Slip Op. 6041, 820 N.Y.S.2d 340, 2006 N.Y. App. Div. LEXIS 9674, decided 7/27/2006, but since the issue was not properly raised below before the hearing officer, the board did not entertain the argument and the Court chose to affirm the board's refusal to hear the argument. In case 09716133, the board decided on 5/08/2006 that a "nonlegal resident" did not comply with the provisions of WCL § 15(3)(v), requiring that in certain serious schedule-loss type cases a claimant is entitled to continuing supplemental compensation after his schedule runs out if the impairment of wage-earning capacity is due solely to the work-related injury. Since the "nonlegal resident" had as his primary obstacle to obtaining employment the fact that he was not a legal resident, his impairment was not solely due to the injury.

Lurking behind these decisions is language in the *Testa* decision of nearly a half-century ago. Quoting from an even more venerable Court of Appeals decision, the Third Department approvingly said that workers' compensation "is given without reservation and wholly regardless of any question of wrongdoing of any kind."

"One may conclude therefore that the illegal status of an injured employee seeking workers' compensation protection is unlikely to result in the claim being barred, although the issue has yet to be decided by New York Courts since the U.S. Supreme Court spoke in Hoffman.*"*

One may conclude therefore that the illegal status of an injured employee seeking workers' compensation protection is unlikely to result in the claim being barred, although the issue has yet to be decided by New York Courts since the U.S. Supreme Court spoke in *Hoffman*. In a clear case of employee fraud perpetuated upon an innocent employer, the issue is in doubt, although even then there is precedent for the making of an award.

Equitable Estoppel of a Mortgagee's Claim

By Richard A. Klass

The doctrine of "equitable estoppel" was applied in a recent case litigated in the Commercial Division of the Kings County Supreme Court. In deciding that a mortgagee was estopped from collecting additional moneys from the mortgagor / cooperative corporation, Justice Carolyn Demarest relied upon the long-standing principle that the courts will not allow a party to "lull" another into inactivity to its detriment. In affirming the Decision and Order of Justice Demarest, the Appellate Division, Second Department found that summary judgment was properly granted on the basis of equitable estoppel.

The case of *335 Second Street Housing Corp. v. Fridal Enterprises, Inc. Money Purchase Pension Plan* (Sup. Ct., Kings Co., Index No. 840 1 / 2005) involved an interesting fact pattern. As illustrated in the decision of the judge, the relevant facts of the case (which were not in dispute) were as follows:

335 Second Street Housing Corp. ("335 Second") is the owner of real property located at 335 Second Street, Brooklyn, New York. 335 Second acquired title to the premises through a conversion to cooperative ownership. At the time that 335 Second acquired title to the premises, the real property had been encumbered by a mortgage, dated April 28, 1989, with an unpaid principal sum of $200,000 held by D&F Capital Co. ("D&F"). On July 26, 1990, 335 Second entered into an extension agreement with D&F, which provided that 335 Second Street was indebted to D&F for the sum of $200,000 with interest from July 26, 1990; however, the extension agreement also modified and extended the tithe for 335 Second to pay and satisfy the principal indebtedness of $200,000, by making it payable as follows:

> $194.45, representing a payment of interest only for the period of July 26, 1990 to July 31, 1990;
>
> $1,166.67, commencing on August 1, 1990, and equal consecutive payments on the same day of each and every month thereafter, until July 31, 1993, with each of the monthly payments to be applied to interest only at the rate of 7% per annum on the unpaid principal balance;
>
> $1,500, commencing on August 1, 1993, with equal consecutive payments on the same day of each and every month thereafter, until July 31, 1995, with each of the monthly payments to be applied to interest only at the rate of 9% per annum;
>
> The entire unpaid principal balance of $200,000 together with accrued interest thereon, if any, shall become due and payable on July 26, 1995, unless the apartment corporation exercises its option to extend the mortgage for an additional five (5) years.

The extension agreement provided that if 335 Second, after the initial five-year term of the mortgage (from July 26, 1990 to July 31, 1995), elected to exercise its option to extend the mortgage for an additional five years after the due date of the unpaid principal balance, it was required to "notify the Mortgagee in writing thirty (30) days prior to August 1, 1995." It stated that if 335 Second did so, "a one (1%) percent fee on the unpaid principal balance" would "then be due and payable by the apartment corporation to the mortgage." The extension agreement also stated that if 335 Second exercised this option to extend the mortgage for the additional five-year term, the following terms of payment would then be applicable:

> [M]onthly payments shall be $2,333.33, commencing August 1, 1995 and equal payments on the same date of each month thereafter consisting of interest only at the rate of 14% per annum on the unpaid principal balance until July 26, 2000, when the entire unpaid principal balance of $200,000 shall become due and payable.

Paragraph 24 of the extension agreement further provided:

> After maturity, stated or accelerated, interest shall accrue at the rate of sixteen (16%) percent per annum, but this provision shall not constitute an extension of time for the payment of the balance of principal.

By assignment, also dated July 26, 1990, D&F assigned its interest in the mortgage to Fridal Enterprises, Inc. Money Purchase Pension Plan ("Fridal").

335 Second duly made the monthly payments of interest-only due under the mortgage, as provided in the extension agreement. When the entire unpaid principal balance of $200,000 became due and payable on the July 26, 1995, maturity date, as provided

by the extension agreement, 335 Second did not satisfy the principal balance. 335 Second also did not notify Fridal in writing 30 days prior to August 1, 1995, that it was electing to exercise the option given to it in the extension agreement to extend the mortgage for an additional five-year term. Finally, 335 Second did not pay to Fridal the one (1%) percent extension fee on the unpaid principal balance, which would have been due and payable in the event that it elected to exercise such option to extend the term of the mortgage.

Instead, 335 Second simply continued to pay interest on the note at the nine (9%) percent interest rate, which had been the rate in effect pursuant to the terms of the extension agreement prior to the note's maturity. 335 Second made these interest-only payments in response to regular, monthly bills sent by Fridal, which specifically listed the interest rate of nine (9%) percent per annum and the monthly payment due as $1,500. These monthly bills directed 335 Second to remit this amount of payment together with a copy of the relevant bill within five days of the due date, which was the first of the following month.

By letter dated December 7, 1995, Fridal advised 335 Second that the principal indebtedness of $200,000 on the property had matured on August 1, 1995. Fridal stated, in such letter, that it was "willing to discuss an extension and modification of payments on this loan." It further stated that 335 Second call immediately to set up an appointment date. No response was made by 335 Second to this letter and no new extension or modification of payments on the loan were discussed or negotiated between the parties. Fridal did not declare a default at that time; rather, it continued to send monthly bills to 335 Second, as it had previously done, which directed that it remit its monthly payment of $l,500, computed at the rate of nine (9%) percent per annum.

335 Second also did not pay the unpaid principal balance of $200,000 on July 26, 2000, and Fridal did not declare a default at that time. 335 Second merely continued to duly pay the bills sent to it by Fridal, which billed it at the nine (9%) percent per annum interest rate. This pattern of payments continued for almost ten years (from July 26, 1995 to December 2004). In December 2004, 335 Second contacted Fridal regarding the provision of a pay-off statement pertaining to the extension agreement because it was in the process of refinancing the real property with another lender to do renovations.

On February 14, 2005, Fridal, in response, informed 335 Second that, aside from payment of the principal balance of $200,000, 335 Second was indebted to Fridal for additional moneys, namely: (1) the difference in interest between 14% per annum and 9% per annum for the period of August 1, 1995 until July 26, 2000; (2) the difference in interest between 16% per annum and 9% per annum for the period of August 1, 2000 until pay-off of the principal balance; and (3) the 1% extension fee. Fridal contended that these sums were due pursuant to the terms of the extension agreement. Specifically, Fridal claimed that the terms of the extension agreement, which provided for the higher 14% interest rate and the 1% fee in the event that 335 Second had extended the loan beyond the July 26, 1995 maturity date, had automatically become operative due to 335 Second's non-payment of the principal balance on the July 26, 1995 maturity date. It further claimed that after July 26, 2000, the default rate of 16% per annum had become operative. Fridal demanded payment of this entire sum.

Consequently, 335 Second brought an action against Fridal, seeking a declaratory judgment that Fridal's claims for these additional moneys had been waived, and that Fridal should be directed to tender a pay-off statement solely for the principal balance due and any accrued interest from the time of commencement of the action until satisfaction of the mortgage at the rate of 9% per annum. Fridal counterclaimed for a judgment against 335 Second for all of the alleged back interest and fees due, which it claimed it was owed.

In reaching her decision, Justice Demarest indicated it is well settled that the doctrine of equitable estoppel may be invoked where a lender's actions have lulled a borrower into a false sense of security or where it would be inequitable to enforce certain terms of an agreement. *See Karas v. Wasserman*, 91 A.D.2d 812 (1982); *Marine Midland Bank-Western v. Center of Williamsville*, 48 A.D.2d 764 (1975); *More Realty Corp. v. Mootchnick*, 232 A.D. 705 (1931); *Triple Cities Construction Co. v. Maryland Casualty*, 4 N.Y.2d 443 (1958) ("An estoppel . . . rests upon the word or deed of one party upon which another rightfully relies and, in so relying, changes [its] position to [its] injury" (*quoting Metropolitan Life Insurance Co. v. Childs Co.*, 230 N.Y. 285 (1921)).

In *N. Y. State Guernsey Br. Co-op v. Noyes*, 260 A.D. 240 (3d Dep't 1940), *modified on other grounds*, 284 N.Y. 197 (1940), the court laid out the essential elements of an equitable estoppel claim, as follows:

1. As related to the party to be charged: (a) conduct which amounts to a false representation or concealment of material facts; (b) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (c) knowledge, actual or constructive, of the real facts; and

2. As related to the party claiming the estoppel: (a) lack of knowledge; (b) reliance upon the conduct of the party estopped; and (c) action based thereon of such a character as to change his position prejudicially.

In this case, Fridal did not bill 335 Second for the higher 14% per annum interest payments or the 1% extension fee which it now claimed were due, nor did it otherwise make any demand for such moneys. Rather, Fridal has admitted that since 1993 up until the present time (long past the 1995 due date), it had regularly billed 335 Second for interest payments of the subject mortgage in the amount of $1,500. As noted above, the bills indicate specifically thereon that the $1,500 payment is based upon "Interest Rate: 9.00%." Such conduct by Fridal indicates that Fridal was continuing to operate under the pre-maturity terms of the extension agreement, which required 9% per annum interest payments. The letter from Fridal, dated December 7, 1995, further evidenced its intent that the higher 14% interest rate was not automatically operative or in effect since it stated that it was "willing to discuss an extension and modification of payments on this loan." Fridal's conduct, by continuing to render bills at 9% per annum interest, and accepting payments at this rate following its sending of this letter on December 7, 1995, demonstrated that the higher 14% interest rate was never triggered and that it would continue to accept the amount of the payments made by 335 Second in full satisfaction of the interest due.

Furthermore, as the judge noted, Fridal never affirmatively declared a default by 335 Second on July 26, 2000, or indicated any intention to impose the 16% per annum interest rate after that date. Instead, Fridal simply continued to bill 335 Second at the 9% per annum interest rate. By its failure to demand payment of the full principal indebtedness or declare a default following July 26, 2000, Fridal indicated that it was not seeking to impose the 16% per annum rate of interest.

"Waiver is the intentional relinquishment of a known right, and therefore may be inferred from conduct or a failure to act that evinces an intent not to claim the purported advantage" (*Fundamental Portfolio Advisors v. Tocqueville Asset Mgt. LP*, 22 A.D.3d 204 (2005), *quoting Hadden v. Consolidated Edison Co. of NY*, 45 N.Y.2d 466 (1978)). Although Fridal had knowledge of the actual terms of the extension agreement, it customarily never complained of the previous pattern of payments in its continued dealings with 335 Second. It was only when 335 Second sought to refinance that Fridal made this belated claim to these alleged additional moneys due over and above the interest payments which it had previously accepted as satisfactory for nearly ten years without complaint. Fridal's position of seeking these back payments was deemed inconsistent with its prior conduct.

In relying upon the reasoning of *More Realty Corp. v. Mootchnick*, 232 A.D. 705 (1931), Justice Demarest determined that Fridal should have reasonably expected that its acceptance of regular monthly payments at 9% would induce 335 Second to be lulled into a false sense of security and to not seek to renegotiate the loan upon better terms. By Fridal's conduct, in at no time declaring a default, failing to demand payment of the 1% extension fee, affirmatively rendering monthly bills at 9% interest, and accepting such payments from 335 Second, it conveyed the impression that Fridal was not imposing the higher 14% interest rate or enforcing its right to obtain interest at the default rate of 16%.

In this case, 335 Second was able to ascertain the terms of the extension agreement but lacked the knowledge that Fridal would change its position, disclaiming the terms that 335 Second had every reason to believe were operative, and demand additional back interest and moneys purportedly due despite Fridal's failure to declare a default or to otherwise make a demand for these moneys. 335 Second justifiably relied upon the bills sent by Fridal, which set forth the 9% per annum interest rate and the monthly $1,500 amount due, and upon Fridal's acquiescence in 335 Second's payment of these sums. These bills induced 335 Second to reasonably believe that Fridal had tacitly accepted the payments in full satisfaction of all interest due. 335 Second changed its position to its prejudice by virtue of Fridal's conduct in that it did not seek to renegotiate the rate or interest or to satisfy or refinance the mortgage debt for the past nearly 10 years, during which time interest rates had been in decline.

Accordingly, under these circumstances, the court determined that it would be unconscionable to require 335 Second to now pay the additional amounts sought by Fridal, since Fridal induced 335 Second to believe that these back payments would not be imposed and such belief was reasonable and acted upon by 335 Second to its prejudice, and that Fridal should be equitably estopped from seeking such moneys. Moreover, it was an undisputed fact that the terms of the extension agreement established that only if 335 Second elected to extend the mortgage beyond July 26, 1995, and exercised its option by giving notice to Fridal in writing within thirty days prior to August 1, 1995, would the 14% rate of interest apply. Since 335 Second did not elect to exercise its option under the terms of the extension agreement, the higher 14% interest rate and the 1% fee were never payable to Fridal. The letter of Fridal, dated December 7, 1995, implicitly acknowledged this fact by offering "to discuss an extension and modification of payments on this loan."

Although 335 Second never responded to the December 7 offer directly, Fridal continued to bill at 9%, thus indicating its intent to accept such sum as a modification of the terms of the extension agreement. In making such payments, as demanded by Fridal in writing, 335 Second accepted Fridal's offer and a new contract was thereby created. The extension agreement provides: “This agreement may not be changed or terminated orally”; however, the modification here was not oral but was reflected in the written billing demands of Fridal. The course of conduct of the parties, Fridal’ s failure to declare a default, and 335 Second’s payment of the 9% interest demanded and accepted by Fridal over a period of nearly ten years, corroborates the amended terms of the agreement. *See generally Rose v. Spa Realty Assoc.*, 42 N.Y.2d 338.

The judge noted that the 9% interest rate in effect when the mortgage became due on July 26, 1995, was acceptable and beneficial to both parties. The higher rate provided in the extension agreement might have been prospectively reasonable on July 26, 1990, but was no longer advantageous to 335 Second in 1995. If Fridal had sought to enforce the terms of the agreement, 335 Second would no doubt have sought to refinance the mortgage much sooner. By implicitly reforming the terms of the mortgage, by continuing to demand and accept the 9% interest after the maturity date, Fridal induced 335 Second to leave its mortgage in place. There was no evidence presented of “mutual mistake” or reliance on a billing mistake continuing for nearly ten years, but rather, the evidence suggested a conscious decision on both sides to maintain the status quo for each party’s own benefit.

In granting summary judgment in favor of 335 Second as against Fridal, Justice Demarest directed Fridal to provide a pay-off statement, without including all of the additional moneys. The judge equitably estopped Fridal from collecting (1) the difference in interest between 14% per annum and 9% per annum for the period of August 1, 1995, until August 26, 2000; (2) the difference in interest between 16% per annum and 9% per annum for the period of August 1, 2000, until pay-off of the principal balance; and (3) the 1% extension fee.

The Appellate Division, Second Department rendered a Decision and Order on January 9, 2007 (2007 NY Slip Opinion 130), in which the court affirmed the Order of Justice Demarest. The Second Department held that:

> Contrary to the defendant’s contentions, the issue of equitable estoppel was properly before the court on these motions. Moreover, the Supreme Court correctly determined that the defendant engaged in a course of conduct over a period in excess of nine years whereby it affirmatively billed the plaintiff at an interest rate lower than that authorized by the parties’ agreement, and acquiesced in the plaintiff’s payments at that rate without complaint, objection, or the declaration of a default. Moreover, the evidence submitted on the motions established that the defendant’s conduct induced the plaintiff’s reasonable belief that the higher rate would not be imposed, and that the plaintiff relied upon that conduct to its detriment in refraining from seeking a more advantageous financing agreement. Accordingly, the Supreme Court properly granted summary judgment to the plaintiff on the basis of equitable estoppel. (*See generally Nassau Trust Co. v. Montrose Concrete Products Corp.*, 56 N.Y.2d 175; *Triple Cities Construction Co. v. Maryland Casualty Co.*, 4 N.Y.2d 443; *First Union National Bank v. Tecklenburg,* 2 A.D.3d 575; *Karas v. Wasserman*, 91 A.D.2d 812; *More Realty Corp. v. Mootchnick,* 232 A.D. 705.)

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Alternative Dispute Resolution: A Win-Win Proposition

By Irwin Kahn

As practicing attorneys we all know that 95% of our civil cases are ultimately settled before coming to trial. Therefore it makes good sense to avail yourself of Alternative Dispute Resolution as soon as practicable. When we are talking about mediation, since both parties must agree to the settlement, there is no downside to sitting down and discussing your case before a trained neutral. In some situations the parties wish to continue their relationship. In other situations it just makes common sense from a business point of view to dispose of the matter without having to invest more time, energy and money. Getting prompt payment is a plus for the claimant. Capping the potential exposure is a good business judgment on behalf of the defendant. That is one reason why mediation is a win-win proposition.

Arbitration can result in an economical time-saving end to a dispute that would linger in the court system for a great period of time. This is another win-win situation.

> *"Overall the statistics show that utilizing Alternative Dispute Resolution in your practice as a case management tool will result in speeding up the turnover of your caseload while enhancing the effective conclusion of your cases to your clients' satisfaction."*

Naturally, for any aspect of Alternative Dispute Resolution to be successful, it is necessary that both sides have evaluated the liability, damages, and potential verdict in the venue in which the action is pending. For mediation to be successful, both sides must be agreeable to entering into good-faith negotiations before a skilled neutral who acts as an agent for reality. You should approach Alternative Dispute Resolution the same way you prepare for trial. In a mediation, a concise memorandum setting forth the facts, the law, liability, damages, and current applicable jury verdicts will be of great value in educating both the neutral and your adversary. Similarly, in an arbitration what amounts to a trial memorandum should be prepared.

At the present time there are many tools under the umbrella of Alternative Dispute Resolution. They are mediation, arbitration, mini-trials, fact or coverage determination, and as many variations of same as the imagination and creativity of the participants, including the neutral, can create.

In the Securities industry, both the New York Stock Exchange and the National Association of Securities Dealers have instituted mediation programs in addition to the well-established arbitration programs that they have traditionally provided.

The American Arbitration Association has arbitration and mediation programs in a number of areas, such as commercial, construction, insurance and labor. In the Federal Courts, Alternative Dispute Resolution is in effect in both the Southern and Eastern Districts. George O'Malley, Alternative Dispute Resolution Administrator of the Southern District of New York, reports an 83% settlement success rate. Gerald P. Lepp, Alternative Dispute Resolution Administrator for the Eastern District of New York, reports that 68% of the cases submitted for mediation were successfully settled. This number does not reflect cases that were settled after they returned to the court. Both administrators indicate that those who participated have also benefited from expedited discovery and the narrowing of issues.

The New York State Unified Court System Office of Alternative Dispute Resolution Programs is led by Daniel M. Weitz, Esq., State Alternative Dispute Resolution Coordinator. There are a number of Alternative Dispute Resolution programs throughout the state including Family Court, Community Dispute Resolution Centers, the New York County Commercial Division, and several other County Commercial Division programs. New York County also has a Matrimonial Mediation pilot program as well as the availability of Tort Mediation. The evaluations are handled by Michael Tempesta, Esq., telephone number (646) 386-3691, and Shelley Rossoff Olsen, Esq., telephone number (646) 386-3689.

There are a number of commercial providers that supply skilled neutrals at a reasonable cost. These providers usually aid the panics in those agreeing to participate, deciding which Alternative Dispute Resolution modality would be most beneficial, scheduling the session at a convenient site before a well-qualified neutral.

Overall the statistics show that utilizing Alternative Dispute Resolution in your practice as a case management tool will result in speeding up the turnover of your caseload while enhancing the effective conclusion of your cases to your clients' satisfaction. This is why I contend that Alternative Dispute Resolution is a win-win proposition.

General Practice Session: Hot Tips January 23, 2007

Irwin Kahn has been a civil litigator for more than forty years. He is a principal of the New York City law firm of Kahn & Horwitz, P.C. He is the past Chair of the Arbitration Committee of the General Practice Section of the New York State Bar Association and a past Chair of the Alternative Dispute Resolution Committee of the New York County Lawyers' Association. He is an experienced arbitrator and mediator. He has served as a neutral for the New York Stock Exchange, National Association of Securities Dealers, American Arbitration Association, and National Arbitration and Mediation. He is a Special Referee and was Panel Chair for the Appellate Division, First Department, Departmental Discipline Committee. He has served as an Administrative Law Judge for the City of New York. Mr. Kahn lectures on Alternative Dispute Resolution and other subjects for the American Arbitration Association, New York State Trial Lawyers' Association, New York County Lawyers' Association and New York State Bar Association. He has also participated in programs at Columbia Law School, Fordham Law School, New York Law School and NYU School of Law.

Radical Changes to the Workers' Compensation Law

By Martin Minkowitz

The Legislature this year passed Chapter 6 of the laws of 2007, which makes significant changes to many of the sections of the Workers' Compensation Law (WCL) and added a significant number of new ones. The goal was to increase benefits to injured workers from the then-current maximum of $400 per week, and to offset the increase in the cost of providing workers' compensation by other statutory modifications. There had not been an increase in indemnity for disability in more than a decade. The first part was achieved by increasing the benefit levels from $400 to $500 for an accident or disability occurring on or after July 1, 2007; up to $550 for an accident or disability that occurs on or after July 1, 2008; and to a maximum of $600 for accidents or disabilities that occur on or after July 1, 2009.

> *"It is recommended that those who have any interest in the area of workers' compensation take the time to review the statute and the new revisions to the law."*

In addition, and for the first time in New York history, after July 1, 2009, the Legislature need not address this issue again, since an increase will automatically happen as the New York State average weekly wage increases. The amount will be two-thirds of the state's average weekly wage after the set increases go into effect. The minimum benefits were also raised from $40 a week for permanent or partial disability and permanent or temporary disability, to $100 a week. Death benefits were increased from $600 to $750 for accidents or disabilities on and after July 1, 2007; to $825 on and after July 1, 2008; and to $900 on and after July 1, 2009. Thereafter, it will float to two-thirds of the state's average weekly wage. To offset the cost, and again for the first time in the history of the WCL in New York, there are now caps on the number of weeks an injured worker will be entitled to receive benefits. An amendment to section 15(3)(w) of the WCL provides that a claimant with a permanent partial disability will have maximum indemnity payments ranging from as low as 225 weeks for a claimant whose loss of wage-earning capacity is 15% or less, and up to 525 weeks when the loss is more than 95%. There is a presumption included in the statute that medical benefits should continue even after the cap on indemnity payments goes into effect. This is a rebuttable presumption requiring the employer or carrier to have the burden to rebut the presumption.

It is too difficult to describe all of the major changes in the new legislation, and there are many other significant ones, in a column of this size, but it should be noted that the Second Injury Fund has been sunsetted and provisions have been made for a winding down of its operations.

After July 1, 2007 an award for a permanent partial disability under § 15-3(w) WCL is to be paid by the insurance company to the Aggregate Trust Fund. Settlements will be made under WCL § 32, primarily by the aggregate trust fund (*see* WCL § 27).

There are also very significant penalties, civil and criminal, against employers who do not maintain workers' compensation coverage, including the authority given to the Workers' Compensation Board to issue a stop-work order against an employer who is in violation of the law in failing to maintain workers' compensation coverage. A recent newspaper article indicates that the Workers' Compensation Board has, in fact, issued such stop-work orders to companies in New York State.

It is recommended that those who have any interest in the area of workers' compensation take the time to review the statute and the new revisions to the law. This legislation also includes a provision amending WCL § 50(2) relating to out-of-state employers. All out-of-state employers with employees working in New York State are required to carry a full statutory New York State workers' compensation insurance policy. According to a bulletin issued by the Chair of the Workers' Compensation Board,

> An employer has a full, statutory NYS workers' compensation insurance policy when New York is listed in Item 3A on the Information Page of the employer's compensation insurance policy.

Whether the cost of the increase will actually be offset in the future by the provisions entered for that purpose is still an open question. It has, however, resulted in a significant decrease in the premium rate for the coming year.

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Compensating for the Loss of Business Value as a Result of Condemnation

By David C. Wilkes

Justice Frankfurter analogized compensation for intangibles such as going concern under the Fifth Amendment with a covenant between purchaser and seller restricting one's right to compete with the other in the *Kimball Laundry Co.* case.[1] Courts have stringently awarded compensation for going concern in takings cases based on the following four theories: (1) damage to a business was not considered compensable by virtue of the fact that neither business nor goodwill were taken, (2) damages to business or goodwill were considered *damnum absque injuria* (loss not giving rise to legal action for damages), (3) the constitutional scope of just compensation does not contemplate the uncertainties and vicissitudes in businesses, and (4) goodwill and intangible losses cannot be inferred from the Constitution's eminent domain clause.[2] The Uniform Eminent Domain Code embraces a flexible definition of goodwill; it must be broad enough to support activities that fail to qualify as a business according to the Internal Revenue Service.[3] Another perspective is that going concern valuation depends as much on the quality of the operation in question as the location itself, thus going concern value is likely to persist despite relocation.[4] States have approached the problem of takings compensation for going concern quite differently.

Florida has developed an approach where, in limited circumstances satisfying three conditions, a business may be awarded compensation for going concern value in condemnation proceedings: (1) the business must be more than five years old (though not necessarily with its present owner), (2) the taking must be for right-of-way purposes by condemnors who are named in the statute, and (3) the business taken must have been located on the land or its adjoining lands for five years.[5] Florida's legislature has adopted the view that business damages *necessarily* stem from lost profits, which are linked to a reduced profit-making capacity resulting from a taking.[6]

Texas courts do not consider goodwill and going concern to be among the *in rem* and ordinary rights attributable to real property, which are more traditionally the subject of condemnation proceedings.[7] Relevant Texas statutes speak in broad, conservative terms on valuing going concern: "If an entire tract or parcel of real property is condemned, the damage to the property owner is the local market value of the property at the time of the special commissioners' hearing."[8] It is well established that Texas courts shy away from awarding compensation for losses of both goodwill and going concern.[9] One Texas court has justified its reasoning as twofold: (1) profitability depends more on invested capital, business conditions, and entrepreneurial skill rather than the location of the business, and (2) only the real estate, not the business, is being taken.[10] Generally speaking, these courts do not consider goodwill and going concern as within the purview of condemnation statutes despite their real property characteristics affecting other legal issues.[11]

Connecticut courts have undertaken an inclusive approach to valuing going concern. One court has defined the concept as "an established and operating business with an indefinite future life."[12] In another case involving a nursing home, the value of intangibles that constituted going concern exceeded that of the real property itself.[13] The total business enterprise value contemplated intangibles including, but not limited to, goodwill, business management skills, reputation, and a trained workforce.[14] Kentucky courts share a similar view where evidence of profits will contribute to market value in some circumstances, unless the profits result from entrepreneurial skill and character rather than the land.[15] Adding another wrinkle, Georgia courts have inserted a uniqueness condition to the broad rules of goodwill compensation.[16] This requires that a business seeking to recover going concern or goodwill beyond that of fair market value must prove that unique or peculiar characteristics exist between the condemnee's business and the property.[17] In order to arrive at a fair, reasonable estimation, these issues are presented to juries in Georgia courts for resolution.[18]

Many states are taking a more liberal approach and departing from valuations directly linked to real property. Colorado gives precedence to equitable factors in awarding takings compensation over stricter, technical concepts in real property law.[19] Colorado also acknowledges a distinction between income derived from the land itself and income that is merely incidental to land ownership.[20] Alternatively, Missouri courts will generally consider evidence of profits derived from a business on land to be overly speculative and inadmissible as a basis of evidence for determining the fair market value of property.[21] Although this does not speak directly to going concern it reflects the attitude of Missouri courts which have, like Colorado, bifurcated the valuation process into categories that remain separate and distinct from each other.[22]

At the extremes are speculation and intangible rights, which few states are willing to accept as compensable losses. More generally, many states agree that appraising going concern necessitates a bifurcated analysis at least in part. The nexus between intangible and tangible assets includes reasonableness and equity. New York has begun to weigh the issue of jury trials and the fairest means in arriving at equitable takings compensation by means of proposed bills and legislation in light of the Supreme Court's decision in *Kelo v. New London*.[23] Nevertheless, this state continues to provide no compensation for the loss of going concern value except in extremely limited circumstances. The balance of this article will examine in detail the law and rationales for this approach, particularly as applied in New York State.

The most difficult and often controversial assignments real estate appraisers encounter in their daily practice are those that involve a going business concern, for which the physical real estate assets are integral parts of the proprietor's ongoing business and not easily separated. Going concern appraisals most commonly arise in the valuation of hotels and motels, senior living properties such as nursing homes and assisted living facilities, restaurants, golf courses, gas stations, bowling alleys, retail stores, shopping centers, and industrial enterprises, among others.

It is well established that the ultimate and basic test for establishing the amount of a condemnation award is always market value.[24] But, with several limited exceptions that will be examined later in this article, "market value" in condemnation proceedings relates principally to the real property value alone, and an award will generally not be available for the lost value of the owner's entire business. The difficulty in determining appropriate compensation for a going concern property lies in separating the market value that is attributable to the real estate from that which is attributable to the business.

In comparison to ordinary, more passive real estate ventures in which market value may be derived directly from the actual rental income and the expenses associated with a property, or from the sales of comparable rental properties, the income and expenses of going concern properties commingle items that are related to the real estate with items that are related to the operation of the business, and sales prices of comparable business operations often combine both real estate and business value together in a single sum without distinction between the two components.

To illustrate the dilemma this can present in the context of determining a condemnation award, in a nursing home, for example, income is never neatly separated between that which is attributable to the residents' rental of their rooms and that which is attributable to the medical services the facility provides. The income generated by a restaurant, likewise, will make no distinction between the portion that patrons pay for the food they are served and the portion that relates to the theoretical "rent" customers pay for the temporary use of dining space. Hotels are typically purchased for the entire value of the going operation, including goodwill, contracts with suppliers, and possibly franchise rights, without regard to the underlying value of the bricks and mortar alone.

In the course of ordinary operations, there is little need for most such businesses to make distinctions between real estate value and the more "intangible" items that add value to the enterprise. At best, a business enterprise may make some form of allocation of value to the real estate for accounting purposes, but such treatment is often based more on generally accepted rules of accounting than on the information a competent appraiser would deem relevant.

The general rule concerning a business taking is that damages for the loss of goodwill or loss of the going concern value of a business are not compensable unless the condemnor intends to substantially continue the operation of the business it is taking.[25] In other words, although determining the value of the business portion of the condemnation may be subject to more speculation and conjecture than the real estate portion, it is not so much the intangible character of the going concern value that negates a duty of just compensation, but rather it is whether the business itself was intended to be taken in the first place or was simply incidental to the taking of the land.[26]

Of course, to any business owner, the effective taking or substantial disruption of the business in connection with the condemnation of the land, even if arguably "unintentional," can hardly be considered incidental. Yet, the rationale traditionally promulgated has been that where the location of the property is not crucial to the conduct of the business, nothing has actually been taken because under competent management the business can be relocated and continued.[27] "The owner of the business may remove to another place, establish his business and carry his goodwill with him."[28] Where the condemnor's principal aim is an appropriation of the land, irrespective of the current business enterprise, there is no compensable "taking" of the business in a legal sense.

Therefore, in attempting to determine the fair market value of a motel and restaurant complex for purposes of condemnation, it was proper for the court to reject an appraiser's income approach to value where the appraiser capitalized the gross profits of the business rather than the fair rental value of the real property.[29] To do so would be to effectively value the going concern as a whole, including, for example, personal property such as furniture, fixtures, and equipment and intangible personal property, or business enterprise value, rather than just the realty. It is the actual or market-level real estate income that can be capitalized, and not, as one court wrote, "entrepreneurial skills or lack of such skills."[30]

One appellate panel reversed a trial court's finding that the owner of a golf course was entitled to compensation where the state appropriated approximately four acres of land in connection with building the New York State Thruway.[31] In that case, the lower court found that the land taken utilized a portion of the seventh fairway, resulting in the placement of the seventh tee more than 225 feet closer to the planned roadway than it was prior to the appropriation. "The nearness of said seventh tee to the Thruway and the inexperience of a large percentage of the golfers using said course . . . created a hazard to those using the Thruway, from being struck by flying golf balls."[32] The trial court concluded, therefore, that the resulting likelihood of accidents would deplete golf course revenues and awarded consequential damages to the claimant-owner. On appeal, the Appellate Division's Fourth Department rejected this analysis, finding that the lower court had effectively calculated its award on the basis of the golf course as a going concern, and held that while profits from the enterprise might be used to show the best available use of the property, such profits could not be used to value the real estate itself.[33] Notwithstanding the validity of the final decision, the lower court's sympathy for errant hackers is noted.

In condemnation proceedings, the income from a business concern might be relevant only to the question of whether the existing use is suitable for the land condemned, or whether such business income reveals that a higher and better use might be made of the property. As one court found, the operational results of the beach club properties at issue provided little insight into the value of the underlying land and actually appeared to impede the highest and best use of the land rather than enhance that value.[34] This conclusion was further bolstered by the record before the court, which revealed that no other beach club had been built in that area in the preceding 10 years, and that single-family residential development was the prevailing local use. If one were to merely capitalize the operating results of the business enterprise, the resulting value would be a small fraction of the value of the land as vacant, and a taking award would be confiscatory in comparison to the highest and best use for residential purposes, according to the court.[35]

Once it has been determined that the property at issue is of such a nature that an allocation may be required to be made among the various components of, for example, real estate, furniture, fixtures and equipment, business enterprise, and other intangible elements of value, the appraisers must turn their attention to defining such components and then placing the appropriate values upon them.

In addition to the constraints placed upon an appraiser in performing an eminent domain assignment, the reporting requirements of the Uniform Standards of Professional Appraisal Practice (USPAP) require that value be allocated between the real estate and other elements of a going concern. Specifically, USPAP Standard Rule 1-4(g) provides that "[a]n appraiser must analyze the effect on value of any personal property, trade fixtures or intangible items that are not real property but are included in the appraisal."[36]

The various assets of an enterprise other than the realty and furniture, fixtures and equipment that have no real physical component and that may add to the going concern value of a business are considered "intangible assets." In a large company, intangible value might be found in the form of having a trained workforce, an operating plant, necessary patents, copyrights and trademarks, contracts with suppliers, goodwill, and even a recognizable name. The two most common broad categories of intangible assets that appraisers commonly concern themselves with are "business enterprise value" and "goodwill."

Business enterprise value may exist in a property when the income and expenses of the property are commingled with those of the occupying business, or the property has become "branded" by association of the property with that business, as might be the case in a hotel property for example. Business enterprise value has been defined as "a value enhancement that results from items of intangible personal property such as marketing and management skill, an assembled work force, working capital, trade names, franchises, patents, trademarks, non-realty related contracts / leases, and some operating agreements."[37]

The term "business enterprise value" is perhaps familiar to many appraisers and attorneys. However, a later edition of the well-regarded appraisal resource quoted above has coined a new term for the concept, which it refers to as "capitalized economic profit," or "CEP," which is defined as "[t]he present worth of an entrepreneur's economic (pure) profit expectation from being engaged in the activity of acquiring an asset or collection of assets at a known price and then selling or being able to sell the same asset or collection of assets at a future uncertain price."[38]

Goodwill value is occasionally treated as simply a component of business enterprise value and is sometimes kept distinct. "Goodwill consists of the benefits that accrue to a business as a result of its location, reputation for dependability, skill, or quality, and any other circumstances resulting in probable retention of old, or the acquisition of new, patronage."[39] Goodwill is, by its nature, highly personal to the particular business property being condemned, and, on the scale of intangible items, perhaps the most easily forfeited when an enterprise is disrupted.[40]

Appraisal experts have devised widely varying methodologies for distilling real estate value from the other components that are present in the value of a going concern. Indeed, significantly different appraisal methodologies may be more or less appropriate depending on specific property types, particular property locations, and even current market activity. In fact, the subject of appropriately valuing going concern properties is a highly controversial one among many appraisers. Although this article is not intended as a guide to appraisal techniques, it may be helpful to consider a fairly typical approach that might be taken in estimating business enterprise value and determining whether the business contributes to the going concern. The main issue to be concerned with in many cases is the amount of net operating income necessary to support the investment in real estate. If, after making that determination, it is found that residual income exists, a determination must be made as to how much is required to support other personal and intangible components of the going concern.

Another methodology that has found some common acceptance in the appraisal community relies on a variation of the sales comparison approach to value. A general market ratio is identified between business value and real estate value in the regional market for the particular property type. Using this approach, a comparison is made between, for example, senior living facilities and similar-looking, "pure" real estate operations such as apartment complexes. The higher operating expense ratio that would typically be associated with running the senior living facility as compared to the apartment complex would then be attributed to the healthcare services provided—the "business"—and not to additional real estate-related services.[41] A ratio can then be derived from market transactions in senior care facilities and then applied to the subject property to determine that portion of the net income that is attributable to running the real estate.

Neither of the foregoing approaches to separating real estate value from business value is necessarily the best or only approach, nor is either necessarily recommended or suitable for any given particular property at issue. Rather, these are intended merely to illustrate fairly common methodologies that have been used by appraisers in the past to solve difficult valuation allocation problems.

In the process of attempting to distill the real estate value from business enterprise and other intangible value, a further word of caution is in order. Although the property type at issue may by its nature suggest that some form of going concern or business enterprise value is present, such as with nursing homes, hotels, motels, and similar operations, this does not hold true in every case. Upon close examination, specific property operations may indicate that the actual net operating income is sufficient to support the real estate component and nothing more.

Occasionally, the business climate for the particular enterprise at issue is moving in a direction opposite to or at a markedly different pace than the real estate market at that time. Because a condemnation award will be based upon highest and best use and is not limited to current use, situations may often arise in which going concern value shrinks or expands without regard to the value of the bricks and mortar. For example, the local market for nursing homes may be saturated and at a low ebb while the subject property's readily convertible use as an apartment building may be in great demand, rendering the real estate value the same or higher than the going concern value.

State or local legislation may apply in particular circumstances to broaden the scope of compensation for a taking that results in damages to the tangible non-realty components of a going concern. Where property is acquired pursuant to the EDPL for purposes of a state educational institution, for example, payment may be authorized for actual reasonable and necessary moving expenses, and for actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation, so long as such losses do not exceed the reasonable amount of expenses that would have been required to relocate the business.[42] Actual reasonable expenses may also be available in such circumstances for the search for a replacement business or farm.[43] A variety of similar business relocation statutes exist that may apply in given situations depending on the identity of the condemnor; counsel should not therefore summarily presume that damages will only extend to the value of the real estate alone in every case.[44]

In addition to the legislative authority for reimbursement of moving and other direct losses incurred by a business in specific circumstances, practitioners should also become familiar with any local code provisions applicable to the particular condemning authority that may similarly broaden the scope of an award. Certain business owners, for example, in specified counties whose going concern is directly or indirectly decreased in value as a result of New York City's acquisition of land for additional water supply have a right to damages for such decrease in business value.[45] Recovery was allowed under the New York City Administrative Code provision where claimants owned *no* real estate subject to the taking but were, rather, permissive users of water in connection with their businesses and suffered indirect losses when that water usage was impacted by the city's actions.[46] In another claim pursued under the New York City Code, the owner of a retail feed enterprise was awarded compensation for lost profits and customers following the city's appropriation of nearby lands for water supply purposes.[47]

A recognized exception to the general rule that compensation is not available for a business concern occurs when the condemnor seeks to take over the business itself. As noted earlier, the rationale traditionally promulgated has been that where the location of the property is not crucial to the conduct of the business, nothing has actually been taken because under competent management the business can be relocated and continued.[48] Where the condemnor does intend to continue operating the business, as one frequently quoted federal decision observed, "the condemning authority in effect takes the business since, in a monopoly situation, the former owner cannot establish a rival operation capable of receiving any of the former business' transferable intangible value."[49]

In a federal case upholding an award for the business value of the going concern, claimants contended that the government did indeed intend to "create a monopoly situation" and take "any transferable and tangible value of the former business" when it took over the operation of claimants' lakeshore canoe-launching enterprise to make it a part of the National Park Service's operations.[50] Government documents indicated that the condemnor sought to condemn the claimant's property with the intention of substantially carrying on the existing operations. It was further evident that the area along the lake that was the subject of the condemnation was the only one suitable for canoe launching, thus precluding any competition with the government's proposed operation and depriving the commercial owners of their livelihood. The court concluded that while the government did not intend to continue the operation of the existing business per se, it clearly intended to continue to provide a service of the same nature as the current business and would financially benefit from its existence, and an award including the value of the business as a whole, including any goodwill and going concern value, was appropriate.[51]

This holding followed the frequently cited decision of the United States Supreme Court in *Kimball Laundry Co. v. United States*,[52] which involved the temporary taking and operation of a laundry plant for use by Army personnel during World War II. The laundry-claimant argued that just compensation under such circumstances should include both the rental value of the real estate as well as the diminution in the value of its business when the government effectively destroyed the company's trade routes. The Court agreed, noting that during the period of temporary occupancy the government had effectively preempted the laundry's trade routes, and the intangible character of such value alone would not preclude compensation for the loss.[53]

This line of cases provides persuasive authority to suggest, as well, that in a given situation courts might appropriately grant damages for going concern value where the taking has the inevitable effect of completely depriving the owner of the going concern value of the business, even if the business is not actually continued by the government, such as where the business is inextricably tied to the location or some other particular characteristic that cannot be reasonably resumed elsewhere without suffering substantial damages.[54]

Endnotes

1. *See Kimball Laundry Co. v. United States*, 338 U.S. 1, 10–11 (1949).
2. *See* 4 Nichols, *Law of Eminent Domain* § 13.18[2] (3d ed. rev. 1977).
3. *Id. at* § 13.18[4].
4. 26 Am. Jur. 2d *Eminent Domain* § 368 (2006), citing *In re Larned-Bates Rehabilitation Project*, 202 N.W.2d 816 (1972).
5. *See* 4 Nichols, *Law of Eminent Domain* § 13.18[3] (3d ed. rev. 1977).
6. *See* Fla. Stat. §§ 337.27(3) (2003), 127.01(1)(b) (2006), 166.401(2) (2000); *see also Dep't of Transp. v. Fortune Fed. Sav. & Loan Ass'n*, 532 So.2d 1267 (Fla. 1988).
7. *Id.*
8. Tex. Prop. Code Ann. § 21.042(b) (Vernon 2000).
9. *See Herndon v. Hous. Auth. of City of Dallas*, 261 S.W.2d 221, 222–23 (Tex. App. 1953).
10. *Id.* at 223.
11. *Id.*
12. *Pilots Point Marina, Inc. v. Town of Westbrook*, 2005 Conn. Super. LEXIS 2651, at *13 (Oct. 6, 2005).
13. *See Avon Realty, LLC v. Town of Avon*, 2006 Conn. Super. LEXIS 913, at *19 (Mar. 24, 2006).
14. *Id.* at *18.
15. *See Commonwealth v. R.J. Corman R.R. Co./Memphis Line*, 116 S.W.3d 488, 496 (Ky. 2003).
16. *See* Charles M. Cork III, *Special Contribution: A Critical Review of the Law of Business Loss Claims in Georgia Eminent Domain Jurisprudence*, 51 Mercer L. Rev. 11 (1999).
17. *Id.*
18. *Id.*
19. *See Bd. of County Comm'rs v. Delaney*, 592 P.2d 1338, 1340 (Colo. Ct. App. 1978).
20. 4 Nichols, *Law of Eminent Domain* § 13.3[2] (3d ed. rev. 1977), citing *DURA v. Berglund-Cherne Co.*, 193 Colo. 562 (1977); *see*

also *Denver v. Quick*, 108 Colo. 111 (1941) (finding evidence relating to care, feeding, and sale of cattle relevant to income as admissible in valuing business as it was derived *from the use of the property itself*).

21. *See* 4 Nichols, *Law of Eminent Domain* § 13.18[7] (3d ed. rev. 1977).
22. *Id.*
23. 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005).
24. *New York v. 57 Columbia, Inc.*, 40 N.Y.2d 1057 (1976).
25. *Banner Milling Co. v. State of New York,* 240 N.Y. 533 (1925); *United States v. 0.88 Acres of Land,* 670 F. Supp. 210 (W.D. Mich. 1987).
26. 26 Am. Jur. 2d *Eminent Domain* § 335 (2006).
27. *Banner Milling Co. v. State of New York,* 240 N.Y. 533 (1925).
28. *Id.* at 540.
29. *Niagara Falls Urban Renewal Agency v. Gorge Terminal Realty Co.*, 92 A.D.2d 719 (4th Dep't 1983).
30. *In re County of Nassau (Lido Boulevard)*, 43 A.D.2d 45, 50 (2d Dep't 1973), *aff'd sub nom. Colony Beach Club, Inc. v. County of Nassau*, 39 N.Y.2d 958 (1976).
31. *Humbert v. State of New York*, 278 A.D. 1041 (4th Dep't 1951).
32. *Id.*
33. *Id. See also*, *Burdick v. State of New York,* 276 A.D. 1052 (4th Dep't 1950), *aff'd,* 302 N.Y. 670 (1951); *In re City of Rochester [Smith St. Bridge]*, 234 A.D. 583 (4th Dep't 1932); *Banner Milling Co. v. State of New York*, 240 N.Y. 533 (1925).
34. *In re County of Nassau (Lido Boulevard),* 43 A.D.2d 45, 50–51 (2d Dep't 1973).
35. *Id.* In this regard, it is also interesting to note the juxtaposition of these rules when the underlying land, in and of itself, contains inherent business value. In *Belott v. State of New York*, 26 A.D.2d 749 (3d Dep't 1966), the land subject to taking contained valuable mining rights. While the court disagreed with the claimant's methodology for calculating damages, it did find that the proper measure of damages in that case was the present business value of the profits to be realized from ownership of such mineral rights.
36. USPAP (Appraisal Foundation), Standard Rule 1-4(g).
37. The Appraisal Institute, *The Appraisal of Real Estate* 578 (11th ed. 1996).
38. The Appraisal Institute, *The Appraisal of Real Estate* 641 (12th ed. 2001).
39. UNIF. EMINENT DOMAIN CODE § 1016.
40. *See Kimball Laundry Co. v. United States*, 338 U.S. 1 (1948) ("The value compensable under the Fifth Amendment . . . is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent.").
41. Richard T. Crotty, Anthony J. Mullen, & William C. Weaver, *Identifying Business Values in Assessment of Senior Living and Long-Term Care Properties*, Assessment Journal, March / April 2001, at 33; *see also* Anthony J. Mullen, *A Note on Underwriting and Investing in Senior Living and Long-Term Care Properties: Separating the Business from the Real Estate*, 5 Journal of Real Estate Portfolio Management 299–302 (1999).
42. N.Y. EDUC. LAW § 307(10) (McKinney 2000).
43. *Id.*
44. *See, e.g.*, N.Y. AGRIC. & MKTS. LAW § 27(12) (McKinney 2004); N.Y. CANAL LAW § 40(12) (McKinney 1996); N.Y. CORRECT. LAW § 21(12) (McKinney 2003); N.Y. ENVTL. CONSERV. LAW §§ 3-0305(16), 3-0306(12) (McKinney 2005); N.Y. EXEC. LAW § 213(12) (McKinney 2001); N.Y. HIGH. LAW §§ 29(11), 30(13), 347(14) (McKinney 2000); N.Y. MIL. LAW § 177(12) (McKinney 1990 & Supp. 2006); and N.Y. PUB. HEALTH LAW § 401(12) (McKinney 2001).
45. NYC ADMINISTRATIVE CODE § 5-423 (Condemnation Procedures: Damage to value of real property; businesses, and employees thereof).
46. *In re Huie (Klass)*, 11 A.D.2d 837 (3d Dep't 1960).
47. *In re Huie (Crawford Bros., Inc.)*, 26 A.D.2d 746 (3d Dep't 1966).
48. *Banner Milling Co. v. State of New York,* 240 N.Y. 533 (1925).
49. *United States v. 0.88 Acres of Land,* 670 F. Supp. 210 (W.D. Mich. 1982); *see also Mitchell v. United States*, 267 U.S. 341 (1925) (consequential damages for losses to business precluded because government's destruction of the business was unintentional).
50. *United States v. 0.88 Acres of Land,* 670 F. Supp. 210 (W.D. Mich. 1982).
51. *Id.* at 213.
52. 338 U.S. 1 (1948).
53. *Id.* at 10–12.
54. *See* 26 Am. Jur. 2d *Eminent Domain* § 335 (2006); *see also Kimball Laundry Co. v. United States,* 338 U.S. 1, 13 (1948) ("If such a deprivation has occurred, the going-concern value of the business is at the Government's disposal whether or not it chooses to avail itself of it.").

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Ethics Opinion No. 811

Committee on Professional Ethics of the New York State Bar Association

4/13/07

Topic: Conflicts of interest; public defender

Digest: Where a public defender cannot be assigned due to a conflict, the public defender may not review billing vouchers of the counsel assigned to the matter to determine or recommend whether they should be paid.

Code: DR 5-101, 5-105(C), (D), 7-101(A)(1); EC 5-1, 5-15.

Question

1. May a public defender employed by the county perform a review of billing vouchers submitted by counsel assigned pursuant to Article 18-B of the County Law where the 18-B lawyer is appointed because the public defender has a conflict?

Opinion

2. New York law requires each county to establish a plan to provide attorneys for people who are entitled to legal representation in criminal and family matters but who cannot afford to pay for counsel.[1] Counties are permitted to use any of four methods to provide such counsel: a public defender, a private legal aid bureau, a bar association plan for rotation of private counsel, or a combination of these.[2] In many cases, counties that have chosen to establish a public defender in accordance with County Law Article 18-A rely on private attorneys under Article 18-B in cases in which the public defender is unable to represent an indigent litigant because of a conflict of interest with another client of the office (co-defendants in a criminal proceeding, for instance).

3. A number of counties do not have a separate program or coordinator that would have responsibility for reviewing bills submitted by attorneys assigned to represent poor people under Article 18-B. Some counties may require the public defender to review billing vouchers of assigned conflict counsel. Some of these counties go further and include the assigned counsel budget in the appropriation for the public defender's office.[3]

5. The Committee concludes that if the public defender's office is barred from representing a party because of a conflict, it would similarly be barred from reviewing the billing vouchers of assigned counsel to determine whether they should be paid by the county. In reviewing those billing materials, the public defender's office would not only likely be exposed to work product about the trial preparation activities of assigned counsel, but would be called upon to determine or advise the county whether those expenditures were excessive. The office owes a duty of loyalty, EC 5-1, and of zealous advocacy, DR 7-101(A)(1), to its client in the matter that conflicts with the expectation of the county that the office provide impartial advice on whether the bills of the 18-B lawyer are appropriate. This may be viewed as a conflict under DR 5-105 between two clients of the office—the county, which hires the office to provide legal advice on the appropriateness of the 18-B lawyer's bills,[4] and the client in the matter that creates a conflict. Alternatively, it may be viewed as a conflict under DR 5-101 between the interests of the client in the matter and the office's own interest in properly carrying out its obligation to provide impartial review of the bills.[5] Under either view, the result is the same. This prohibition would prevent any member of the public defender's staff from engaging in the review of billing submissions.[6] In short, if the public defender's office is conflicted from representing a party in litigation, the office may not get back involved in the representation by participation in determining whether the assigned counsel's bills should be paid.[7]

6. Conflicts under DR 5-101 and DR 5-105 can often be waived with the informed consent of the affected clients, DR 5-105(C), but several circumstances make it unlikely that consent will cure the conflict here. First, we have noted that it is often difficult to obtain informed consent to waiver of a conflict from indigent clients who have been assigned counsel.[8] Moreover, a lawyer or law office (such as the public defender's office) rarely can represent multiple criminal defendants.[9] Indeed, in seeking the appointment of 18-B counsel because of a conflict, the public defender is likely to have concluded that the conflict was not consentable. If the conflict that precluded the public defender from representing the defendant was not consentable, the same conflict would prevent the public defender from

reviewing the bills of the defendant's 18-B counsel and would presumably not be consentable.

Conclusion

8. Where counsel is assigned to represent a criminal defendant because the public defender has a conflict, the public defender may ordinarily not review the bills submitted by assigned conflict counsel so as to determine or recommend whether they should be paid.

(35-06)

Endnotes

1. N.Y. County Law § 722.
2. *Id.*
3. *See* Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services at 57-58 (Spangenberg Group, June 2006).
4. *See* N.Y. City 2004-3 (assuming that a government lawyer's client is the government agency that employs the lawyer).
5. *See* N.Y. State 767 (2003) (lawyer may not represent parents in hearing before impartial hearing officer where such officer is separately appearing on behalf of private clients before the lawyer acting as impartial hearing officer); N.Y. State 682 (1996) (a lawyer may not accept a referral fee from an investment advisor because of the potential impact on the lawyer's advice to the client).
6. DR 5-105(D) (conflicts under DR 5-105 and DR 5-101 are imputed to all lawyers in a law firm or law office). *See also* EC 5-15 (the lawyer "should resolve any doubts against the propriety of the representation"); N.Y. State 788 (2005) (the conflicts of prosecutors in a small D.A.'s office are imputed to a part-time prosecutor).
7. Our view is limited to the facts here, involving conflicting interests of criminal defendants. We express no view with respect to other circumstances, such as the review of bills in other contexts submitted by counsel for parties whose interests differ only slightly or only potentially from those of the reviewer's client.
8. N.Y. State 800 (2006) ("Client consent, in a case where a conflict is consentable, is often not possible. Consent can only be sought where the prospective client would be empowered to withhold consent freely. . . . [I]t would be difficult to obtain voluntary consent from an assigned client."); N.Y. State 490 (1978) (When seeking consent, the attorney "should be particularly sensitive to any element of submissiveness on the part of their indigent clients; and such requests should be made only under circumstances where the [attorney] is satisfied that [his or her] clients could refuse to consent without any sense of guilt or embarrassment.").
9. *See* EC 5-15 ("there are few situations in which the lawyer would be justified in representing in litigation multiple clients with potentially differing interests"); Restatement (Third) of the Law Governing Lawyers §129 cmt. c (2000) ("joint representations in criminal cases often has a material and adverse effect on the representation of each defendant"); ABA Model Rule 1.7 cmt. 23 ("The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant."); *Wheat v. United States*, 486 U.S. 153 (1998) ("[M]ultiple representation of criminal defendants engenders special dangers of which a court must be aware" and a court confronted with possible conflicts "must take adequate steps to ascertain whether the conflicts warrant separate counsel.").

Ethics Opinion No. 812

Committee on Professional Ethics of the New York State Bar Association

5/3/07

Topic: Communication with a represented party.

Digest: Unless prohibited by state or local law, DR 7-104(A)(1) permits a lawyer representing a private party before a town planning board to communicate with individual planning board members about pending determinations provided: (a) the proposed communications solely concern policy issues; and (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications.

Code: DR 7-104(A)(1); EC 7-15, 7-18.

Question

1. Over the objection of counsel representing a town planning board, may in-house counsel for a real estate development company communicate privately, separately, and informally about the developer's pending applications with individual members of the board who support the developer's proposed project?

Opinion

2. The inquirer is in-house counsel to a limited liability company engaged in the business of shopping center development. In that capacity, the inquirer is the "public face" of the developer and represents the developer before various government bodies to secure required land use permits and approvals.

3. The inquiry concerns a development project for which a State Environmental Quality Review Act ("SEQRA") review and site plan and subdivision approvals are pending before a seven-member town planning board. The project is controversial and has engendered substantial public opposition. The town board, which has no jurisdiction over the determinations to be issued by the planning board, is said to support the shopping center project. However, a majority of the members of the planning board, including the planning board chair, are said to oppose the project.

4. The planning board is represented with respect to the shopping center project by outside counsel. The developer has also secured outside counsel to "formally" represent the developer before the planning board, limiting in-house counsel's role to communicating "separately and informally" on behalf of the developer with the "more receptive" minority of planning board members who support the project. The inquirer states that these communications are "not in the nature of legal advice or assistance" and are "not designed to supplant guidance provided to the board by their own legal counsel." Rather, the separate communications "are confined to the provision and receipt of factual information and the discussion of state and local environmental and land use issues and polices" and are intended "to ensur[e] that supportive members of the planning board have the information they need to counter the opposition's efforts to derail the project, and are able to share facts and strategies with the developer." The developer thus seeks to create an even playing field with "[m]embers of the public who oppose the project [and who] communicate and strategize freely with like-minded members of the planning board, without going through the board's legal counsel."

5. Counsel for the planning board has objected to the separate, private communications regarding the project with individual members of the planning board, and has directed that the inquirer limit his communications to written submissions addressed to the planning board secretary for distribution to the entire board and for inclusion in the administrative record.

6. Against this background, the inquirer asks whether he may ethically persist in the "informal communications" with individual members of the planning board.

7. The inquiry is governed by DR 7-104(A)(1), known as the "no-contact" rule, which provides:

> During the course of the representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent

> of the lawyer representing such other party or is authorized by law to do so.

See also EC 7-18.

8. Because consent has clearly not been given, and because the planning board is represented with respect to the matter, the proposed communications are prohibited under the "no-contact" rule unless within the meaning of DR 7-104(A)(1): (a) planning board members are not "parties"; or (b) the communications are otherwise "authorized by law." We address each question in turn.

1. Are Planning Board Members "Parties"?

9. The answer to this question is controlled by application of the standard set forth by the New York Court of Appeals for determining the "party" status of employees of corporations and other entities for DR 7-104(A) purposes in *Niesig v. Team I*:

> The test that best balances the competing interests, and incorporates the most desirable elements of the [various] approaches, is one that defines "party" to include corporate employees whose acts or omissions in the matter under inquiry are binding on the corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.[1]

10. We have held the *Niesig* test to be applicable to governmental units.[2] Thus, DR 7-104(A)(1), as interpreted by *Niesig*, prohibits "only communications with government officials who have authority, individually or as part of a larger body, to bind the government or to settle a litigable matter, or whose act or omission gave rise to the matter in controversy."[3] Here, as the planning board is invested with the power to issue binding SEQRA, site plan and subdivision determinations with respect to the matter before it, the *Niesig* "party" test is satisfied.

2. Are the Proposed Communications with the Planning Board "Authorized by Law"?

11. In N.Y. State 404 (1975) we recognized an "implicit exception" to the broad no-contact prohibition of DR 7-104(A)(1) where a "public body is involved," based on the "overriding public interest [which] compels that an opportunity be afforded to the public and their authorized representatives to obtain the views of, and pertinent facts from, public officials representing them." Accordingly, we opined that private counsel could, without the consent of school district counsel, properly communicate about a controversy with an individual member of a school board who disagreed with the school board decision being contested by the lawyer's client. This sentiment – that the literal application of the "no-contact" rule must be tempered by constitutional considerations where the First Amendment right to petition government is implicated – is shared by most authorities.[4]

12. This concern for protecting the First Amendment interests of citizens to contact governmental decision makers has also led to specific no-contact rule exceptions in California and the District of Columbia.[5]

13. The issue of whether a lawyer who is representing a private party in a controversy may communicate about the matter with responsible government officials without the prior consent of government counsel has been comprehensively addressed by the American Bar Association Standing Committee on Ethics and Professional Responsibility in ABA 97-408. Noting the "tension between a citizen's right of access and the government's right to be protected from uncounselled communications by an opposing party's lawyer,"[6] the ABA Committee interpreted Model Rule 4.2, the functional equivalent of DR 7-104(A)(1),[7] to allow unconsented contacts with government officials that would otherwise have been prohibited by the no-contact rule, but subject to three conditions. First, the official to be contacted must have authority to take or recommend action in the controversy. Second, the sole purpose of the communication must be to address a policy issue. Third, advance notice of the proposed communications must be given to the lawyer representing the government official in the matter so as to afford government counsel the opportunity to advise his or her client with respect to the communication, including whether even to entertain it.[8]

14. Insofar as set forth in this opinion, we adopt the approach taken in ABA Formal Op. 97-408 and here conclude, on the facts presented, that the proposed communications fall within the protection of the First Amendment right to petition. They are, therefore, not prohibited by DR 7-104(A)(1), provided that counsel for the planning board is given reasonable advance notice that such communications will occur.[9] Although the precise parameters of the constitutional right to petition are beyond our jurisdiction, we note that communications directed to government

officials who do not have the authority to take or recommend action in the matter, or communications that are intended to secure factual information relevant to a claim (for example, mere witnesses to government misconduct), should both be fully subject to the no-contact rule as, in each of these situations, there are no First Amendment considerations at play.[10]

15. Our resolution of this inquiry comes with several important caveats. First, we do not opine on whether additional "private," "separate" or "informal" communications with board members may violate a state statute or local ordinance that governs planning board procedures, or whether such communications may implicate a locally adopted ethics code. Second, we do not here address ex parte communications with an adjudicatory government body, such as a zoning board of appeals, which present different considerations.[11] Third, the inquirer may not deliberately elicit information that is protected by attorney-client privilege or as attorney work product.[12] Fourth, the inquirer should cease contact with a planning board member if the member so requests.[13]

Conclusion

16. Absent the application of state or local ordinances that prohibit or regulate the practice, and subject to the qualifications set forth in this opinion, DR 7-104(A)(1) permits a lawyer representing a private party before a town planning board to communicate with individual planning board members about pending SEQRA, site plan and subdivision determinations *provided*: (a) the proposed communications solely concern municipal development policy issues; and (b) the lawyer gives planning board counsel reasonable advance notice of the proposed communications.

(37-06)

Endnotes

1. 76 N.Y.2d 363, 374; 558 N.E.2d 1030, 1035; 559 N.Y.S.2d 493, 498 (1990).
2. N.Y. State 652 (1993); *see also* N.Y. State 768 (2003).
3. N.Y. State 652 (*citing* N.Y. City 1991-4 and Ohio Opinion 92-7).
4. *See, e.g., American Canoe Ass'n Inc. v. St. Albans*, 18 F. Supp. 2d 620 (S.D. W. Va. 1998) (the right to contact and communicate with government officials is a right of citizenship); ABA Formal Op. 97-408 (1997) (Model Rule 4.2 "does not prohibit a lawyer representing a private party in a controversy with the government from communicating directly with government officials who have authority to take or recommend action in the matter, provided the communication is solely for the purpose of addressing a policy issue, including settling the controversy."); Alabama Opinion 2003-03 (lawyer defending employees and officials of state board of education in suit by county board of education may communicate directly with county board of education members to discuss settlement); Kansas Opinion 00-06 (lawyer for zoning applicant may contact city officials about client's application despite city attorney's contrary directive because "a citizen must always have access to his or her government"); Utah Opinion 115 (1993) (lawyer may contact any employee of a represented government agency after advising the employee of the matter in question and of the lawyer's representation therein); *see also* RESTATEMENT OF LAW GOVERNING LAWYERS (THIRD) § 101(1), at 102 (2000**)** ("Unless otherwise provided by law . . . . the prohibition . . . . against contact with a represented non-client does not apply to communications with employees of a represented government agency or with a governmental officer being represented in the officer's official capacity.").
5. California Rule of Professional Conduct 2-100(C)(1) (providing that the general no-contact rule "does not apply to communications with a public officer, board, committee or body"); District of Columbia Rule of Professional Conduct 4.2(d) (providing that the District's no-contact rule does not prohibit "communications by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client").
6. ABA Formal Op. 97-408, at 7.
7. Model Rule 4.2 (Communication with Person Represented by Counsel) provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."
8. ABA Formal Op. 97-408, at 7-8.
9. *Cf.* N.Y. State 768 (2003) (lawyer representing government agency may be present and counsel the lawyer's own client at a meeting with a person known to be represented in that matter without opposing counsel's consent, provided lawyer gives reasonable advance notice to opposing counsel of lawyer's intention to attend and does not communicate with opposing party).
10. *See* ABA Formal Op. 97-408, at 8-9.
11. *See* EC 7-15 ("The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both.").
12. *See* N.Y. State 785 (2005).
13. C*f.* EC 7-18 ("A lawyer who advises a client with respect to communications with a represented person should also advise the client against engaging in abusive, harassing or unfair conduct.").

Ethics Opinion No. 813

Committee on Professional Ethics of the New York State Bar Association
5/7/07
Clarifies: N.Y. State 803 (2006)

Topic: Unauthorized practice of law; debt collection; letterhead

Digest: A lawyer who provides debt collection services as a non-legal service may not use law firm letterhead in doing so, but a lawyer who, as a lawyer, represents clients in collecting debts may use law firm letterhead.

Code: DR 1-106(A), 1-102(A)(4), EC 3-6.

Question

1. A lawyer in New York has been retained by several debt collection agencies, both in New York and out of state, to assist in the collection of debts. The lawyer has hired employees of the debt collection agencies to assist in this work, including preparing letters to debtors. The employees are located in New York and out of state. May the lawyer use the lawyer's letterhead in sending letters to the debtors?

Opinion

2. We see no impediment in the New York Code of Professional Responsibility to a New York lawyer, acting as a lawyer, using law office letterhead in seeking to collect a debt, assuming no violation of any other jurisdiction's rules. In N.Y. State 803 (2006) we addressed an inquiry in which a lawyer wished to engage in a debt collection business outside of New York without engaging in the practice of law in the state where that business was conducted. The lawyer was not admitted in that state. Rather, the inquirer there sought to assist clients in collecting debts as a non-legal service, which we assumed was permitted by the rules of that other state. Our opinion focused primarily on the requirements of DR 1-106(A) where a law firm is offering both legal and non-legal services, and in particular the requirement that the lawyer advise the client in writing that the protection of the attorney-client relationship does not exist with respect to the non-legal services.

3. In addition, in paragraph 4 of the opinion we addressed the implications of DR 1-102(A)(4), which prohibits a lawyer from engaging in "conduct involving dishonesty, fraud, deceit, or misrepresentation." We said:

   > Similarly, the firm must avoid misleading debtors with whom it communicates pursuant to the collection activities [citing DR 1-102(A)(4)]. For example, it may not use its law firm letterhead in communicating with debtors and must otherwise avoid suggesting to debtors in such communications that the firm or its representatives are functioning as lawyers engaged in the representation of the creditor-client or that the firm or its representatives might undertake legal action on the creditor-client's behalf.

4. This discussion of the use of firm letterhead related only to the conduct of a collection business as a non-legal activity in a state where that was permitted. Our concern was that the lawyer not mislead debtors as to the capacity in which the lawyer is acting, so as to suggest, for example, that a lawyer has considered the merits of the claim or is preparing to sue the debtor.

5. In the present inquiry, a lawyer proposes to offer *legal* services to the lawyer's debt-collection-agency clients. In that situation, the lawyer is acting as a lawyer in seeking to collect the debt, and can use law office letterhead in doing so.

6. We caution that in conducting such a debt-collection practice, the lawyer must adequately supervise his or her non-lawyer employees.[1] A lawyer must retain full professional responsibility and meaningful involvement in supervising the activities of law firm employees. As we said in N.Y. State 179 (1971), "It would not be improper to permit a stenographer in the office of the client to type the collection letters in the form prepared by the attorney and to forward them to the attorney, who would read, sign and mail the letters to the debtors in the event the letters met with the attorney's approval." But it would be a violation were the lawyer to turn the sending of the lawyer's collection letters over to the collection agency or to the lawyer's debt-collection employees without any meaningful involvement by the lawyer.[2]

7. As in N.Y. State 803, we express no opinion on any question arising out of the rules relating to the unauthorized practice of law. We do not

opine on the law or ethics rules of any other jurisdiction.[3]

Conclusion

8. The New York Code of Professional Responsibility does not prevent a lawyer offering legal services from using the lawyer's law firm letterhead in the course of representing clients in collecting a debt. If the law firm undertakes to offer debt collection services as a non-legal service in places where doing so is otherwise permitted, the lawyer should not use law firm letterhead in doing so, as that would suggest that the lawyer is offering legal services.

(10-07)

Endnotes

1. *See* EC 3-6 (delegation of tasks to clerks, secretaries and other nonlawyers "is proper if the lawyer maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product").
2. *Cf. Clomon v. Jackson*, 988 F.2d 1314, 1320 (2d Cir. 1993) (finding violation of federal law prohibition on use of "false, deceptive or misleading" representations or means in debt collection where lawyer did not determine to whom letters over his name should be sent, did not see, review or approve letters before they were sent, and did not know to whom they were sent).
3. Indeed, we do not opine on what constitutes unauthorized practice of law in New York either, because the rules governing unauthorized practice of law in New York are matters of law, not the Code of Professional Responsibility. New York Judiciary Law §§ 476-a, 476-b, 478, 484-486.

NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, New York 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

Ethics Opinion No. 814

Committee on Professional Ethics of the New York State Bar Association

5/15/07

Topic: Supervision of a branch office managed by a non-partner.

Digest: New York office of multi-state law firm may be managed by a non-partner who is admitted to practice in New York where the non-partner is supervised by an out-of-state partner who is licensed in another state, but not in New York.

Code: DR 1-104(A), (C); DR 2-102(D); DR 2-106; DR 4-101; DR 5-105(E); DR 6-101; DR 9-102; EC 1-8; EC 2-19.

Question

1. May a New York office of a multi-state firm be managed by a non-partner who is admitted in New York, where the non-partner is supervised by an out-of-state partner who is admitted in another state, but not in New York?

Opinion

2. A lawyer admitted to practice in New York is contemplating becoming an associate or of counsel to what will be a two-person law firm, with offices in New York and New Jersey. The New York attorney will be paid a salary, will work out of and manage the New York office, but will not share in the overall profits, liabilities and professional responsibilities of the law firm. The firm will practice in the name of the New Jersey attorney, who is not admitted in New York. The New York attorney's status as an "associate" or "of counsel" to the Firm will appear on the letterhead and in any promotional materials pursuant to DR 2-102(D).

3. As an initial matter we address the ethical propriety of having a New York office of a multi-state law firm where there is no partner of the firm in residence. This Committee recently confirmed that it is permissible for a New York attorney to form a partnership with a lawyer who is admitted only in another jurisdiction.[1] Similarly, none of this Committee's opinions suggests that a New York lawyer may not be associated with, and employed by, an out-of-state partner of a multi-state law firm. Nor is there any such prohibition in the Lawyer's Code of Professional Responsibility (the "Code").

4. The Code imposes certain supervisory responsibilities on law firms in DR 1-104(A) and (C):

   A. A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to the disciplinary rules.

   C. A law firm shall adequately supervise, as appropriate, the work of partners, associates and non-lawyers who work at the firm. The degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter.

   In N.Y. State 762 (2003), we noted that there is no rule in the Code defining which law firms are subject to the disciplinary authority of New York. We concluded that, at a minimum, the Disciplinary Rules that specifically address the ethical obligations of law firms apply to firms with a New York office and at least one New York lawyer affiliated with the firm in that office. Therefore, the supervisory rules concerning law firms apply to the firm described in this fact scenario.[2]

5. The firm's specific supervisory obligations are described in DR 1-104(A) and DR 1-104(C). These include the obligation to ensure that all lawyers "conform to the disciplinary rules" and to "adequately supervise" the work of all of the attorneys in the firm. Generally, this requires the firm to develop systems to ensure that its New York lawyers comply with New York's disciplinary rules and that the firm's practice is conducted in a professional and ethical manner.[3] To discharge this duty, the firm may consider establishing procedures (i) to ensure that lawyers reach agreement with clients on fees and provide accurate bills (EC 2-19; DR 2-106); (ii) to educate lawyers and nonlawyers about the importance of maintaining client confidences and secrets, and systems to assist with the main-

tenance of client confidences (DR 4-101); (iii) to keep records of prior engagements and detect conflicts of interest (DR 5-105(E)); (iv) to oversee work handled by any New York attorney and ensure that the lawyer handling the matter is competent (DR 6-101); (v) to allow non-partners to raise concerns about ethical conduct (EC 1-8); (vi) to segregate client funds and maintain appropriate records (DR 9-102); and (vii) to provide continuing legal education to attorneys (EC 1-8).

6. The application of the DR 1-104 supervisory obligations to this law firm requires that the firm establish appropriate systems to ensure ethical conduct, and take care to hire lawyers and non-lawyers who can competently represent clients and follow any procedures established by the firm.

Conclusion

7. The New York office of a multi-state firm may be managed by an associate or of counsel attorney who is admitted in New York, and supervised by an out-of-state partner who is licensed in another state. The law firm is responsible for establishing procedures to ensure that the New York attorney complies with New York's disciplinary rules.

(40-06)

Endnotes

1. N.Y. State 801(2006); *see also* N.Y. State 175 (1971).
2. Only the First Department has adopted a rule defining which law firms are subject to the Code. *See* 22 NYCRR § 603.1(b), 603.2(b). The First Department rules provide that any law firm (as defined in the Code) that has as a member, employs, or otherwise retains an attorney or legal consultant who is subject to the New York Code can be disciplined for professional misconduct under the New York Code. If the New York office of the firm is located within the First Department, the rules makes plain that the firm would be subject to the Code.
3. N.Y. State 762 (2003); *see also* EC 1-8 ("A law firm should adopt measures giving reasonable assurance that all lawyers in the firm conform to the Disciplinary Rules and that the conduct of non-lawyers employed by the firm is compatible with the professional obligations of lawyer in the firm.").

ONE ON ONE

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