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ONEONONE

A publication of the General Practice Section
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A Message from the Chair

Welcome to another fantastic issue of *One on One*. You may have already noticed something slightly unusual on this page. For the first time in two years, the photo accompanying this column is not that of Martin Kera, who guided the General Practice Section with great skill for two years. Marty's contributions to this Section are immensurable, and we owe him a debt of gratitude. Marty was the Chair of this Section during a time of great economic uncertainty, and thanks in no small part to his leadership and commitment to the Section, our membership remains strong. I look forward to continuing to work with him.

Which, by way of belated introduction, is another way of saying that the photo accompanying this article is of me, the new Chair. I am so proud to be a member of the General Practice Section which, through its newsletters, listserve, and CLE programs (among others), provides unparalleled benefits to its members. It is an honor to serve as the Chair. I have been a member of NYSBA since I moved to New York to practice law. NYSBA does tremendous work throughout the State both for attorneys and for the community at large, and is a great voice for the profession. But one of the larger problems faced by our profession comes from those who aren't yet even in it. I am troubled that the number of people entering law school is on a steep decline. As you've no doubt been reminded by both parties this election season, the state of our economy is still a concern. Getting that prized, well-paying job immediately out of law school is not as likely a possibility for some graduates as it once was. Never mind those vaunted positions, many graduates are having difficulties finding work at all. Though this has been a trend since the start of the recession, perhaps not surprisingly, it is now being reflected by the decreasing number of law school applicants.

Inside

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As the *New York Times* reported earlier this year, the number of people who sat for the LSAT declined by 16 percent over the previous year. A few months later, the paper reported the results of a study by Professor William D. Henderson at the Indiana University Maurer School of Law, who found that barely over half of all 2011 graduates had secured positions that required a law degree. I dislike the oft-repeated, slightly dismissive claim that law schools "churn out" graduates, as if students who spend a small fortune to be immersed in the study of law for three years were no different than candy bars being moved along an assembly line. We should be concerned that for many college graduates and others, as they see no likelihood of a light at the end of the law school tunnel, they are deciding not to enter the tunnel at all. As a result, some of the would-be future leaders of our profession are choosing a different, possibly more secure career path. Though understandable, it is a great shame. I was thinking about this changing reality recently while serving as a member of NYSBA's Working Group on Pro Bono Rule. Chief Judge Jonathan Lippman's initiative, which conditions bar admission on completing fifty hours of pro bono work, will not only give law students more hands on experience, but (one hopes) provide them with a broader perspective when it comes to the types of post-graduation career opportunities available. Ours is a noble profession, and pro bono experience will, in my opinion, remind law students of the ideals that propelled them to attend law school in the first place. The problem is getting the message about the importance and value of a legal education out to dissuaded prospective law school applicants.

Chief Judge Lippman announced the new 22 NYCRR § 520.16 this past September 19th, and it remains to be seen how our Section could best assist law students in fulfilling this new pro bono requirement. However, I have no doubt that in the months and years ahead, the contributions this Section and its members will make in helping to usher in the pro bono requirement will be great.

Since its creation in 1980, the General Practice Section has sought not only to provide a network for solo practioners, general practitioners, small firm lawyers and others to communicate with colleagues Statewide, but has also been (through its broad focus) a way for attorneys who specialize to have a deeper understanding of areas of the law in which they would not normally practice. General practitioners and attorneys at small firms are the lifeblood of our profession. They serve the needs of communities large and small, individuals from all walks of life and businesses, regardless of size. When we grew up idealizing lawyers, it was likely the general practitioner we venerated. Thanks to television, movies, books and and admiring stories we would hear from friends and relatives, we saw the general practitioner as the Swiss Army knives of the profession—seemingly able to remedy any problem a client had, no matter how complex. Of course, that's a little simplistic, but probably not by much. It is hard to read our invaluable listserve (which, if you have not done so already, you should sign up for today) and not get the impression that the members of this Section have the appropriate answers, suggestions and advice to practically any query.

Robert Ostertag, the founding Chair of this Section, said at the time of its formation thirty-two years ago that the General Practice Section would "further the continuing educational needs of a substantial majority of our members and the general legal profession at large, while improving the quality and delivery of legal services to the public." I am thrilled to be able to follow in his footsteps and further that most honorable objective. To that end, I am excited to remind you that the first CLE of my tenure is on a topic that should be of great interest to all of the membership. Charging liens and retaining liens afforded to lawyers who are owed money for legal services is always a relevant concern for practitioners. Richard Klass (who, incidentally, is the editor of *One on One*), has organized a very instructive and informative panel on this topic. There will be instruction on the rules pertaining to attorney fee arbitrations including the timing of serving the notice of right to fee arbitration, papers in the fee arbitration and the procedures of the fee arbitration before the proper forum, as well as a discussion on collection actions and best practices for risk management. This CLE will be held at the Penn Club in Midtown Manhattan on November 13th, and I would encourage all of you to register and attend.

Zachary J. Abella

From the Co-Editors

Richard Klass

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

Stipulations of settlement: The author, Jaclene D'Agostino, discusses New York State law concerning stipulations of settlement. As indicated by the author, stipulations of settlement are favored by the courts and will not generally be set aside except under certain circumstances (such as fraud, collusion, mistake, or accident). In order to have a binding stipulation of settlement under CPLR 2104, the stipulation must either be made between counsel in open court or in a writing subscribed by counsel or reduced to an order. Case law involving both the enforcement and grounds for vacating stipulations of settlement are mentioned.

Summary judgment issue concerning expert witness affidavits: In an article by David A. Glazer and Karen Schnur, they discuss the issues surrounding the potential preclusion of an expert witness's affidavit either in support of or in opposition to a motion for summary judgment. The issue arises when the party has not made disclosure of the expert witness prior to the filing of the note of issue. There is a comparison between the two approaches of the First Department and Second Department on this issue.

Protecting information in the "Cloud": Robert B. Milligan and D. Joshua Salinas delve into the problematic area of the protection of information and trade secrets in both cloud computing and social media. The informative article offers a walk-through on cloud computing's background and benefits; then, the article outlines what constitutes a "trade secret." Lastly, the authors offer real solutions to the issue of protecting trade secrets and other information while utilizing cloud computing systems and social media.

Ethical issues concerning e-mails: When an attorney and client exchange e-mails with each other, those e-mails may contain sensitive, confidential or privileged information. Those e-mails are entitled to remain private even if inadvertently transmitted to an adverse party to whom the e-mails were not intended to be sent, according to Eric M. Hellige. In the article, Mr. Hellige lays out the various ethical rules concerning the sender's and recipient's duties when e-mails are inadvertently transmitted to another party.

Martin Minkowitz

Legal malpractice: In an article by Richard A. Klass, Co-editor of *One on One*, he discusses the recent NYS Court of Appeals decision of *Dombrowski v. Bulson*, in which the court held that a former client suing his attorney for legal malpractice relating to the client's alleged wrongful incarceration cannot recover nonpecuniary damages. The court rejected the claim for nonpecuniary damages (such as pain and suffering) for public policy reasons. As the court stated, "Most significantly, such a ruling could have a chilling effect on the willingness of the already strapped defense bar to represent indigent accused. Further, it would put attorneys in the position of having an incentive not to participate in post-conviction efforts to overturn wrongful convictions."

Workers' compensation: Martin Minkowitz, Co-editor of *One on One*, writes of the circumstance where a worker voluntarily withdraws from the labor market and potentially loses his workers' compensation benefits. The issue generally arises when the worker is unemployed due to permanent partial disability, as opposed to a permanent total disability. The articles discusses the presumptions afforded to the worker and employer when a hearing is conducted to determine whether benefits should cease.

Same-sex marriage: In the article entitled "New York's Marriage Equality Act: One Year Later," authors Steven D. Cohn and Amanda N. Cully review the status of the law of same-sex marriages under the newly enacted Marriage Equality Act, as well as the federal Defense of Marriage Act. There is an outline of various states which have enacted such laws, as well as recent decisions from New York and other states on the issue.

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

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

Sincerely,
Martin Minkowitz
Richard Klass
Co-Editors

Client Cannot Sue His Lawyer for Nonpecuniary Damages

By Richard Klass

In the recent decision of *Dombrowski v. Bulson*, 2012 NY Slip Op. 04203 (May 31, 2012), the New York State Court of Appeals dealt with an open issue in the area of legal malpractice, namely: whether a former client may recover nonpecuniary damages in a lawsuit brought against his attorney for legal malpractice arising from the client's alleged wrongful incarceration.

Client's Conviction for Attempted Rape and Sexual Abuse

In this legal malpractice case, the plaintiff was convicted in 2000, after a jury trial, of attempted rape, sexual abuse and endangering the welfare of a child. The plaintiff brought a motion pursuant to Criminal Procedure Law Section 440.10 to vacate his conviction, arguing that he had received ineffective assistance of counsel. The state court judge denied the motion and determined that the plaintiff's former criminal defense attorney provided meaningful representation in the case.

Subsequently, the plaintiff sought a writ of habeas corpus in federal court. He indicated numerous deficiencies of his former attorney, including failing to investigate or present evidence concerning a defense, interview potential witnesses and cross-examine the victim regarding discrepancies in her testimony. After a hearing, the federal Magistrate found errors by the former defense counsel which made it difficult for the jury to make a reliable assessment of the critical issue of the victim's credibility. Accordingly, the petition was conditionally granted unless further criminal proceedings were brought against the plaintiff. The plaintiff was not reprosecuted and the indictment was then dismissed.

Commencement of Legal Malpractice Case

The plaintiff then brought a legal malpractice action against his former attorney, alleging that he suffered damages as a result of the attorney's malpractice. In his complaint, the plaintiff indicated that he was incarcerated more than five years and was then serving for a period of post-release supervision, and sought damages against the attorney for the time spent.

The Supreme Court granted the defendant attorney's motion for summary judgment and dismissed the complaint, finding that the plaintiff's receipt of Social Security disability benefits while he was incarcerated precluded the claim for pecuniary damages and that damages for any nonpecuniary losses were not permitted in the action for legal malpractice. The Appellate Division modified and reinstated that portion of the complaint which sought nonpecuniary damages. The Appellate Division held that, while nonpecuniary losses were not available for legal malpractice claims where the underlying action was a civil matter, an individual who had been wrongfully convicted as a result of legal malpractice in a criminal matter could recover compensatory damages for loss of liberty and other losses resultant from his imprisonment.

Standard for a Legal Malpractice Case

In order to recover damages in a legal malpractice action, a plaintiff must establish "that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession' and that the attorney's breach of this duty proximately caused the plaintiff to sustain actual and ascertainable damages." Quoting *McCoy v. Feinman*, 99 NY2d 295, 301 (2002). For malpractice actions arising from allegations of negligent representation in a criminal matter, a plaintiff must have at least a colorable claim of actual innocence—that the conviction would have not resulted but for the attorney's negligent representation. *See, Britt v. Legal Aid Society*, 95 NY2d 443 (2000).

Rejection of Claim for Nonpecuniary Damages

Generally, New York courts have rejected these types of claims by plaintiffs in legal malpractice actions against their former attorneys arising out of representation in civil proceedings. *See, e.g., Dirito v. Stanley*, 203 AD2d 903 [4 Dept. 1994]; *Wolkstein v. Morgenstern*, 275 AD2d 635 [1 Dept. 2000]. As held in various cases, there can be no recovery, other than for pecuniary losses, for emotional or psychological injury in a legal malpractice action.

In the case of *Dombrowski v. Bulson*, the plaintiff argued (and the Appellate Division acknowledged) that limiting recovery to pecuniary damages in cases of malpractice arising out of criminal matters would likely deny the claimants any meaningful relief. However, the Court of Appeals determined that there was no compelling reason to depart from the established rule limiting recovery in legal malpractice actions to pecuniary damages. Allowing claimants to recover nonpecuniary damages (which would be damages for items which cannot be measured on a formal monetary scale, such as pain and suffering or social isolation) could have devastating consequences on the criminal justice system. As the court stated, "Most significantly, such a ruling could have a chilling effect on the willingness of the already strapped defense bar to represent indigent accused. Further, it would put attorneys in the position of having an incentive not to participate in post-conviction efforts to overturn wrongful convictions."

Accordingly, the Court of Appeals held that a plaintiff suing his former defense attorney cannot claim nonpecuniary damages in a legal malpractice action.

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Voluntary Retirement and Loss of Workers' Compensation Benefits

By Martin Minkowitz

The issue of a worker voluntarily withdrawing from the labor market is fairly often addressed by the Workers' Compensation Board and the Appellate Courts. It is a factual issue for the Board to decide which needs substantial evidence to support it. If so supported the courts will not disturb the Board's decision.[1] The case law over the past few decades has evolved to require the Board to consider whether the claimant has retained an attachment to the workforce, if capable of doing so, or has involuntarily left it because of the disability for which workers' compensation benefits are being paid. If there is a finding of a voluntary withdrawal from the labor market, not from that disability, but because of some other reason, then the Board will order benefits to cease. The issue will not arise where the claimant has a permanent total disability (or in death cases), since the finding in that award was that the claimant had no future earning capacity. There the attachment to the labor market is irrelevant. It is only in a case found to be a permanent partial disability where the issue arises.

The Court of Appeals has recently weighed in on this.[2]

It was the case of a woman who had been classified with a permanent partial disability that the Court may have made its decision based on an observation that could change how these cases are interpreted in the future by both the Board and the Appellate Division, Third Department. This decision could result in more cases having benefits terminated, but probably not of any significant number. The majority of the Court of Appeals admonished the Appellate Division, Third Department that by its interpretation it had converted what should have been an inference of causation into a presumption.

The Appellate Division, in reversing the Board, found that there was no voluntary withdrawal from the labor market and that "it was incumbent upon *the employer* to rebut the inference of causation or prove that the reduction in employment was solely due to factors unrelated to the disability." The Court of Appeals addressed the burden of proof differently. It cited one of its decisions in 2007 that "*claimant* must demonstrate that his or her reduced earning capacity is due to the disability [and] not…factors unrelated to the disability." From such a showing the Board can infer that reduced future earnings resulted from the disability. However, that inference should not be treated by the Appellate Division as a presumption. It should not be "presumed rather than merely permitted."

The New York State's highest court objected to the Appellate Division mandating that the Board find causation instead of inferring that the claimant cannot find a suitable job because of her disability. The claimant must prove an attachment to the labor market with evidence of a search for employment within his or her medical restriction.[3] An inference is good; however, when raised to a presumption, it is not.

For all practical purpose, while the decision is good guidance for the Board in rendering decisions on voluntary withdrawal from the labor market cases and on appeal of those decisions by the Appellate Division, Third Department, I believe that it will probably not change the outcome of any significant number of decisions.

Endnotes

1. *Magerko v. Edwin B. Stimpson Co. Inc.*, 67 AD3d 1267 (2009).
2. *Zamora v. New York Neurologic Associates et al.*, __ NY3d __ (2012).
3. *Rosario v. AIG et al.*, __ AD3d __ (2012).

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New York's Marriage Equality Act: One Year Later

By Steven D. Cohn and Amanda N. Cully

I. The Marriage Equality Act

The "Marriage Equality Act" was signed into legislation by Governor Cuomo on June 14, 2011 and took effect July 24, 2011. The Act allows same-sex couples to acquire marriage licenses and recognizes same-sex marriages legally performed in another state or the District of Columbia.[1] Now the sixth state to recognize same-sex marriage, New York did not always afford same-sex couples such rights. A series of evolution took place before the enactment of the Marriage Equality Act, including landmark national cases[2] and the recognition of same-sex marriage in five other states and the District of Columbia.[3] New York policy regarding same-sex marriage began with zero recognition, moved to recognition of valid same-sex marriages performed in other states, incorporated domestic partnership which gave same-sex couples some of the same rights as opposite-sex married couples, and finally in 2011 New York officially became the sixth state to acknowledge same-sex marriage. This evolution only came about through years of court challenges to the ban on same-sex marriage in New York and eventually the decision in *Hernandez v. Robles*, in which the court, in a coda to its opinion, urged "the participants in the controversy over same-sex marriage" to "address their arguments to the Legislature" along with a call to the Legislature to hear and "wisely" decide the issue.[4] Even after this call to the Legislature and two bills recognizing same-sex marriage passing through the State Assembly, these bills were rejected by the State Senate. Five years after the court's deference to the Legislature, the Marriage Equality Act was finally passed.

Initial reactions to the act were strong on each side of the issue. President Obama stated that New York law was moving toward "greater equality," remarking that this was a "good thing."[5] Former New York Senator and current Secretary of State Hillary Clinton referred to the law as "historic," supporting the "basic rights of gay people."[6] Opponents of gay marriage, including the Catholic Church, expressed severe disappointment in the passage of the act.

II. Same-Sex Marriage Federally

While same-sex marriage has gained official recognition in New York, the rest of the country has yet to follow suit and, for the most part, has been moving in the opposite direction. In 1996, the federal government passed the Defense of Marriage Act (DOMA). DOMA classifies marriage solely between two members of the opposite sex. The act strictly limits the definition of marriage to "only a legal union between one man and one woman as husband and wife"[7] and limits the definition of a spouse "only to a person of the opposite sex who is a husband or a wife."[8] Further, the act allows states to "prohibit same-sex marriage and/or refuse to recognize same-sex marriages validly performed in other states."[9] Specifically, the act states that "[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex…"[10]

a. Effect of DOMA

DOMA withholds from same-sex couples the benefits of more than 1,000 federal statutes and regulations affording married couples' rights. Among these rights denied to married same-sex couples are the ability to file jointly federal income tax returns, the benefit of unlimited marital deductions and spousal transfers, survivor and spousal social security benefits, the capability to take unpaid leave to care for an ill spouse afforded under the Family and Medical Leave Act, and federal spousal privilege regarding communications.[11] Other marital rights denied to these same-sex couples through DOMA include health insurance coverage for spouses of federal employees, immigration allowances, and military benefits.

A total of 1,138 rights, benefits, and protections afforded to married couples under federal law are denied to same-sex married couples as a result of DOMA.[12] In tax considerations alone, almost 200 provisions consider marital status, affording benefits to married opposite-sex couples such as tax exemptions for spousal insurance premium payments.[13] Same-sex married couples are also not afforded breaks in real estate taxes, estate taxes, and retirement savings taxes.[14] Surviving spouse and surviving parent, to a deceased beneficiary's child, social security benefits are denied to same-sex partners.[15] Citizens with same-sex partners are unable to petition for those partners to immigrate to the United States as they are not recognized as family.[16] Almost 300 provisions relating to benefits afforded to "current and retired federal employees, members of the Armed Forces, elected officials, and judges" are affected by marital status.[17] Health and other benefits are denied to same-sex spouses of these federal workers.[18] Continued health coverage for private employees after cessation of employment provided under the federal COBRA initiative are denied to same-sex spouses under DOMA.

In a practical sense, this denial of federal marriage rights creates a number of obstacles for same-sex married couples to overcome. Before marriage these couples need to consider cohabitation agreements, residency issues, and tax issues.[19] Once married, dissolution of the marriage presents an array of difficulties beyond the usual issues associated with the dissolution of the marriage of an opposite-sex couple. Foremost, divorce is not available in any state that does not recognize same-sex marriage. In states that do recognize the union, residency requirements may be in place that must first be met, ranging from six months to two years. Issues arise in equitable distribution of assets including in the ability to transfer assets and resulting taxation.[20] Issues also arise regarding maintenance awards including taxation, inexistence of spousal social security benefits, and the inability to continue health insurance through federal programs after divorce.[21]

III. Historically

The right to marry has long been established as a fundamental and basic civil right by the Supreme Court of the United States. After years of prohibition of interracial marriages, the Supreme Court in *Loving v. Virginia* held that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," striking down state laws disallowing interracial marriage.[22] The court further classified marriage as "one of the 'basic civil rights of man' fundamental to our very existence and survival."[23]

Circuit Judge Michael Boudin of the First District Court of Appeals has recently remarked that federalism permits the "diversity of governance based on local choice."[24] DOMA interferes with federalism by taking the power to regulate marriage away from the states and into the hands of the federal government.

IV. State Levels

Currently, Massachusetts, Connecticut, New York, Iowa, New Hampshire, Vermont, and the District of Columbia recognize and allow same-sex marriage.[25] Maryland and Washington have passed laws allowing gay marriage which are not yet in effect.[26] Maryland and Rhode Island honor same-sex marriages performed in another state.[27] Eight states allow civil unions between same-sex couples and three do not specify. The remaining 31 states have enacted bans on same-sex marriage.[28] Most recently, North Carolina provided a prime example of the position of these 31 states, voting May 8, 2012 to strictly define marriage as between a man and a woman.[29]

This divide between states raises the issue as to whether comity and full faith and credit between the states should be applied. The legislatures in a large majority of states have enacted "mini-DOMA" laws, either by statute or amendment to the state constitution. However, state courts will be the ultimate deciders of whether or not to allow same-sex divorce in these states. These courts must decide whether to apply the principle of comity and acknowledge another state's recognition of a same-sex marriage. In addition, these courts must take into consideration the Full Faith and Credit Clause of the U.S. Constitution which states "[f]ull faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."[30] A literal and straightforward application of this clause directs each state to acknowledge marriages performed and recognized by another state.

V. Marriage Equality Act in Effect

In New York, the Legislature was clear in its intent in drafting the Marriage Equality Act stating the "[m]arriage is a fundamental human right."[31] Further, it declared that "[s]ame-sex couples should have the same access as others to the protections, responsibilities, rights, obligations, and benefits of civil marriage."[32] Most clearly it stated "it is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law."[33]

On June 6th, 2012, Judge Barbara Jones of the Southern District of New York became the third Article 3 judge to declare section 3 of DOMA violates the Constitution.[34] In *Windsor v. United States*, Edith Windsor sued the government for taking over $393,000 in estate taxes after her spouse, Thea Spyer, passed away in 2009.[35] Had DOMA recognized same-sex marriage, Windsor would not have been subject to these exorbitant federal taxes. Although the third federal district court to find DOMA unconstitutional, the court in *Windsor* is the first New York district court to do so.

The Family Leave Insurance Act, a same-sex inclusive bill, was recently introduced in both the New York Senate and the State Assembly.[36] This bill, if enacted, would extend rights previously afforded to different-sex married couples, through the Temporary Disability Insurance program, to same-sex married couples.[37] Same-sex partners are in certain need of these rights including the ability to take paid leave to care for a newborn child and the ability to take paid leave to care for a seriously ill family member.[38]

VI. Nationally

The Ninth Circuit Court in California upheld a lower court ruling in 2010 declaring Proposition 8, the 2008 amendment to the California Constitution barring same-sex marriage, unconstitutional.[39] Judge Reinhardt opined that "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."[40] On June 6,

2011 the Ninth Circuit denied Proposition 8 proponents request for *en banc* review, leaving the Supreme Court as the last venue in which the case may be reheard.[41]

Other Judges in California have ruled recently on the issue. Judge Claudia Wilken likened DOMA to legalizing bigotry by withholding over 1,000 federal benefits from legally married same-sex couples,[42] citing "joint tax filing, Social Security survivor payments and immigration sponsorship."[43] Judge Jeffrey White also ruled DOMA unconstitutional, ordering family insurance coverage be afforded to a lesbian court employee's spouse.

VII. Recent Federal News

On the executive level, President Barak Obama has become the first president ever to come out in support of same-sex marriage, officially stating that he believes "same-sex marriage 'should be legal.'"[44] President Obama revealed to ABC News that he "concluded that for me personally, it is important for me to go ahead and affirm that I think same-sex couples should be able to get married."[45] This announcement came in response to a North Carolina vote to limit the definition of marriage to between a man and woman.[46] Previously, other members of the Obama Administration, including Vice President Joe Biden, had come out in support of same-sex marriage.

Federal judicial opinion also appears to be moving in favor of same-sex marriage. The 1st Circuit Court of Appeals recently upheld a lower court's decision that DOMA's discrimination against same-sex couples is unconstitutional.[47] In July of 2010, the U.S. District Court in Boston ruled in both *Commonwealth of Massachusetts v. Health and Human Services and Gill v. Office of Personnel Management* that DOMA's discrimination against same-sex couples is unconstitutional.[48] On May 31, 2012, the United States Court of Appeals for the 1st Circuit ruled in *Commonwealth of Massachusetts v. United States Department of Health and Human Services, et al.* that DOMA discriminates against married same-sex couples through the denial of rights and benefits afforded to opposite-sex couples.[49] No immediate effect will occur as the Circuit Court "stayed its ruling in anticipation of an appeal to the Supreme Court."[50] In its decision, the Circuit Court limited the scope of the issue to the denial of benefits to same-sex couples rather than addressing the legality of same-sex marriage.[51] However, this decision is still regarded as an "illustration of the growing consensus of the judiciary about the unconstitutionality of discriminating against gays and lesbians in the realm of marriage."[52]

VIII. Conclusion

At this point a call has been made to the Legislature to take action. Both the President and the Federal Circuit Court, whose opinion may soon be the decision of the United States Supreme Court, have rejected DOMA as unconstitutional. Until DOMA is repealed, states will never be able to exercise their constitutionally given power to regulate marriage and same-sex couples will not receive equal rights in marriage or in divorce.

Endnotes

1. Alison Arden Besunder, *Closing the Gap*, N.Y.L.J., Sept. 19, 2011, at [hereinafter A Match Made in Albany].
2. Frank Gulino, *A Match Made in Albany: The Uneasy Wedding of Marriage Equality and Religious Liberty,* N.Y. BAR ASSOC. J., Jan. 2012 at 38, 38-39.
3. *Nightly News: Appeals Court: Denying Federal Benefits to Same-Sex Couples is Unconstitutional* (NBC television broadcast May 31, 2012), *available at* http://usnews.msnbc.msn.com/_news/2012/05/31/11990019-appeals-court-denying-federal-benefits-to-same-sex-couples-is-unconstitutional?lite [hereinafter Appeals Court].
4. *See* Gulino, *supra* note 2, at 39 *(quoting* Hernandez v. Robles, 7 N.Y.3d 338 (2006)).
5. *See* Gulino, *supra* note 2, at 39.
6. *Id.*
7. Defense of Marriage Act, 1 U.S.C. § 7 (1996).
8. *Id.*
9. *A Match Made in Albany*, *supra* note 1.
10. 1 U.S.C. § 7.
11. Alison Arden Besunder, *For Love and Money: Inequalities Remain Despite Same-Sex Marriage,* N.Y.L.J., July 1, 2011.
12. Human Rights Campaign, *An Overview of Federal Rights and Protections Granted to Married Couples*, http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples [hereinafter An Overview].
13. *Id.*
14. *Id.*
15. An Overview, *supra* note 12.
16. *Id.*
17. *Id.*
18. *Id.*
19. Colloquium, *The Marriage Equality Act: Issues and Considerations for the Practitioner in Advising Same-Sex Couples,* Nov. 1, 2011.
20. *Id.*
21. *Id.*
22. *See* Gulino, *supra* note 2, at 38 (*quoting* Loving v. Virginia, 388 U.S. 1 (1967)).
23. *Id.*
24. Washington United for Marriage, *DOMA Ruled Unconstitutional By Federal Appeals Court,* May 21, 2012, http://washingtonunitedformarriage.org/doma-ruled-unconstitutional-by-federal-appeals-court/.
25. *Appeals Court*, *supra* note 3.
26. *Id.*
27. Wendy B. Samuelson, *Recent Legislation, Decisions, and Trends,* N.Y. BAR ASSOC. FAM. L. REV., Spring 2012 at 24.
28. *Id.*
29. *Id.*
30. U.S. Const. art IV. §1.

31. Marriage Equality Act, N.Y. DRL §11.
32. *Id.*
33. *Id.*
34. Mark Hamblett, *Judge Finds DOMA Discriminates Against Married Same-Sex Couples,* N.Y.L.J., June 12, 2012, *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202558215733&Judge_Finds_DOMA_Discriminates_Against_Married_SameSex_Couples&slreturn=1.
35. *Id.*
36. Jared Make, *In Sickness and in Health? LGBT New Yorkers Need Family Leave Insurance,* HUFFINGTON POST, June 21, 2012, http://www.huffingtonpost.com/jared-make/in-sickness-and-in-health_1_b_1616448.html.
37. *Id.*
38. *Id.*
39. Samuelson, *supra* note 27 at 25.
40. *Id. (quoting Perry v. Schwarzenegger*, 91 F.3d 1147 (9th Cir. 2010)).
41. Santa Barbara, http://www.independent.com/news/2012/jun/06/pride-foundation-celebrates-9th-circuits-declining.
42. *Appeals Court, supra* note 3.
43. *Id.*
44. Jonathan Lemire, *Obama Sez Yes,* N.Y. DAILY NEWS, May 10, 2012 at 4.
45. *Id.*
46. *Id.*
47. *Appeals Court, supra* note 3.
48. Samuelson, *supra* note 27 at 25.
49. *Comm. of Mass. v. U.S. Depart. of Health and Human Serv., et al.,* (1st Cir. 2012) *available at* http://www.ca1.uscourts.gov/pdf.opinions/10-2204P-01A.pdf.
50. *Id.*
51. *Id.*
52. *Id.* (quoting Geoffrey Stone, professor of law at the University of Chicago).

Ethical Obligations Regarding Inadvertently Transmitted E-Mail Communications

By Eric M. Hellige

On a daily basis, with a click of the mouse, hundreds of e-mails are exchanged between attorneys and their clients. Much of this traffic constitutes harmless correspondence, but often the content of the e-mail includes sensitive, confidential or privileged information. Occasionally, in the constant stream of e-mail exchange, an e-mail will inadvertently be sent directly or copied to the wrong party. This situation presents a serious concern for attorneys charged with maintaining their own confidentiality, as well as that of their clients. Despite how regularly these circumstances arise, there is no clear consensus among the relevant rules of professional conduct or the ethics opinions interpreting the rules on attorneys' ethical responsibilities regarding inadvertently sent or received e-mails, nor does the case law provide consensus concerning any use the recipient may make of inadvertently received e-mails, or their impact on the waiver of attorney-client privilege. As a result, attorneys face a conundrum when they receive inadvertently disclosed e-mails. This article presents attorneys practicing in the State of New York with some basics that will enable them to better deal with inadvertently transmitted communications.

Historical Development

In 1992, the American Bar Association (the "ABA") Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 92-368, "*Inadvertent Disclosure of Confidential Materials*," which provided that

> [a] lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer and abide by the instructions of the lawyer who sent them.[1]

However, the ABA Model Code of Professional Responsibility (the predecessor to the ABA Model Rules of Professional Conduct) provided no real basis for the duties imposed in ABA Formal Op. 92-368. In fact, ABA Formal Op. 92-368 was deigned to admit that "[a] satisfactory answer to the question posed cannot be drawn from a narrow, literalistic reading of the black letter of the [ABA] Model Rules."[2] As a result, the ABA Committee explained that it had derived these duties from five main principles:

> (i) the importance the [ABA] Model Rules give to maintaining client confidentiality, (ii) the law governing waiver of the attorney-client privilege, (iii) the law governing missent property, (iv) the similarity between the circumstances here addressed and other conduct the profession universally condemns, and (v) the receiving lawyer's obligations to his client.[3]

Following the issuance of ABA Formal Op. 92-368, New York weighed in with its responses. The New York County Lawyers' Association Committee on Professional Ethics issued Formal Opinion 730, "*Ethical Obligations Upon Receipt of Inadvertently Disclosed Privileged Information*," in 2002, which basically reiterated Formal Op. 92-368.[4] In 2003, the Association of the Bar of the City of New York (the "ABCNY") Committee on Professional and Judicial Ethics issued Formal Opinion 2003-4, "*Obligations Upon Receiving a Communication Containing Confidences or Secrets Not Intended for the Recipient*," which concluded that

> a lawyer receiving a misdirected communication containing confidences or secrets (1) has obligations to promptly notify the sending attorney, to refrain from review of the communication, and to return or destroy the communication if so requested, but, (2) in limited circumstances, may submit the communication for in camera review by a tribunal, and (3) is not ethically barred from using information gleaned prior to knowing or having reason to know that the communication contains confidences or secrets not intended for the receiving lawyer. However, it is essential as an ethical matter that the receiving attorney promptly notify the sending attorney of the disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary.[5]

In reaching this conclusion, ABCNY Formal Op. 2003-4 backed away from absolute imposition on lawyers of the duties outlined in ABA Formal Op. 92-368. In 2004, the New York State Bar Association (the "NYSBA") Committee on Professional Ethics, in Opinion 782, "*E-mailing Documents That May Contain Hidden Data*

Reflecting Client Confidences and Secrets," described the standard of care lawyers should follow when using e-mail communication, stating that "a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication…[t]he extent of [which] var[ies] with the circumstances."[6]

Addressing the Confusion

For many years, confusion remained as to whether the three duties set forth in ABA Formal Op. 92-368 were appropriate statements of professional responsibility to which lawyers must adhere. As a consequence, in the last major revision of the ABA Model Rules of Professional Conduct, the ABA adopted new rules governing inadvertent disclosure. ABA Model Rule 1.6(a), "*Confidentiality of Information*," prevented attorneys from revealing information about a client without consent and required them to protect confidential client information.[7] Comments to the rule required lawyers to safeguard client information from inadvertent or unauthorized disclosure, and to take reasonable precautions to prevent information from reaching unintended recipients.[8] ABA Model Rule 4.4(b), "*Respect for Rights of Third Persons*," reduced the ethical duties imposed on attorneys who receive inadvertent e-mails, leaving only the duty to notify the sender of the inadvertent transmission.[9] As a result of that change, in 2005, the ABA Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 05-437, "*Inadvertent Disclosure of Confidential Materials: Withdrawal of Formal Opinion 92-368 (November 10, 1992)*," withdrawing its previously expressed opinions in ABA Formal Op. 92-368.[10]

Despite the ABA's adoption of rules governing inadvertent disclosure, the New York Lawyer's Code of Professional Responsibility, which governs the conduct of New York attorneys, lacked provisions expressly governing inadvertent disclosure until 2009. State courts and ethics committees struggled with how to deal with such situations, and a body of law developed to expressly address such issues. However, the New York Rules of Professional Conduct, which became effective on April 1, 2009, attempted to rectify this gap by including a provision that specifically addressed inadvertent disclosure. New York Rule 4.4(b), "*Respect for Rights of Third Person*," states that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."[11] Given the brevity of New York Rule 4.4(b), the comments to the rule, which specifically provide that the term "document" includes any electronically stored information that can be read (including e-mails), are more helpful in providing guidance to attorneys. The comments state as follows:

> [1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.
>
> [2] [Rule 4.4(b)] recognizes that lawyers sometimes receive documents that were mistakenly sent, produced, or otherwise inadvertently made available by opposing parties or their lawyers. One way to resolve this situation is for lawyers to enter into agreements containing explicit provisions as to how the parties will deal with inadvertently sent documents. In the absence of such an agreement, however, if a lawyer knows or reasonably should know that such a document was sent inadvertently, this Rule requires only that the lawyer promptly notify the sender in order to permit that person to take protective measures. Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail and other electronically stored information subject to being read or put into readable form.
>
> [3] Refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address and returning the document to the sender honors the policy of these Rules to protect the principles of client confidentiality. Because there are circumstances where

> a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, however, this Rule does not subject a lawyer to professional discipline for reading and using that information. Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the sender, or both. Accordingly, in deciding whether to retain or use an inadvertently received document, some lawyers may take into account whether the attorney-client privilege would attach. But if applicable law or rules do not address the situation, decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer.[12]

Addressing the same issue two years later under the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2011, the ABA Standing Committee on Ethics and Professional Responsibility issued two opinions that address attorneys' ethical obligations concerning inadvertently disclosed correspondence under the ABA Model Rules.

ABA Formal Opinion 11-459, "*Duty to Protect the Confidentiality of E-mail Communications with One's Client*" explains that lawyers have a duty to warn clients about the risks of sending or receiving electronic communications where there is a significant risk that an employer or third party may gain access to privileged e-mail correspondence.[13] As a general rule, the ABA explains, lawyers should advise clients about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications, and warn the client against discussing their communications with others. A lawyer should also instruct the client to avoid using an employer-issued computer, telephone or other electronic device to receive or transmit confidential communications. Despite e-mail becoming a common replacement for letters and in-person meetings, e-mail communications without safeguards can be just as risky as having a confidential face-to-face conversation in a setting where it can be overheard.[14]

The ABA also points to various factors that tend to establish an ethical duty on the lawyer to protect client-lawyer confidentiality by warning the client against using business devices for communications with their own counsel. Clients should be warned if (i) they have engaged in, or indicated an intent to engage in, e-mail communications; (ii) their employment provides access to workplace communication devices; (iii) given the circumstances, the employer or other third party has the ability to access e-mail communications; or (iv) as far as the lawyer knows, the client's employer's policies and the jurisdiction's laws do not clearly protect those communications.[15]

ABA Formal Opinion 11-460, "*Duty When Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel*," explains that when an employer's lawyer receives copies of an employee's private communications with counsel, ABA Model Rule 4.4(b) does not require the employer's lawyer to notify opposing counsel of the receipt of the communications.[16] With ABA Formal Op. 11-460, the ABA has provided a clear distinction for dealing with inadvertently received communications based on how they were disclosed to the unintended recipients. In the case of a communication that is inadvertently sent to an unintended recipient by one of the parties to the communication, ABA Model Rule 4.4(b) "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly."[17] However, when the communication has been retrieved by an unintended recipient from a public or private space where it is stored, such as in the context of an employer's access to an employee's files, then the ABA opines that ABA Model Rule 4.4(b) does not require the third party to notify opposing counsel of the receipt of the communications.[18]

It is important to note that the ABA Model Rules and the ABA formal opinions are not binding, and merely provide guidance to the states regarding the ABA's position on the rules of professional conduct, and how to interpret those rules. Therefore, attorneys should pay attention to developments on ethical issues in the state laws, ethical rules and case law of their local jurisdiction.

Current Expectations of Professional Conduct

To review, the following are the current positions of the ABA and the State of New York of which every lawyer should be aware when he or she receives an inadvertently disclosed e-mail:

ABA

Sender's Duty When Transmitting E-mails

The sender has no explicit duty regarding the sending of e-mails. A lawyer's general duties with regard to the confidentiality of client information under ABA Model Rule 1.6 apply to e-mail communications as well.[19]

Must the Recipient Notify the Sender Upon Receipt of an Inadvertently Transmitted E-mail?

Yes. Under ABA Model Rule 4.4(b), a "lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should

know that the document was inadvertently sent shall promptly notify the sender."[20] However, ABA Formal Op. 11-460 clarifies that ABA Model Rule 4.4(b) does not impose notification obligations on lawyers that retrieve inadvertently disclosed communications from a public or private sphere, rather than receiving them from a specific sender.[21]

May the Recipient Review an Inadvertently Transmitted E-mail?

Yes. ABA Formal Op. 05-437 states that although ABA Model Rule 4.4(b) "obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly," it "does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer."[22]

New York

Sender's Duty When Transmitting E-mails

NYSBA Op. 782 notes that "a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology and determine if the mode of transmission is appropriate under the circumstances."[23] The extent of reasonable care varies with the circumstances.

Must the Recipient Notify the Sender Upon Receipt of an Inadvertently Transmitted E-mail?

Yes. ABCNY Formal Op. 2003-4 concludes that an attorney who receives a communication and is exposed to its contents "prior to knowing or having reason to know that the communication was misdirected…is not barred, at least as an ethical matter, from using the information," but also states that "it is essential as an ethical matter that a receiving attorney promptly notify the sending attorney of an inadvertent disclosure in order to give the sending attorney a reasonable opportunity to promptly take whatever steps he or she feels are necessary to prevent any further disclosure."[24]

May the Recipient Review an Inadvertently Transmitted E-mail?

Yes. The comments to New York Rule 4.4(b) state that while "refraining from reading or continuing to read a document once a lawyer realizes that it was inadvertently sent to the wrong address" honors the policy of the Rules, since there may be "circumstances where a lawyer's ethical obligations should not bar use of the information obtained from an inadvertently sent document, [the] Rule does not subject a lawyer to professional discipline for reading and using that information."[25] The comments to New York Rule 4.4 do, however, warn lawyers to take into account any applicable law or rules before reviewing inadvertently received e-mails. In the absence of such law or rules, "decisions to refrain from reading such documents or to return them, or both, are matters of professional judgment reserved to the lawyer."[26]

Endnotes

1. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992).
2. *Id.*
3. *Id.*
4. NYCLA Comm. on Prof'l Ethics, Formal Op. 730 (2002).
5. ABCNY Comm. on Prof'l and Jud. Ethics, Formal Op. 2003-4 (2003).
6. NYSBA Comm. on Prof'l Ethics, Formal Op. 782 (2004).
7. Model Rules of Prof'l Conduct. R. 1.6(a) (1983).
8. Model Rules of Prof'l Conduct. R. 1.6 cmt. (1983).
9. Model Rules of Prof'l Conduct. R. 4.4(b) (1983).
10. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
11. NY Rules of Prof'l Conduct. R. 4.4(b) (2009).
12. NY Rules of Prof'l Conduct. R. 4.4 cmt. (2009).
13. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2011).
14. *Id.*
15. *Id.*
16. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).
17. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
18. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).
19. Model Rules of Prof'l Conduct. R. 1.6(a) (1983).
20. Model Rules of Prof'l Conduct. R. 4.4(b) (1983).
21. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-460 (2011).
22. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005).
23. NYSBA Comm. on Prof'l Ethics, Formal Op. 782 (2004).
24. ABCNY Comm. on Prof'l and Jud. Ethics, Formal Op. 2003-4 (2003).
25. NY Rules of Prof'l Conduct. R. 4.4 cmt. (2009).
26. *Id.*

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Stipulations of Settlement

By Jaclene D'Agostino

Parties to a litigation may stipulate with respect to most aspects of the action or proceeding in which they are involved. Indeed, it has long been established that parties may "shape the facts to be determined at trial"[1] and "chart their own procedural course through the courts"[2] by making any variety of agreements. Hence, through stipulations, parties may grant each other extensions of time to respond to pleadings or motions, waive procedural defects and, of course, settle their dispute. This article reviews the strict requirements for creating a valid and enforceable stipulation of settlement and the various issues that may arise with respect to such agreements.

Stipulations of settlement are favored by courts and will not be lightly cast aside.[3] Nevertheless, a stipulation of settlement that fails to comply with the statutory requirements under the New York Civil Practice Law & Rules (CPLR) is not enforceable—a fact that would likely surprise and dismay parties who relied upon counsel to implement a failsafe agreement. Accordingly, it is essential that attorneys ensure that stipulations to which their clients are parties fulfill the requisite statutory elements and meet any additional requirements that may arise based upon the particular circumstances of the case.

I. Statutory Requirements

Courts will not enforce a stipulation that does not comport with the provisions of CPLR 2104 or the prerequisites of a valid contract; i.e., a meeting of the minds, fair and adequate consideration and a manifestation of all the material terms of the agreement between the parties.[4] Specifically, CPLR 2104 provides that a stipulation must be made in one of the following manners: (1) between counsel in open court; (2) in a writing subscribed by the party or his attorney; or (3) reduced to the form of an order and entered.[5] Although these requirements appear rather straightforward on their face, New York case law is replete with instances in which parties have argued that one of the requirements was or was not met, placing the validity of a stipulation into question. Further, even if a stipulation complies with the necessary requirements, there are certain—albeit unusual—situations in which it may be cast aside.

"…made between counsel in open court"

Most disputes as to whether a stipulation is valid and enforceable turn on the question of what exactly constitutes "open court." The Court of Appeals has defined "open court" as "a judicial proceeding in a court, whether held in public or private, and whether held in the court house, or a courtroom, or any place else, so long as it is, in an institutional sense, a court convened, with or without a jury, to do judicial business."[6] Further, "the proceedings in open court would always have some formal entries, if only in the clerk's minutes, to memorialize the critical litigation events."[7]

There are two elements essential to find that parties entered into a stipulation in "open court." First, a judge must be present for the consummation of the stipulation,[8] and second, a court reporter must be in attendance to record and provide a stenographic transcription of the proceedings.[9] Absent one of these elements, the stipulation will not be deemed to have occurred in "open court," thus failing to satisfy the requirements of CPLR 2104. For example, the Court of Appeals has opined that a stipulation entered into in a judge's presence during a conference in chambers was not made in "open court,"[10] but where a court reporter was also present to accurately record the agreement made in the judge's chambers, the elements of "open court" were satisfied.[11] However, a stipulation entered into in the presence of a law clerk, rather than a judge, fails to meet the "open court" requirement, even if transcribed by a court reporter.[12] Surrogate's Court practitioners should note that a different result has been reached where a stipulation was made in the presence of a court-attorney referee.[13]

The absence of a stenographic transcript is not necessarily dispositive on the issue of "open court." In such situations, courts will analyze the format of the recording of the stipulation on a case-by-case basis. Stipulations made in the presence of a judge absent a transcript may be deemed made in "open court," "but only if the terms of settlement are clear and recorded in the court's minute book or otherwise 'entered during formal court proceedings.'"[14] The notes of a judge or a court attorney regarding the stipulation are generally insufficient to satisfy this requirement[15] because they are typically too informal, vague or inadequate to memorialize the terms of the stipulation.[16] Where the terms of the stipulation are adequately transcribed, there appears to be no requirement that the parties sign the transcript, unless the Domestic Relations Law governs the action or proceeding.[17] This, of course, is generally not the case for trusts and estates practitioners.

Interestingly, New York's federal courts seem to interpret "open court" more liberally than the state courts when following the provisions of CPLR 2104. This was illustrated in *Pretzel Time, Inc. v. Pretzel International, Inc.*,[18] where a stipulation of settlement was upheld as an "open court" agreement despite being transcribed

during a scheduled deposition in the absence of a judge. The Southern District explained its interpretation of the "open court" requirement of CPLR 2104 as follows:

> [T]he "open court" provision does not require that the settlement actually take place in a courtroom before a judge. Rather, settlements undertaken with less formality but with similar indicia of reliability have been held to meet this provision…. The importance of the "open court" requirement is to ensure that there are some formal entries…to memorialize the critical litigation events.[19]

Thus, the Southern District placed less emphasis on the presence of the judge at the time of the agreement and instead relied upon the formal transcription of events. The *Pretzel Time* decision went on to cite similar cases where stipulations were transcribed by court reporters at scheduled depositions, such as the federal decision in *Penn Columbia Corp v. Cemco Resources. Inc*.[20] and New York County Civil Court case *Hub Press v. Sun-Ray Lighting*.[21] Significantly, there was no judge present for the agreement made in either of those cases.

In *Hub Press*, the court's rationale for deciding that the subject stipulation had been made in "open court" was based on the fact that the examination at which the agreement had been made "was scheduled pursuant to statute and under the aegis of the court."[22] Accordingly, the court explained, "[e]ither party was free to obtain court rulings during the examination or to appropriately move the court regarding the conduct of the examination including a request that the court actually monitor the examination."[23] Still, it is only the federal courts that have relied upon *Hub Press* in recent years, which indicates that the more stringent decisions by the higher state courts will likely govern this issue.

Further, although certain federal courts, such as the Southern District in *Pretzel Time*, have cited to CPLR 2104 as the statute relevant to stipulations, the district courts are currently divided as to whether it is at all applicable in the federal forum. As the *Pretzel Time* decision indicates, many New York district courts enforce settlement agreements that do not comply with the state rule.[24]

Although some practitioners may view the strict requirements of the "open court" threshold imposed by the New York State courts as overly technical, the requirements do have a significant purpose. Aside from eliminating disputes regarding the essential terms of an agreement, these requirements serve "a cautionary function by tending to ensure that acceptance is considered and deliberate."[25]

"…in a writing subscribed by him or his attorney or reduced to the form of an order and entered"

It is only in cases where a stipulation is not in a writing subscribed by the party or his attorney, or reduced to the form of an order and entered, that one must consider whether it was suitably made in "open court" in accordance with the statute. One might assume that satisfying the requirement of a subscribed writing is a black and white question that would not generate litigation, but as is the case with any legal issue, there are always some gray areas.

Consider the Court of Appeals' decision in *Bonnette v. Long Island College Hospital, et al.*,[26] where the parties reached an oral, out-of-court settlement of a medical malpractice case against a doctor and hospital, but the hospital required that the agreement be formally finalized in writing. The hospital sent the requisite forms to the plaintiff with a cover letter stating, "enclosed are copies of closing documents required to effectuate [the] settlement."[27] The plaintiff signed and returned only one of the forms.

Months later, the hospital informed the plaintiff that it did not consider any settlement to exist because the agreement had not been finalized as required by CPLR 2104, even though it conceded that an oral agreement had been made. The plaintiff sought to enforce the settlement, relying on the hospital's letter forwarding the settlement documents as a writing sufficient to satisfy the statute. The Court of Appeals rejected this position, opining that the letter failed to comply with the statute because it did not incorporate all material terms of the settlement. The court similarly rejected the plaintiff's arguments of substantial compliance and equitable estoppel based upon partial performance, stating that "[i]f there are rare occasions when these doctrines can permit enforcement of a settlement agreement where the literal terms of CPLR 2104 are not satisfied (a question which we do not decide), this is not one of them."[28]

In some cases, a stipulation will be enforced on equitable grounds despite its failure to satisfy the statutory requirements. The decision in *Regolodo v. Neighborhood Partnership Housing Development Fund Co., Inc.*,[29] illustrates one such situation.

In *Regolodo*, equitable estoppel was invoked to enforce a stipulation that failed to meet the technical requirements of CPLR 2104. There, the defendants' counsel had made an offer of settlement during a telephone call with plaintiffs' counsel, and the offer was accepted, also by phone. Thereafter, the defendants acknowledged plaintiffs' acceptance by an e-mail to plaintiffs' counsel. The plaintiffs subsequently obtained the consent of the New York State Insurance Fund to the settlement, and its agreement to accept approximately

one-half of the worker's compensation lien that it had held against the injured plaintiff, in reliance upon the existence of a settlement.

As in *Bonnette*, the defendants conceded the facts surrounding the agreement but argued that it was not enforceable because it failed to meet the requirements of CPLR 2104. The court disagreed, explaining that "where there is no dispute between the parties as to the terms of the agreement, the courts will refuse to permit the use of [CPLR 2104] against a party who has been misled or deceived by the oral agreement to his detriment or who has relied upon it."[30] Applying the foregoing rationale, the court opined that the agreement and all of its material terms had been "clear, final and definite"[31] and that the plaintiffs had relied upon those terms to negotiate a compromise with the New York State Insurance Fund over its lien on the settlement proceeds. Accordingly, the settlement agreement was upheld despite its failure to meet the statutory requirements.

Regolodo raises another pertinent issue that has arisen in more recent cases as a result of our increasingly technologically based society—the validity of stipulating via e-mail. Although it was not the basis for the enforceability of the stipulation in *Regolodo,* e-mail has been relied upon as the sole subscribed writing in seeking conformity with CPLR 2104. Hence, in *Williamson v. Delsener*,[32] the First Department upheld a settlement agreement, opining that e-mails exchanged between counsel in which their names appeared at the end constituted signed writings pursuant to statute. Similarly, in *Brighton Investment, Ltd. v. Har-Zvi*,[33] the Appellate Division explained that "an exchange of emails may constitute an enforceable contract, even if a party subsequently fails to sign implementing documents, when the communications are sufficiently clear and concrete to establish such an intent."[34] Accordingly, modern courts have largely accepted e-mails as writings sufficient to satisfy CPLR 2104.

II. Vacating Stipulations of Settlement

Although stipulations are generally favored by courts, parties may be relieved of the consequences of such an agreement if it appears that the stipulation was entered into inadvisedly or that it would be inequitable to hold the parties to its terms.[35] However, "only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved of the consequences of a stipulation made during litigation."[36] Even if a stipulation is voidable on one of these bases, a party who accepts the benefit of a stipulation will not be relieved of its consequences, as he will be deemed to have ratified the agreement.[37] Similarly, if a party is present when his attorney is stipulating on his behalf, and he remains silent, his silence will usually be deemed a ratification.[38] The passage of a considerable length of time before challenging an agreement may, in certain circumstances, amount to ratification.[39]

Consider *Weissman v. Weissman*,[40] where the parties in a divorce action, each represented by counsel, entered into a stipulation of settlement in open court. About a year later, the defendant moved to enter a judgment of divorce incorporating by reference the terms of the agreement. The plaintiff opposed the motion and cross-moved to vacate the stipulation on the grounds that it was only an outline of an agreement and that she lacked the mental capacity to understand and agree to its terms. She further argued that the agreement should be set aside as unfair, unconscionable and a product of overreaching. Dismissing the plaintiff's claims, the court held that the plaintiff failed to carry her burden of demonstrating that she was unable to understand and agree to the terms of the stipulation. Moreover, the court added that the plaintiff had ratified the stipulation by accepting the benefits of the agreement for more than a year.

A stipulation may also be set aside where agreed upon by an attorney who lacked the authority to stipulate on behalf of the client. However, it is often difficult for a client to prove that the attorney did in fact lack authority; a client may be bound by a stipulation that was signed by his attorney even where it exceeds the attorney's actual authority, if the attorney had the apparent authority to enter into the agreement.[41]

In making such a determination, courts analyze the attorney-client relationship as one of agent and principal. As explained by the Court of Appeals, "essential to the creation of apparent authority are words or conduct of the principal, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction."[42] In other words, only the client's own statements or conduct can give rise to the reasonable belief that his attorney has the authority to act on his behalf; "the agent cannot by his own acts imbue himself with apparent authority."[43]

It has also been recognized that "the existence of 'apparent authority, depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal—not the agent."[44] However, "[a] party who relies on the authority of an attorney to compromise an action in his client's absence deals with such an attorney at his own peril."[45] When a question of fact exists as to whether an attorney had authority to act on behalf of his client, an evidentiary hearing is required.[46]

The landmark case addressing the issue of an attorney's authority to enter into a stipulation of settlement is *Hallock v. State*.[47] There, the attorneys for the parties entered into a stipulation of settlement on the record at

a pre-trial conference on the scheduled trial date. The plaintiffs later moved to vacate, alleging that their attorney had no authority to enter into the agreement. The Court of Appeals upheld the stipulation as valid and enforceable because (1) the attorney had represented the plaintiffs throughout the case and participated in prior settlement negotiations and (2) the rules of the court required attorneys to have authority to enter into binding settlements at pre-trial conferences.[48]

Following the rationale of *Hallock*, the Second Department recently rejected a motion to vacate alleging that an attorney lacked authority to enter into a settlement agreement. In *Wil Can (USA) Group, Inc. v. Shen Zhang*,[49] the attorneys for both sides had met in private sessions with a mediator in the presence of their respective clients in an attempt to settle the action. A settlement was ultimately reached, memorialized in writing and signed by the mediator and the attorneys for the parties. The plaintiff later moved to enforce the agreement, and the defendants cross-moved to vacate. Relying upon the attorney's longtime involvement in the litigation and representation of the defendants in prior settlement discussions, the court affirmed the order granting the motion to enforce the agreement.[50]

Contrast this result with *Koss Co-Graphics, Inc. v. Cohen*,[51] where the Second Department reversed an order of the Supreme Court denying the defendant's motion to vacate a stipulation of settlement. There, the Appellate Division held that counsel for the defendant lacked the apparent authority to settle the matter, predicating its determination on the facts that "the defendant vigorously defended the proceeding on the merits from the start,"[52] there had not been any previous settlement negotiations and the defendant promptly moved to vacate the stipulation upon being advised of its attorney's actions.

Practitioners should be especially cautious in this respect. Although an attorney may believe he has the authority to stipulate on his client's behalf, if a client contests that authority and the court upholds the stipulation based upon apparent authority, a legal malpractice action could ensue. Therefore, where possible, it is recommended that the attorney insist that the client be present when a settlement is being placed on the record in open court, so that the client can allocute as to his or her knowledgeable and voluntary consent to the settlement.

It should be noted that courts are divided with respect to who has the burden of proving that a party's attorney lacked authority to act on a client's behalf. Although some decisions have appeared to place the burden on the party seeking to enforce the action,[53] other cases have placed the burden on the party disaffirming it.[54]

Another basis upon which a stipulation may be vacated is if necessary parties are not notified or fail to consent to the terms of a stipulation.[55] In many instances, infants or individuals under another disability are among the necessary parties, but in such scenarios, the creation of an enforceable stipulation of settlement is substantially more complex.

III. Infants as Parties to Stipulations

Generally, where an infant or someone under another disability is a necessary party to an action, it is the parent or guardian of the property who represents the individual in that action. CPLR 1201 provides that if the disabled individual has no such guardian, then the court will appoint a guardian-ad-litem to represent his interests.[56] It is the parent or guardian who will have the authority to enter into a stipulation of settlement on behalf of the incapacitated individual, but he or she must seek court approval of the agreement by motion pursuant to CPLR 1207 prior to its becoming enforceable.

The corresponding procedure in Surrogate Court is very similar. Under New York Surrogate's Court Procedure Act 315 (SCPA), a competent adult party who has a similar economic interest to another necessary party who suffers from a disability (i.e., an infant) may represent the other party by virtual representation.[57] However, the statute restricts virtual representation to court proceedings and informal accounts, and thus it does not apply with respect to a typical out-of-court settlement. Instead, where an individual under a disability is a necessary party to a settlement agreement that falls outside of SCPA 315(8), the parties must file a compromise proceeding pursuant to SCPA 2106.

Although SCPA 2106 and CPLR 1207 provide means by which necessary parties under a disability can be bound by a settlement, these statutes create additional hurdles to creating enforceable stipulations. For example, the proposed agreement may be rejected by the guardian-ad-litem, his or her appointment may result in the filing of objections or the court may not find the agreement to be "just and reasonable."[58]

IV. Conclusion

Although the stringent requirements of CPLR 2104 must be satisfied for a stipulation of settlement to be valid and enforceable, what exactly constitutes compliance with the statute is constantly subject to interpretation. The foregoing case law demonstrates the more recent interpretations to date and provides some reassurance that principles of equity, such as ratification and estoppel, may serve to enforce settlement agreements in the rare but appropriate case.

Endnotes

1. *Nishman v. DeMarco*, 76 A.D.2d 360, 368-369, 430 N.Y.S.2d 339, 346 (2d Dep't 1980).
2. *Stevenson v. News Syndicate*, 302 N.Y. 81, 87, 96 N.E.2d 187 (1950).
3. *Hallock v. State of New York*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984); *Peralta v. All Weather Tire Sales & Serv., Inc.*, 58 A.D.3d 833, 873 N.Y.S.2d 130 (2d Dep't 2009); *Perrino v. Bimasco, Inc.*, 234 A.D.2d 281, 61 N.Y.S.2d 53 (2d Dep't 1996), citing *Galasso v. Galasso*, 35 N.Y.2d 319, 361 N.Y.S.2d 871 (1974).
4. *See Hevesi v. Pataki*, 169 Misc. 2d 467, 474, 643 N.Y.S.2d 895 (Sup. Ct., N.Y. Co. 1996).
5. N.Y. Civil Practice Law & Rules 2104 (CPLR).
6. *In re Dolgin Eldert Corp.*, 31 N.Y.2d 1, 4-5, 334 N.Y.S.2d 833 (1972).
7. *Id.*
8. *See Diarassouba v. Urban*, 71 A.D.3d 51, 55, 892 N.Y.S.2d 410, 414 (2d Dep't 2009), citing *Kushner v. Mollin*, 144 A.D.2d 649, 535 N.Y.S.2d 41 (2d Dep't 1988).
9. *In re Dolgin Eldert Corp.*, 31 N.Y.2d 1, 4-5, 334 N.Y.S.2d 833 (1972).
10. *Id.*
11. *Sontag v. Sontag*, 114 A.D.2d 892, 495 N.Y.S.2d 65 (2d Dep't 1985).
12. *See Conlon v. Concord Pool Ltd.*, 170 A.D.2d 754, 565 N.Y.S.2d 860 (3d Dep't 1991).
13. *See In re Winer*, N.Y.L.J., Sept. 15, 1995, p. 30, (Sur. Ct., N.Y. Co.).
14. *Bergassi, LLC v. Ikon Solutions, Inc.*, 21 Misc. 3d 1133(A), 875 N.Y.S.2d 818 (N.Y.C. Ct., 2008), quoting *Neiman v. Springer*, 89 A.D.2d 922, 453 N.Y.S.2d 771 (2d Dep't 1982); *see also Popovic v. New York City Health and Hospitals Corp.*, 180 A.D.2d 493, 579 N.Y.S.2d 39 (1st Dep't 1992).
15. *See Rivers v. Genesis Holding LLC*, 11 Misc. 3d 647, 649, 812 N.Y.S.2d 301, 303 (Sup. Ct., N.Y. Co. 2006), relying on *In re Estate of Janis*, 210 A.D.2d 101, 620 N.Y.S.2d 342 (1st Dep't 1994); *Berkeley Realty, LLC v. Hicks*, 7 Misc. 3d 130(A), 801 N.Y.S.2d 230 (Sup. Ct., Appellate Term, 9th and 10th Judicial Districts 2005).
16. *See Errico v. Davidoff*, 170 Misc. 2d 378, 382, 647 N.Y.S.2d 382 (Civ. Ct., Kings Co. 1998); *Zambrana v. Memnon*, 181 A.D.2d 730, 581 N.Y.S.2d 83 (2d Dep't 1992).
17. *See, e.g., Trapani v. Trapani*, 147 Misc. 2d 447, 556 N.Y.S.2d 210 (Sup. Ct., Kings Co. 1990).
18. 2000 WL 1510077 (S.D.N.Y. 2000).
19. *Id.*
20. 1990 WL 6555 (S.D.N.Y. 1990).
21. 100 Misc. 2d 1055, 420 N.Y.S.2d 443 (N.Y. Civ. Ct., 1979).
22. *Id.* at 1057.
23. *Id.*
24. *See e.g., Figueroa v. City of New York*, 2011 U.S. Dist. LEXIS 9433 (S.D.N.Y. 2011); *Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78 (E.D.N.Y. 2006).
25. *Tocker v. City of New York*, 22 A.D.3d 311, 311, 802 N.Y.S.2d 147 (1st Dep't 2005).
26. 3 N.Y.3d 281, 785 N.Y.S.2d 738 (2004).
27. *Id.* at 284.
28. *Id.* at 285.
29. 25 Misc. 3d 1229(A), 906 N.Y.S.2d 775 (Sup. Ct., Kings Co. 2009).
30. *Id.* at *2, relying on *Smith v. Lefrak Organization, Inc.*, 142 A.D.2d 725, 531 N.Y.S.2d 305 (2d Dep't 1988).
31. *Id.* at *3.
32. 59 A.D.3d 291, 874 N.Y.S.2d 41 (1st Dep't 2009).
33. 88 A.D.3d 1220, 932 N.Y.S.2d 214 (3d Dep't 2011).
34. *Id.* at 1222.
35. *See Genesis Holding LLC v. Watson*, 5 Misc. 3d 127(A), 798 N.Y.S.2d 709 (App. Term, 1st Dep't 2004).
36. *Hallock v. State of New York*, 64 N.Y.2d 224, 485 N.Y.S.2d 510, relying on *Estate of Frutiger*, 29 N.Y.2d 143, 324 N.Y.S.2d 36 (1971).
37. *See Weissman v. Weissman*, 42 A.D.3d 448, 839 N.Y.S.2d 798 (2d Dep't 2007).
38. *See 1420 Concourse Corp. v. Cruise*, 175 A.D.2d 747, 573 N.Y.S.2d 669 (1st Dep't 1990).
39. *Bouloy v. Peters*, 262 A.D.2d 209, 692 N.Y.S.2d 329 (1st Dep't 1999); *Suncoast Capital Corp. v. Global Intellicom Inc.*, 280 A.D.2d 281, 719 N.Y.S.2d 652 (1st Dep't 2001).
40. *Id.*
41. *Wil Can (USA) Group, Inc. v. Shen Zhang*, 73 A.D.3d 1166, 903 N.Y.S.2d 429 (2d Dep't 2010).
42. *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984).
43. *Melstein v. Schmid*, 116 A.D.2d 632, 497 N.Y.S.2d 482 (2d Dep't 1986).
44. *Cornwell v. NRT NY LLC*, 31 Misc. 3d 1209(A) (Sup. Ct., N.Y. Co. 2011), relying upon *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984).
45. *Slavin v. Polyak*, 99 A.D.2d 466, 470 N.Y.S.2d 38 (2d Dep't 1984); *see also Feuerstein v. Feuerstein*, 72 A.D.2d 546 (2d Dep't 1979).
46. *See Suslow v. Rush*, 161 A.D.2d 235, 554 N.Y.S.2d 620 (1st Dep't 1990); *In re Sosinksy*, 9 Misc. 3d 1113(A), 808 N.Y.S.2d 920 (Sur. Ct., Nassau Co. 2005).
47. *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984).
48. *See* 22 NYCRR § 202.26[e]; *cf.* 22 NYCRR § 202.12.[b].
49. 73 A.D.3d 1166, 903 N.Y.S.2d 429 (2d Dep't 2010).
50. *See also Suncoast Capital Corp. v. Global Intellicom, Inc.*, 280 A.D.2d 281, 719 N.Y.S.2d 652 (1st Dep't 2001).
51. 166 A.D.2d 649, 561 N.Y.S.2d 76 (2d Dep't 1990).
52. *Koss Co-Graphics*, 166 A.D. 2d at 650, 561 N.Y.S. 2d at 76.
53. *See Ford v. Unity Hospital*, 32 N.Y.2d 464, 472-473, 346 N.Y.S.2d 238 (1973); *In re Estate of Lagin*, N.Y.L.J., April 12, 2006 p. 20 (Sur. Ct., Nassau Co.).
54. *Hallock v. State*, 64 N.Y.2d 224, 485 N.Y.S.2d 510 (1984); *Allison v. Allison*, 41 A.D.3d 519, 838 N.Y.S.2d 168 (2d Dep't 2007).
55. *See Estate of Drake*, 278 A.D.2d 929, 718 N.Y.S.2d 767 (4th Dep't 2000); *Estate of Mohamed*, N.Y.L.J., Feb. 18, 1999, page 28, col. 4, (Sur. Ct., Bronx Co.); *Sohn v. Kong*, N.Y.L.J., Dec. 22, 1993, page 25, col. 2 (Civ. Ct., Bronx Co.).
56. CPLR 1201.
57. N.Y. Surrogate's Court Procedure Act 315 (SCPA).
58. SCPA 2106.

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The Preclusion of Expert Affidavits in Summary Judgment Motions: A Comparison of the First and Second Departments

By David A. Glazer and Karen Schnur

It has often been argued by lawyers in summary judgment motions that the use of expert affidavits to either support or oppose the motion are improper if the experts were not exchanged prior to the motion as long as a note of issue has been filed. Until recently, that argument had fallen on deaf ears.

The Second Department has begun to accept that argument. Where previously expert disclosure after the note of issue was allowed, the Second Department has started to require that expert information be exchanged prior to the filing of the note of issue if the party wishes to use the expert in a summary judgment motion.[1] However, whether the Second Department is a trendsetter or floating alone in this matter has not yet been fully determined. Thus far, only the First and Second Departments have dealt with this issue at any length recently.

Second Department Cases

As early as 1996, in *Mankowski v. Two Park Co.*, the Second Department held that it was proper for the Supreme Court to preclude the use of an expert or the expert's affidavit to oppose a motion for summary judgment since the plaintiff failed to timely respond to the defendant's discovery demands.[2] Throughout the years, the Second Department made similar rulings.[3]

In 2011 alone, there were at least four decisions where the Second Department has held that the expert affidavit should have been precluded because the expert was not disclosed to the other party prior to the note of issue being filed.

In *Pellechia v. Partner Aviation Enterprises, Inc.*, the plaintiff allegedly sustained injuries when he slipped and fell while disembarking from defendant's charter jet.[4] The Second Department affirmed the Supreme Court's granting of summary judgment for the defendant on the grounds that the defendant made out a prima facie showing for summary judgment and the plaintiff was unable to raise a triable issue of fact.[5] The Second Department upheld the Supreme Court's decision to disallow the plaintiff's expert affidavit "because the plaintiff never complied with any of the disclosure requirement of CPLR 3101 (d) (1) (i), and only first identified his expert witness in opposition to the defendant's summary judgment motion, after the plaintiff filed the note of issue and certificate of readiness."[6] The Court also held that: (1) the expert did not demonstrate that he was qualified to render an opinion and (2) the affidavit was "speculative and conclusory, and was not based on accepted industry standards.…"[7]

In *Ehrenberg v. Starbucks Coffee Company*,[8] the plaintiff sued Starbucks Coffee Company when a cup of hot tea spilled on him, claiming that the accident was the result of a dangerous and defective condition on the premises. Starbucks moved for summary judgment, which was denied by the Supreme Court.[9] On appeal, the Second Department reversed on the grounds that the Supreme Court improperly considered the affidavit of the plaintiff's expert that was submitted in opposition to the motion.[10] The Second Department held that the Supreme Court should not have considered the affidavit "since that expert witness was not identified by the plaintiffs until after the note of issue and certificate of readiness were filed, attesting to the completion of discovery, and the plaintiffs offered no valid excuse for the delay."[11] As a result, the Court granted summary judgment to Starbucks.[12]

In *Stolarski v. DeSimone*,[13] Stolarski attempted to commit suicide when her boyfriend DeSimone, whom she was living with, broke up with her and told her to move out.[14] She was hospitalized after the attempt and upon discharge was referred to the defendant Family Services of Westchester, Inc.[15] After two consultations with a Family Services social worker, Stolarski successfully killed herself using DeSimone's gun.[16] Her parents sued both DeSimone and Family Services for wrongful death and conscious pain and suffering.[17] Both defendants moved for summary judgment and the Supreme Court denied both motions.[18] On appeal, the Second Department reversed and granted summary judgment for DeSimone but affirmed the denial of summary judgment for Family Services because it "failed to establish its prima facie entitlement to such relief."[19] The Second Department held that the Supreme Court "properly declined to consider the expert affidavits proffered by Family Services in support of its motion[]" because "[t]he experts were not identified by Family Services until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and [it] offered no valid excuse for the delay."[20] The court further explained that because Family Services did not establish its prima facie entitlement to summary judgment, the motion was denied "regardless of the sufficiency of the opposing papers."[21]

Most recently, the Second Department decided *Kopeloff v. Arctic Cat, Inc.*[22] In this case, the plaintiff sued the manufacturer of the snowmobile that he was driving, alleging that an overcentered sway bar caused him to turn over and be thrown off the snowmobile and thus sustain injuries.[23] The defendant moved for summary judgment in August of 2009, over three months after the note of issue and certificate of readiness were filed.[24] In opposition to the summary judgment motion, the plaintiff submitted an affidavit of an expert who was never previously identified to the defendant.[25] The Supreme Court granted the defendant's motion and the plaintiff appealed.[26] The Second Department affirmed the Supreme Court, finding that the court did not abuse its discretion when rejecting the expert affidavit as untimely since the "plaintiff did not provide any excuse for failing to identify the expert in response to the defendant's discovery demands" and also because the plaintiff had retained the expert in question over 18 months prior to the submission of the affidavit yet the defendant was not aware of the expert.[27] Furthermore, the court pointed to a secondary reason to grant defendant's motion for summary judgment: the plaintiff's expert's affidavit was "speculative, conclusory, and partially based on evidence which is not in the record."[28]

First Department Cases

The First Department has also recently addressed this issue, although not with the same frequency, or consistency, as the Second Department. Since April of 2010, the First Department has decided three cases with respect to the preclusion of expert affidavits in summary judgment motions where the expert was not disclosed prior to the note of issue being filed.

In the first case, *Tomaino v. 209 E. 84th Street Corporation*, the plaintiff slipped and fell down a flight of steps and sued the owner of the premises.[29] The defendant moved for summary judgment on the grounds that the plaintiff was unable to state exactly where she fell and the exact cause of her fall, but the Supreme Court denied the motion.[30] On appeal, the First Department affirmed the denial of the defendant's motion for summary judgment and to preclude plaintiffs' expert testimony. It held that the Supreme Court properly did not exclude the plaintiff's expert's affidavit and testimony because "[p]laintiffs established good cause for the untimely disclosure, which does not appear to have surprised or prejudiced defendant."[31]

In *Harrington v. City of New York*, the First Department affirmed the Supreme Court's order which granted defendants' motion for summary judgment and denied plaintiff's cross motion for partial summary judgment.[32] The First Department held that even if the defendants were negligent, "such negligence was not a substantial cause of the events producing the injury" and that the plaintiff "failed to establish prima facie entitlement to summary judgment in her favor on liability."[33] However, the court also stated that "the motion court properly declined to consider the [plaintiff's] expert's affirmation because plaintiff failed to timely disclose his identity."[34] In making this statement, the court cited to a Second Department case, *Wartski v. C.W. Post Campus of Long Is. Univ.*, which held that "[t]he plaintiff's expert affidavit should not have been considered in determining the motion since the expert was not identified by the plaintiff until after the note of issue and certificate of readiness were filed attesting to the completion of discovery, and the plaintiff offered no valid excuse for her delay in identifying the expert."[35] However, the First Department also made clear that even if the expert's affidavit were allowed, that it was insufficient to raise an issue of fact.[36]

The most recent case with respect to this issue was decided in June 2011. In *Baulieu v. Ardsley Associates, L.P.*,[37] the First Department reversed the Supreme Court's granting of summary judgment to the defendant, Powerhouse Maintenance Inc. (Powerhouse) because Powerhouse did not establish prima facie entitlement to summary judgment, and even if it did, evidence offered by the other parties raised triable issues of fact.[38] The Court went further and stated that the plaintiff's expert engineer's affidavit should have been considered on the motion, "notwithstanding that the plaintiffs failed to timely disclose information about the expert before filing their note of issue."[39] It reasoned that the record showed "no evidence that the plaintiffs' belated disclosure…was willful, or that it prejudiced Powerhouse, inasmuch as the specifics of the alleged macadam defect, and the codes and regulations claimed to be violated, were previously set forth in plaintiffs' bill of particulars and deposition testimony."[40]

Comparison of First and Second Departments

The First and Second Departments approach the question of preclusion of expert affidavits, introduced for the first time during a summary judgment motion and after the note of issue has been filed, differently. Looking at the four Second Department cases discussed above, the Second Department will preclude an expert affidavit without a showing of willfulness or prejudice, although it tends to provide at least one secondary reason for either precluding the expert affidavit or its decision to grant or to deny summary judgment. These secondary reasons appear to be a safety net to protect against an appeal. However, as evidenced by *Ehrenberg*, the Second Department will still preclude an expert affidavit solely on the grounds that expert disclosure was not exchanged prior to the note of issue being filed even without a secondary reason for its decision.

The First Department, on the other hand, generally asks whether the late disclosure of the expert was willful or prejudicial to the opposing party and whether the party offering the affidavit had a good cause reason for the delay.[41] *Tomaino* suggests that if the plaintiff presents good cause for the untimely disclosure, that it is not willful, and does not prejudice the other party, preclusion of the expert affidavit is unwarranted. Furthermore, *Baulieu* stands for the proposition that if the information or opinions offered by the expert in the affidavit were disclosed prior to the note of issue being filed, then the opposing party could not have been prejudiced. Therefore, unless the untimely disclosure was willful, the Court should not preclude the expert's affidavit.

Conclusion

The real question is how attorneys should handle expert disclosure moving forward. In any case where a motion for summary judgment is likely, expert disclosure should be made either before the filing of the note of issue, or promptly after its filing. As long as the opposing party has had a viable opportunity to review the disclosure and obtain its own expert for rebuttal purposes, then there should be no issue with the use of an expert affidavit. However, failure to disclose an expert, particularly if that expert was retained well before the filing of the note of issue, will likely result in the preclusion of that expert in a motion for summary judgment.

Endnotes

1. Richard E. Lerner & Judy C. Selmeci, *Timing of Expert Disclosures: A Preemptive Approach*, N.Y. L.J., Aug. 5, 2011, available at http://www.njlj.com.
2. *Mankowski v. Two Park Co.*, 225 A.D.2d 673, 639 N.Y.S.2d 847 (2d Dept. 1996).
3. *See Vailes v. Nassau County Police Activity League, Inc., Roosevelt Unit*, 72 A.D.3d 804 (2d Dept. 2010); *Yax v. Development Team, Inc.*, 67 A.D.3d 1003 (2d Dept. 2009); *Gerardi v. Verizon N.Y., Inc.*, 66 A.D.3d 960 (3d Dept. 2009); *Wartski v. C.W. Post Campus of Long Is. Univ.*, 63 A.D.3d 916 (2d Dept. 2009); *King v. Gregruss Mgt. Corp.*, 57 A.D.3d 851 (2d Dept. 2008); *McArthur v. Muhammad*, 16 A.D.3d 630 (2d Dept. 2005); *Ortega v. New York City Tr. Auth.*, 262 A.D.2d 470 (2d Dept. 1999).
4. 80 A.D.3d 740, 916 N.Y.S.2d 130 (2d Dept. 2011).
5. *Id.*
6. *Id.*
7. *Id.*
8. 82 A.D.3d 829, 918 N.Y.S.2d 556 (2d Dept. 2011).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. 83 A.D.3d 1042, 922 N.Y.S.2d 151 (2d Dept. 2011).
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. 84 A.D.3d 890, 923 N.Y.S.2d 168 (2d Dept. 2011).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. 72 A.D.3d 460, 900 N.Y.S.2d 245 (1st Dept. 2010).
30. *Id.*
31. *Id.* (internal citations omitted).
32. 79 A.D.3d 545, 913 N.Y.S.2d 81 (1st Dept. 2010).
33. *Id.*
34. *Id.*
35. 63 A.D.3d 916, 917, 882 N.Y.S.2d 192 (2d Dept. 2009).
36. *Harrington*, 79 A.D.3d 545.
37. 85 A.D.3d 554, 925 N.Y.S.2d 466 (1st Dept. 2011).
38. *Id.*
39. *Id.*
40. *Id.*
41. The one First Department case that did not apply this analysis relied on a Second Department case for its holding.

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A Brave New World: Protecting Information (Including Trade Secrets) in the Cloud and in Social Media

By Robert B. Milligan and D. Joshua Salinas

I. Introduction

The explosion of cloud computing has provided both large and small companies with many technological benefits, but with those well recognized benefits there are incumbent risks to valuable company data, including prized trade secrets. Companies utilizing cloud computing must employ effective measures to protect and secure their intellectual property. Vendor agreements with cloud providers should be carefully scrutinized to ensure that appropriate contractual provisions are in place to protect company data, including provisions addressing ownership, access, protection, and privacy from both a national and international perspective. Companies should attempt to incentivize their agreements with vendors to ensure that the company's business objectives, including secure data protection, are met.

Social media, which use cloud computing, have also provided companies with access to dynamic platforms for business growth. To effectively navigate in this new environment, companies must ensure that they adopt effective policies that foster creative expression yet protect company data and secrets, including employment policies, with clear direction and guidance for employees. Sensible executives will seek advice from competent counsel to ensure that the cost savings and financial opportunities in cloud computing, including social media, are not outweighed by the potential legal and business risks.

Cloud computing is a hot technology movement. Over forty-three percent of chief information officers expect to utilize cloud services within the next few years.[1] MarketsandMarkets estimates that the cloud computing market will grow from $37.8 billion in 2010 to $121.1 billion in 2015.[2] Cisco predicts that worldwide IP traffic in the cloud will increase twelvefold over the next five years and account for more than one-third of total data center traffic by 2015.[3] Verizon recently spent $1.4 billion to acquire cloud services provider Terremark Worldwide, Inc., which is expected to stimulate other rival carriers to enter the cloud industry.[4] However, the new cloud computing buzz is not new technology to many industry insiders. As Larry Ellison of Oracle stated, it is "[e]verything that we already do."[5]

Cloud computing is a metaphor for the Internet. It comes from the early days when network engineers used a cloud in their network design illustrations to indicate unknown domains. The engineer knew the domain was there, but the details of that domain were unknown. This network of clouds is how we view the Internet today. Cloud service users know their information is readily accessible but generally lack any interest in where that information is physically located. Cloud service users generally can access their information at any place, at any time, and on any device, as long as they have a network connection. Indeed, cloud computing is part of our everyday lives. If you have performed a Google search, checked Yahoo email, or signed in to Facebook, Twitter, or LinkedIn, you have reached into the cloud.

Cloud computing lacks a universal definition. Ask different people in the IT industry what cloud computing is and you will get different answers. The National Institute of Standards and Technology (NIST) has provided the most widely accepted definition: "Cloud computing is a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction."[6] The NIST also notes five essential characteristics of cloud computing services: on-demand self-service, broad network access, resource pooling, rapid elasticity, and measured service.[7]

Cloud computing has numerous technical benefits. Users typically pay the cloud provider for the services and resources they use. This pay-as-you-go infrastructure allows companies to reduce costs. Companies can avoid paying for costly equipment, personnel, and maintenance. For example, if a company needs additional storage space for its data, it can purchase more from the cloud provider. Without cloud computing, the company may have to pay for additional servers, allocate space for bulky servers, and hire additional IT staff, among other costs. Cloud computing also provides scalability. The ability to adapt and quickly respond to increased market demands is invaluable to small companies that lack the finances to significantly invest in expensive IT infrastructure. The on-demand access provides access wherever a cloud user has a network connection. This mobility and convenience is one of the reasons low-cost netbooks and tablet devices such as iPads have rapidly radically increased in popularity. Companies are embracing the cloud as a cost effective way to do business. It provides smaller companies with a better chance to compete.

Cloud computing involves three general service models. The simplest model is Infrastructure as a Service (IaaS). This involves basic storage and data hosting. The second model is Software as a Service (SaaS). In this model, the cloud provider provides the software to access, manage, and utilize the data. This is commonly seen with email (e.g., Gmail, Yahoo mail, Hotmail) and social media sites (e.g., Facebook, LinkedIn, Twitter). The third model is Platform as a Service. This model provides an operating system in which the company can develop and build its own applications. For example, Facebook allows third parties to build and distribute applications within its service. The main factor distinguishing the three models is the level of control the subscriber retains over its data.

While cloud computing is not new, expansive and accelerated network connectivity has fueled the ascent of this technology movement. Companies embracing cloud computing will move data previously stored in-house onto servers provided by third parties. However, moving confidential and proprietary information, such as trade secrets, raises numerous legal, security, and business concerns.

II. Trade Secrets

A trade secret is any information not generally known that is economically valuable and that is subject to reasonable efforts to maintain its secrecy.[8] Many people think of secret formulas, such as the ingredients for Coca-Cola, KFC, or WD-40. Yet trade secrets also can include a wide variety of technical and nontechnical information. Common trade secrets include manufacturing methods, formulas, techniques, business and marketing plans, customer lists, and computer programs. There is no requirement to register or publish a trade secret to receive protection. In addition, a trade secret does not have to involve novel information. The heart of the trade secret's value is its secrecy.

A trade secret owner must take reasonable efforts to ensure the information's secrecy.[9] He or she must make actual efforts to protect the trade secret so that it is not lost through improper, illegal, or unethical means. The burden is on the trade secret owner to keep the information secret; the owner cannot expect others to keep the information secret.

Trade secret law protects against misappropriation, i.e., the illegal or unauthorized acquisition, disclosure, or use of information. Trade secrets are creatures of statute and are protected under several laws such as the Uniform Trade Secrets Act (UTSA), Economic Espionage Act of 1996 (EEA),[10] and the Computer Fraud and Abuse Act (CFAA).[11] Varying versions of the UTSA are enacted in forty-seven states.

Trade secret law holds third parties liable if they knew or had reason to know of misappropriation.[12] However, it generally does not protect against the accidental disclosure or the reverse engineering of a trade secret.[13] For example, if a trade secret is accidentally disclosed by a cloud provider or third party, it could potentially lose its trade secret status if the data leak is not promptly and effectively addressed.

Unlike patent, trademark, or copyright protection, there is no set duration for trade secret protection. A trade secret is protected as long as it is kept secret. However, once a trade secret is lost, it is lost forever. As we have seen in the post-Wikileaks world, once confidential information is disclosed, it can be distributed instantly online for hundreds of millions to see, access, and download.[14]

III. Problems

An issue with new technology is that the law is constantly behind. "[Courts] try to keep up with technology and understand it, but things move so quickly."[15] The use of cloud computing raises several problems for trade secrets. Placing confidential information in the hands of a third-party cloud provider seems contrary to maintaining secrecy. Moreover, information placed into the cloud increases the risk that the information will be accidentally or intentionally disclosed to third parties.

A threshold issue is whether placing confidential information into the cloud diminishes its status as protectable information. Can trade secrets lose their protection in the cloud? The answer may vary depending on the nature of the information and who places the information in the cloud. Courts have used six factors to determine whether a piece of information is secret. These are: (1) the extent to which the information is known outside the company; (2) the extent to which the information is known by employees and others inside the company; (3) the extent of measures taken by the company to protect the secrecy of its information; (4) the value of the information to the company and competitors; (5) the amount of time, effort, and money expended by the company in developing the information; and (6) the ease or difficulty with which the information can be properly acquired or duplicated by others.[16]

A New York district court found a company's customer list was not a trade secret because the information at issue had already been disclosed in the cloud and was publicly accessible. In *Sasqua Group v. Courtney*,[17] an executive search consulting firm alleged that a former employee stole confidential customer information from a client database and later solicited those clients. The confidential database contained client contact information, individual profiles, resumes, descriptions of interactions with clients, and hiring preferences. The court focused on the sixth factor in the six-factor analysis, i.e., the ease with which the information could be acquired by others. The former employee demonstrated

how easily she could find the same client database information by searching LinkedIn, Google, Bloomberg.com, and FX Week. The court found the client database did not constitute a trade secret because the information was easily accessible to the public online. In doing so, the court noted that the protection of certain information may no longer be viable in the twenty-first century in light of new technologies.[18]

A recent New Jersey district court case, however, found that trade secret information may not necessarily lose its trade secret status despite being posted on the Internet. In *Syncsort Inc. v. Innovative Routines, Int'l, Inc.*,[19] the plaintiff data transformation software company alleged that a competitor had improperly developed software when the competitor allegedly improperly acquired and used the plaintiff's trade secrets—confidential command language. The defendant argued that portions of the command language had been posted on the Internet and thus were no longer secret. Moreover, the defendant argued that entire copies of the plaintiff's Reference Guides regarding the command language had been posted temporarily on the Internet, once in Korea and once in Japan.

The court found that the Internet postings did not defeat the command language's trade secret status because (1) the parts of command language posted were insufficient to fully disclose the complete command language and (2) the Reference Guide posts in Korea and Japan were obscure and transient such that it was not made generally known to other competitors in the industry. The takeaway from the case is that the "secrecy" of information may be determined based on the surrounding circumstances and nature of the online disclosure rather than by the mere fact that the information was posted online.

Similarly, a current Northern District of California case, *PhoneDog v. Kravitz*,[20] involves a dispute over whether a Twitter account's followers constitute trade secrets even when they are publicly visible. The court denied the defendant's motion to dismiss and ruled that PhoneDog, an "interactive mobile news and reviews web resource," could proceed with its lawsuit against Noah Kravitz, a former employee, who it claims unlawfully continued using PhoneDog's Twitter account after he quit. The court held that PhoneDog had described the subject matter of the trade secret with "sufficient particularity" and satisfied its pleading burden as to Kravitz's alleged misappropriation by alleging that it had demanded that Kravitz relinquish use of the password and Twitter account but that he refused to do so. With respect to Kravitz's challenge to PhoneDog's assertion that the password and the account followers do, in fact, constitute trade secrets—and whether Kravitz's conduct constitutes misappropriation—the court ruled that such determinations require the consideration of evidence outside the scope of the pleading and should, therefore, be raised at summary judgment rather than on a motion to dismiss. This case merits attention.

Another issue arises when cloud providers use the hosted information for secondary purposes. For example, information containing customer lists or contact information is highly valuable for market studies and behavioral targeting. Providers can earn substantial revenues reselling this raw data to advertisers and other third parties.

Perhaps more threatening to trade secrets are cyber attacks. Hackers have recently targeted their attacks at corporate trade secrets and proprietary information. McAfee reported on the Night Dragon cyber attacks that have targeted oil and gas industry trade secrets.[21] IBM's X-Force cyber security team also reported that cyber criminals now pinpoint valuable corporate data.[22] There is a thriving criminal market for converting stolen trade secrets into cash.[23] In fact, criminal gangs in China, Russia, and the Ukraine will steal information for companies looking to undercut their rivals.[24] Hackers are eagerly awaiting more corporations to embrace cloud computing and to release prized data into the cloud.

The inherent risks in utilizing cloud computing were demonstrated last year with one of the largest security breaches in United States history—the March 2011 Epsilon security breach.[25] Epsilon is one of the largest permission-based email marketing companies. It sends over forty billion emails each year on behalf of over 2,500 clients. Its clients include US Bank, Capital One, Chase, Citi, JPMorgan, Best Buy, Hilton, Target, and Disney. On March 30, 2011, Epsilon detected an unauthorized entry into its customer databases. It discovered that hackers had obtained access to thousands of names and email addresses. As a result, these hackers now have the ability to send highly effective spear-phishing emails to their recently acquired targets.[26]

The following scenario could arise from the Epsilon or other cloud computing breaches: (1) hacker reviews improperly obtained customer information and discovers that the customer works at a large corporation or firm; (2) hacker crafts a well designed email posing as the company to which the client gave its email address (e.g., Best Buy, Target, Citi); (3) customer opens the email at work, clicks a provided link, and undetectable software is downloaded onto the customer's computer; and (4) undetectable software quietly sits inside the corporate network, searches for trade secrets or confidential information, and sends it back to the hacker. Security software company Symantec reports that in 2011 at least fifty companies in the defense and chemical industries were targeted by these spear-fishing attacks, which were specifically aimed at prized research and development information.[27]

Aside from the intentional theft by outside parties, trade secrets always have been susceptible to misappropriation by current or former employees. The typical case involves the disgruntled employee who discloses or uses trade secrets after termination. Yet, the use of cloud services such as social media increase the risks of both intentional and accidental disclosure by such employees.

A related issue involves the ownership of data. If a provider or employee modifies the data, do they have any ownership rights in it? Taking the case of a customer list, if an employee "friends" clients and adds them to a LinkedIn profile, does the contact belong to the employee or to the employer? If the employee leaves his or her employer, can he later contact previous clients? This issue was the underlying dispute in *TEK Systems v. Hammernik*.[28]

In *TEK Systems*, the plaintiff, an IT staffing firm, alleged that a former employee violated a non-solicitation agreement when the employee contacted previous clients on LinkedIn. The non-solicitation agreement lacked any social media restrictions. The issue was whether the employee violated the non-solicitation agreement when she allegedly contacted the clients through her personal social media account after she had gone to work for a competitor. The parties eventually stipulated to the enforcement of the non-solicitation agreement and the return of TEK Systems' documents. Unfortunately, no ruling or precedential decision arose from this case.

The ownership of a social media account is also at issue in the previously discussed *PhoneDog* case—specifically, whether the employer or employee owns the subject Twitter account. PhoneDog asserted a conversion claim, which Kravitz challenged on the ground that PhoneDog had not sufficiently alleged that it owns or has the right to immediately possess the Twitter account. Kravitz also argued that PhoneDog failed adequately to allege that he had knowingly or intentionally engaged in the alleged act of conversion. The court, however, found that these issues lie "at the core of [the] lawsuit" and that, accordingly, an evidentiary record had to be developed before the court could resolve such fact-specific issues.

In *Eagle v. Morgan*,[29] the court held that an employer may claim ownership of its former executive's LinkedIn connections where the employer required the executive to open and maintain the account; the executive advertised her and her employer's credentials and services on the account; and the employer had significant involvement in the creation, maintenance, operation, and monitoring of the account. Similar to *Sasqua Group*, the court found that the contact lists in the LinkedIn account could not constitute trade secrets because they were publicly accessible online. The takeaway in *Eagle*, however, is that employers should consider getting more involved in their employees' social-networking activities and utilize contracts to assign ownership in such accounts.

The nature of trade secrets as digital information within the cloud raises potential litigation concerns. For example, data is often transitory, moving between various servers and facilities. Trade secrets may move from state to state and even across international borders. Thus, difficulties may arise in establishing jurisdiction in cases of trade secret theft. Moreover, a cloud provider's obligation to comply with electronic discovery demands may compromise the integrity of trade secrets or confidential information if secrecy protections such as protective orders and confidentiality agreements are not employed.

Finally, problems may arise with data access continuity. What happens when the contract or subscription for cloud services terminates? The cloud provider may withhold data when a company fails to pay for services. Additionally, what happens when a small startup provider goes bankrupt or is purchased by another company? These and many of the problems discussed above may be addressed with effective and well drafted contracts as part of a well developed cloud computing strategy before placing your company's data in the cloud.

IV. Solutions

The problems of storing data in the cloud are not insoluble. The first step is to conduct a trade secret audit or inventory before placing information in the cloud. Determine what information is sensitive and confidential. Highly valuable trade secrets can remain off the cloud and stored in-house on secured networks or in physical areas. Keeping information out of the cloud inherently reduces the risk it will not be disclosed on the cloud. When in doubt, do not make the information available on the cloud. To the extent you determine that certain trade secret information can be placed in a secure cloud, keep track of such data, as well as of the security measures in place to protect such data (encryption, confidentiality designations, written agreements, etc.) and of who has access to the data.

Once you decide to utilize cloud computing, take all prudent and necessary measures to select the correct provider. Perform diligent checks on all potential providers. Obtain references. Determine whether they have the capability to provide the type of services you desire. Conduct interviews with the providers. Find out their financial viability. View their security and privacy policies and find out how many security breaches they have experienced. Determine whether your data will be encrypted and whether your cloud provider subcontracts its services with third parties. Evaluate choice-of-law, choice-of-forum, and indemnification provisions carefully. Security rather than price should be your top

priority. You may want to consider diversifying your portfolio of data stored on the cloud with multiple providers or backup locally all information stored in the cloud.

State law may require you to contract with the cloud provider to ensure that reasonable security procedures and practices are in place. California requires businesses that possess personal information about California residents to implement and maintain reasonable security procedures and practices.[30] Businesses that disclose this personal information to third parties (e.g., cloud providers) must contract with the third party to implement and maintain reasonable security procedures and practices. Massachusetts also requires contracts to implement and maintain appropriate security measures when providing personal information to cloud providers.[31] Nevada requires businesses to use encryption on data storage devices that contain personally identifiable information.[32]

After the provider is chosen and a trade secret audit or inventory has been conducted, the best way to protect trade secrets and other information is through well-drafted contracts and policies and periodic audits of the cloud provider. This includes contracts with both cloud providers and with the company's own employees who may access the information. First, define the ownership rights in the data. For example, you may want to explicitly state that the cloud provider and employees have no ownership rights in the data. The agreement can state that the provider and employees have limited access to the data only for certain reasons. Defining the limits of authorization also can help establish rights under the CFAA if the provider or employee violates the scope of their authorizations.

Next, define the scope of the protected information. Specifically indicate which information is considered trade secret or confidential. The Economic Espionage Act's language may be preferable because it provides a broad definition of a trade secret. Also include language protecting confidential and propretiary data. Prohibit the unauthorized use or disclosure of company data, including trade secrets and confidential and proprietary information. Contracts also can provide for injunctive relief, liquidated damages, arbitration, and attorneys' fees.

Companies also should control access to their data. Agreements with cloud providers should restrict the use of data to outside vendors or third parties and should hold the provider and any subcontractors liable for security breaches. This is especially important in light of the 2011 Epsilon security breach. Companies should require heightened security standards, such as ISO standards. These standards represent an international consensus on good-quality management practices. For example, they require quality audits, effective training, and corrective actions for problems. In addition, the Federal Trade Commission has provided five key principles for sound data security plans: (1) know the personal information you have; (2) scale down and keep only what you need; (3) protect the information you want to keep; (4) properly dispose of what you no longer need; and (5) create a plan to respond to security incidents.[33]

Contracts should include ongoing confidentiality obligations in case of termination, and they should require the return or deletion of any copies of the data (as appropriate) by the provider or employee after the termination of the agreement. Finally, there should be a provision prohibiting the withholding of data by the provider or employee in the case of a dispute.

As part of a comprehensive policy to address data protection in the cloud, companies should establish effective security and social media policies to prevent employee disclosure of information. Information security measures include password protection, email and electronic data policies, departmental trainings, and exit interviews to remind employees of confidentiality obligations.

Social media policies are even more critical today with explosion of social media in the workplace. Well-drafted and communicated policies can effectively reduce the amount of sensitive information disclosed both accidentally and intentionally on the Internet. Social media policies can restrict employees from posting confidential information on sites such as Facebook, Twitter, or LinkedIn. Employees should be educated about the implications of posting information to these sites through recurring training. For example, Facebook grants itself a license to any information posted on its site,[34] and Twitter grants itself a license to make any posted content available to other companies.[35] Employers should provide constant reminders to employees not to disclose confidential data on such sites.

Employers should, however, be very cautious in the drafting of their social media policy. An overly broad policy could violate employee rights. Employers must align their policies with the National Labor Relations Act (NLRA) to avoid the ire of the National Labor Relations Board (NLRB). Section 7 of the NLRA protects both unionized and non-unionized employees' right to engage in concerted activities in the United States. The NLRB has criticized several employers' social media policies for being overly broad and violative of employee rights.

In *NLRB v. American Medical Response of Connecticut*, an employer terminated an employee who allegedly posted negative remarks about her supervisor on Facebook.[36] The employer's policy prohibited employees from describing the company in any way on the Internet without its permission. The NLRB alleged that this policy violated the employees' right to engage in

concerted activities and discuss her work environment. The parties eventually reached a settlement, and the NLRB thus did not officially rule on the legality of the employer's policy.

Several other social media-employment dispute cases caused the NLRB's Acting General Counsel to release a report on January 24, 2012.[37] In his report, Acting General Counsel Lafe E. Solomon analyzed fourteen recent social media-employment dispute cases and reaffirmed the NLRB's position that social media policies that restrict the ability of employees to discuss working conditions and wages are unlawful. In particular, Mr. Solomon found unlawful social media policies that (1) provide no clear guidance to employees as to what online communications and postings are appropriate; (2) do not provide specific examples of the types of confidential or sensitive information that are prohibited from online disclosure; and (3) "would reasonably tend to chill employees in the exercise of their section 7 rights." The underlying concern is that overbroad social media policies may cause employees to believe that their rights under section 7—to discuss their workplace environment and self-organize—are otherwise prohibited.

Employers should employ specifically tailored social media policies that protect trade secrets and confidential information. Indeed, the NLRB found an employer's social media policy that restricted employees from using or disclosing confidential and or proprietary information are lawful and compliant with the NLRA. However, the NLRB requires that these restrictions sufficiently describe and provide examples of what the employer considers proprietary, confidential, and / or trade secret information. Employers should distance the company from personal social media use by employees that attempts to associate the employee with the company. For example, employers should prohibit the use of company trademarks, graphics, or logos for personal use. Companies also should prohibit, or at least limit, the use of company-provided email addresses for personal social media activity. Companies must be vigilant to ensure that their cloud computing policies and agreements, including social networking policies, remain current with changing technology to protect their most valuable assets.

V. Conclusion

Cloud computing provides significant benefits for the development and growth of businesses, but companies that embrace this technology and venture into the cloud must be careful and thoughtful. Companies should scrutinize what they put into the cloud and select reliable and security-conscious cloud providers. Well-drafted agreements and policies with both providers and employees can help reduce the risk of the disclosure of trade secrets in the cloud. A comprehensive cloud computing strategy can help companies realize the cost savings and financial opportunities in cloud computing, including social media, while ensuring that these benefits are not outweighed by the potential legal and business risks.

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Ethics Opinion 925

Committee on Professional Ethics of the New York State Bar Association (8/2/12)

Topic: Conflicts of interest arising from business relationships between defense counsel and prosecutors and imputation of the conflict to partners of defense counsel.

Digest: Criminal defense counsel may continue representation of a client being prosecuted by a part-time assistant district attorney even if his law partner is in a business relationship with another part-time assistant district attorney of the same county.

Rules: 1.7(a)(2), 1.7(b), 1.10(a), 1.10(d)

Facts

1. The attorney making this inquiry (the "Inquirer") works as a criminal defense lawyer and now is a partner in a firm (the "Firm") with two other lawyers. The Inquirer works in one office, and the other two partners work in the other office. The offices are in different counties. Before joining the Firm, the Inquirer represented a defendant (the "Client") in a criminal case brought in a third county (the "County"), and has continued the representation since joining the Firm.

2. One of the Inquirer's partners (the "Partner") in the Firm has a business relationship with a part-time assistant district attorney (the "A.D.A.") working in the County where the charges are pending against the Client. Specifically, the Partner and the A.D.A. are members in two limited liability companies that operate a real estate business and restaurant venture. The Inquirer knows little about the business between the Partner and the A.D.A., such as whether it has more than one property, whether it has income or losses, whether it has obtained financing or commitments to build the restaurant, whether there are other investors involved, who manages the investment, and so forth. The A.D.A. has a private law office in the same town and county as the Partner, but the A.D.A. does not practice criminal defense law anywhere. The Partner and the A.D.A. have separate law offices, do not share any office, and do not discuss criminal matters.

3. After his business relationship with the A.D.A. arose, the Partner gave the County's District Attorney his assurance that the Partner would not practice criminal defense in the County. This assurance has been observed by the Firm's other partner as well. The Inquirer, upon learning of this assurance, wrote to the District Attorney to advise of her handling of the Client's case as well as her understanding that the Firm she joined was "unable to handle DWI and criminal cases, due to a potential conflict." Whether this understanding is correct is the issue that has been referred to us to address.

4. A different assistant district attorney (the "Prosecutor") is prosecuting the Client, and raised a question at the Client's trial as to whether the Inquirer is prevented from representing the Client because of the potential conflict (the Partner's relationship with the A.D.A.) The trial court allowed the Inquirer to proceed to trial on behalf of the Client, and charges were dismissed that day for procedural reasons. The accusatory instrument has been re-filed, and the Inquirer represented the Client at arraignment, when the Prosecutor again raised the potential conflict.

5. The Client has been informed of all the foregoing facts, and is prepared to give his consent to the representation. However the Prosecutor objects, believing that the District Attorney's office must also consent but is unable to consent to a "dual representation," citing N.Y. State 603 (1989), 482 (1978), and 143 (1970). The judge hearing the matter directed the Inquirer and Prosecutor to seek the view of this Committee as to whether there is a conflict of interest, and if so whether the Client may consent to the representation.

Question

6. Does a business relationship between a lawyer's partner and a part-time assistant district attorney prevent the lawyer from representing a defendant on criminal charges brought by another prosecutor in the office of the part-time district attorney?

Opinion

7. The inquiry deals with conflicts of interest due to the "personal interest" of a lawyer,[1] as contained in Rule 1.7(a)(2):

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that…

> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

8. This Rule serves to ensure that "the lawyer's own financial, property, business or other personal interests should not be permitted to have an adverse effect on representation of a client." Comment 10 to Rule 1.7. This Rule aims to prevent the risk that the lawyer will not "give a client detached advice," that a lawyer's personal relationship would "materially limit the lawyer's representation of the client" or would "affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest." *Id.* The risks also include "the risk that client confidences will be revealed" and that the lawyer's relationship will "interfere with both loyalty and professional judgment." Comment 11 to Rule 1.7.

9. This inquiry presents a question of first impression for our Committee. We have addressed business relationships between criminal defense counsel and prosecutors in two of our prior opinions, but both examined the duties of the prosecuting lawyer, whereas here we examine the interests of the defense counsel.

10. In N.Y. State 413 (1975), an assistant district attorney sought to enter into a business unrelated to the practice of law with an attorney who defends criminal defendants in a county where the assistant district attorney is employed. The nature of the business and extent of the relationship was not described in our opinion. We held that the assistant district attorney could not enter into a business relationship with a criminal defense attorney in the same jurisdiction because it violated two requirements of the former Code of Professional Responsibility (in effect before April 1, 2009). First, we stated that it violated Canon 5 and Ethical Consideration ("E.C.") 5-2, which provided that:

> A lawyer should not accept proffered employment if the lawyer's personal interests or desires will, *or there is a reasonable probability that they will*, affect adversely the advice to be given or services to be rendered the prospective client. After accepting the employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that *would tend* to make his or her judgment less protective of the interests of the client. (Italicized emphasis added.)

11. E.C. 5-2, related to Canon 5's Disciplinary Rule ("D.R.") 5-101(A), was the forerunner of Rule 1.7(a) (2)). However, Rule 1.7(a)(2) does not contain an equivalent to the concept that a lawyer should decline a representation because of a "reasonable probability" that the lawyer's personal interests will affect the lawyer's advice or interests that "would tend" to make the lawyer's judgment less protective of the client.

12. Importantly, we also noted that an assistant district attorney could not obtain consent to the conflict from his client because the "People" may not waive conflicts of interest. Even the assistant district attorney's agreement to remove himself from all cases which involved his business partner did not change the result.

13. We also relied upon Canon 9, the former requirement of the Code of Professional Responsibility, to avoid the "appearance of impropriety," specifically Ethical Considerations 9-2, 9-3, and 9-6. The Rules do not carry forward this "appearance of impropriety" concept.

14. In N.Y. State 583 (1987), an assistant district attorney who was starting a business to advise prospective college students and their families with the college selection and admission process sought to rent office space for the business from an assistant public defender, and to employ the spouse of a criminal defense attorney practicing in the same jurisdiction as an employee in the business. Unlike the business relationship in N.Y. State 413, we declined to rule out these proposed arrangements, construing D.R. 5-101(A) (the predecessor to Rule 1.7(a)(2)).

15. First, we concluded that that the facts determine the outcome in each case, that is, "the nature and extent of the particular involvement, e.g., the size of the investment, both relatively and absolutely, the degree of influence, etc., will determine whether the relationship is barred." The lawyer's personal interests "could come into conflict with his or her duty to exercise professional judgment solely in the interests of his or her clients" because, "depending on the financial arrangements and other business and personal circumstances, a rented office situation might involve relatively little danger that professional judgment would be improperly influenced or, on the other hand, substantial danger." Accordingly, "we perceived. *no per se prohibition*" but at the same time we cautioned the lawyer to "avoid financial or other business or personal

interests, including rentals, that will or could reasonably affect the lawyer's exercise of professional judgment solely on behalf of his or her client."

16. N.Y. State 583 is the better guide for our decision involving the criminal defense counsel and the Firm here. We construe Rule 1.7(a)(2) (and Rule 1.7(b)), the successor version of D.R. 5-101(A) and E.C. 5-2, but not the additional standard of "appearance of impropriety," which was not carried over from the Code to the Rules of Professional Conduct.

17. We analyze the personal interest conflict from the point of view of the Partner because Rule 1.10 imputes the Rule 1.7(a)(2) "personal interest" of the Partner to the Inquirer and all attorneys associated in a firm. We must assess whether there is "a *significant* risk" that the Partner's "professional judgment on behalf of a client *will* be adversely affected" by the Partner / A.D.A. business relationship. N.Y. State 583 teaches that this is a function of the magnitude or extent of that relationship and of its connection to the Partner's professional judgment on behalf the Client.

18. As Prof. Roy D. Simon wrote, a "significant" risk is "more than a possibility but less than a certainty." Simon's N.Y. Rules of Professional Conduct at 271 (2012 ed.). Nevertheless, we consider the possibilities. Like the Inquirer, we do not know if the Partner's sense of loyalty to or solidarity with his business partner, the A.D.A., is great, or if their financial inter-dependence is significant. Even if it were, it is difficult on the information we have been supplied to conclude that the Partner's business relationship with the A.D.A. will motivate the Partner to alter or diminish his professional judgment for his Client, or leak confidential information, or give less than detached advice. It is significant here that the prosecution is handled by the Prosecutor, a different assistant district attorney, whose win or loss probably has little effect on the fortunes of the A.D.A. business partner. A bad outcome for the Client (a "win" for the Prosecutor) would not redound to the benefit of the A.D.A. business partner or benefit the A.D.A.'s real estate and restaurant business with the Partner. A good outcome for the Client (a "loss" for the Prosecutor) is not a loss by the A.D.A., and probably would not harm any interest of the A.D.A. business partner of the Partner. Accordingly, we cannot conclude on the limited facts supplied in the inquiry that there is a "significant" risk that there "will" be a breach of confidential information, from Partner to A.D.A. to Prosecutor, or any disloyalty to the Client by the Partner.

19. We are not a fact-finding body, however, and it would alter our opinion if the court here were to be supplied additional facts that showed that, due to the business relationship with the A.D.A., there is a significant risk that the Partner will not "give a client detached advice"; that the relationship will "materially limit the lawyer's representation of the client" or "affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest"; "that client confidences will be revealed"; or that the lawyer's relationship will "interfere with both loyalty and professional judgment."

20. It may or may not be significant that the Partner has given his assurance to the District Attorney that he will not take on criminal matters in that County, and that another partner in the Firm observes this assurance as well. Both the Prosecutor and the Inquirer have perceived this assurance to reflect a concern for a "potential" conflict of interest. An *actual* conflict of interest, however, is what is relevant, and that is determined by the language of Rule 1.7(a)(2), which, as we said above, is shown by the magnitude and extent of the business relationship and its impact on the Partner's professional judgment on behalf of the Client.

21. Even if an actual personal conflict were established, it does not end the inquiry. The question would turn to whether the Inquirer and the Client could conclude that the representation may proceed. Rule 1.10 provides that the imputed conflict may be waived:

    (d) A disqualification prescribed by this Rule may be waived by the affected client or former client under the conditions stated in Rule 1.7.

22. Rule 1.7(b), in turn, permits waiver of the conflict of interest and consent to the representation under four conditions:

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

    (2) the representation is not prohibited by law;

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

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

23. We assume that the representation is not prohibited by law, and does not involve the assertion of a claim by one client of a lawyer or firm against another client. We turn, therefore, to conditions (1) and (4). We cannot rule out the possibility that both of these conditions may be satisfied.

24. As to the first condition of Rule 1.7(b), the Partner may be able to reasonably conclude, on the facts we have been supplied, that the Partner would provide competent and diligent representation of the Client because (for the reasons stated above) we cannot say that there is a "significant risk" the outcome of the Client's case "will" bear on the Partner's business ventures with the A.D.A. and therefore diminish the competence or diligence of the Partner's representation.

25. If the *Partner* could provide a competent and diligent representation, then likewise the *Inquirer* could do so. The Inquirer does not have any business relationship with the A.D.A. or any interest in the relationship between the Partner and the A.D.A.. The Inquirer stands to gain or lose nothing depending upon the fortunes of the Partner's business venture with the A.D.A. In addition, the A.D.A. is not the assistant district attorney charging the Client, so it is difficult to imagine how even a bad outcome for the Client (a "win" for the Prosecutor) could have any impact on the fortunes of the A.D.A.'s real estate and restaurant business venture(s). There are additional factors present here. The Inquirer has represented the Client since before joining the Firm. The Inquirer has little information about and no interest in the Partner's business venture with the A.D.A. The Inquirer has an office and maintains client files in a different office and in a different county from the Prosecutor, the A.D.A., the Partner, and the business ventures. Overall, on these facts, we see enough to conclude that the Inquirer can reasonably believe that the Inquirer can provide competent and diligent representation to the Client.

26. As to the fourth condition of Rule 1.7(b), informed consent by the Client may be possible on the facts presented. Rule 1.1(j) defines ''Informed consent'' as "the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." As Comment 6 to Rule 1.7 points out, it is a flexible concept, depending upon the sophistication of the Client, the information to be supplied, and whether separate counsel should be recommended to advise the Client about the risks and benefits of giving consent. The Client sets the terms of the consent; if, as we believe, the Inquirer can reasonably conclude that the Inquirer will provide competent and diligent representation, it makes even more sense to respect the consent of a Client to choose to be represented by the Inquirer, who is free of any relationship to the A.D.A. or Prosecutor.

27. Finally, Rule 1.10(d) requires consent from all "affected clients," that is, those who are affected by the personal interest conflict. Here, unlike N.Y. State. 413, we analyze the duties of the Partner, Inquirer, and their Firm, which are criminal defense counsel. They represent the Client and the only client affected by the Partner's personal interest is the Client, not the "People." The Partner (and the Inquirer) have never represented the People. *Cf* N.Y. State 862 (2011) ("If the conflict arises under Rule 1.7(a)(2) because of the conflicted Assistant Public Defender's personal interests, then consent is required only from the inquirer's own assigned client, because no other client is affected.") Therefore, the fact that the District Attorney's office is unable to give consent on behalf of the "People" is of no consequence to the duties of the criminal defense counsel.

Conclusion

28. We conclude on the inquiry presented, limited to the facts supplied, that a lawyer may continue a criminal defense representation of a client after joining a firm which includes a partner who has a business relationship with a part-time assistant district attorney working in the same office where another part-time assistant district attorney is prosecuting the lawyer's client.

Endnote

1. This case does not involve a "dual representation" of the kind covered by Rule 1.7(a)(1) because the Firm has only one "representation" (that of the Client). The Partner's business interest is a personal interest, not a competing representation. It also does not involve a law firm business between the assistant district attorney and a criminal defense attorney.

(23-12)

Ethics Opinion 926

Committee on Professional Ethics of the New York State Bar Association (7/31/12)

Topic: Union-sponsored legal fee reimbursement plan; conflicts of interest.

Digest: A lawyer who belongs to a union (1) may be a lawyer on the panel of a union-sponsored plan that reimburses legal fees, and (2) may represent a fellow employee in a real estate transaction where the client will ask the plan to reimburse the employee for the lawyer's fees.

Rules: 1.0(j); 1.7(a) & (b); 1.8(f)

Facts

1. The inquirer is a practicing attorney licensed in New York State who is also an employee of a municipal corporation and member of its union. The union provides a benefit to its members in the form of reimbursement up to a maximum fixed amount for legal fees incurred by the member in connection with the purchase or sale of real estate. Reimbursement is made only if the member retains a lawyer from a panel of approved lawyers. The inquirer has applied to join the panel, but the union panel administrators asked the inquirer to obtain this Committee's opinion regarding any conflicts that might arise from the inquirer's service on the panel. The members of the panel have no control over admission to the panel; selection is made by a group including union and employer representatives.

Question

2. This inquiry presents two related questions:

   A. May a lawyer who belongs to a union be a panel member of a legal fee reimbursement plan sponsored by the union for fellow employees?

   B. May a lawyer who belongs to a union represent another union member (*i.e.*, a co-worker) in a real estate transaction covered by the reimbursement plan?

Opinion

Question A: May the Inquirer Serve as a Panel Member?

3. This Committee has long recognized that payment of legal fees by third parties is a common practice. For example, in N.Y. State 825 (2008) we opined that no ethical bar exists to a lawyer providing legal services to a client referred and paid by an employee assistance plan.

4. Rule 1.8(f), however, sets three conditions on a lawyer's receipt of payment from a third party. First, the client must give informed consent; second, there must be no interference with the lawyer's independent professional judgment or with the lawyer-client relationship; third, the client's confidential information must be protected as required by Rule 1.6. In addition, while Rule 1.8(f) does not mention it, we recommend that the client's consent be confirmed in writing.

5. The reimbursement plan at issue here differs slightly from the plan at issue in Opinion 825. There the recommendation and fee arrangement were made at the outset of the lawyer-client relationship. Here, the client selects and pays a lawyer but is eligible for reimbursement only if that lawyer is on the approved panel. But this difference is not significant and only makes compliance with Rule 1.8(f) simpler. The likelihood of compromising confidential information or undermining professional independence is reduced in the reimbursement model presented here because the representation takes place and is concluded before the client applies for reimbursement. Consequently, the union may not even be aware of the attorney-client relationship during the representation, and will thus have little or no opportunity to interfere with the relationship or to ask for confidential information.

6. Nevertheless, Rule 1.8(f)(1)'s requirement of "informed consent" raises special concerns. The term "informed consent" is defined in Rule 1.0(j) as follows:

   > "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks and reasonably available alternatives.

7. To obtain a client's informed consent in the context of the union-sponsored reimbursement plan before us here may require the lawyer to discuss the amount of fees, how the lawyer will charge for fees (e.g., flat, hourly, or percentage), the

client's responsibility to pay the fees whether or not the plan approves reimbursement, and whether the lawyer will represent the client if any dispute arises with the union over the client's entitlement to reimbursement under the plan. The "material risks" would appear to be that the plan may for some reason decide not to reimburse the inquirer's fees (or may reimburse only part of them), and that the plan may take a long time to reimburse whatever portion of the fees it approves. The "reasonably available alternatives" would include hiring a lawyer outside the plan (with no chance for reimbursement) or not hiring a lawyer for the real estate deal at all.

8. The considerations in the preceding paragraph exist whether or not the lawyer providing services is a fellow employee and member of the union. Since the members of the panel have no say in the designation of new panel members, it is unnecessary to discuss any ethical implications that might arise if members of the panel had the right to exclude members.

Question B: May the Inquirer Represent a Fellow Employee and Union Member?

9. Rule 1.7(a)(2) governs personal conflicts of interest. Unless a lawyer satisfies the exceptions in Rule 1.7(b), Rule 1.7(a)(2) prohibits a lawyer from representing a client "if a reasonable lawyer would conclude that…there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." The facts necessary for a reasonable lawyer to determine whether there is (or is not) a significant risk of an adverse effect on the lawyer's professional judgment in representing a fellow employee in a real estate transaction are not presented in this inquiry. Such facts might include the inquirer's personal interest in maintaining a favorable employment relationship with the employer. For example, whether a "significant risk" exists might depend on (i) whether the client is in the lawyer's direct reporting structure (and, if so, whether the client is above or below the lawyer in rank), (ii) the likelihood that the lawyer will want the client's favorable recommendation for the lawyer's promotion or advancement, and (iii) the strength of the lawyer's desire to maintain membership on the union approved panel. If these or any other personal interests arising out of the lawyer's employment for their mutual employer raise a significant risk of adversely affecting the lawyer's professional judgment on behalf of a fellow employee, then the inquirer must comply with the requirements in Rule 1.7(b).

10. Rule 1.7(b), permits a lawyer whose personal interests might affect the lawyer's professional judgment under Rule 1.7(a) to represent the client in the matter if the lawyer meets two main conditions:

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

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

11. While we lack sufficient facts to determine whether the inquirer "reasonably believes" she can provide "competent and diligent representation" to the fellow employee, or whether the employee has given informed consent, confirmed in writing, we have drawn attention to some issues the lawyer may wish to address before accepting or continuing to represent a fellow employee who intends to seek reimbursement for the lawyer's fees under the union-sponsored reimbursement plan. If, after exploring these and any other relevant personal interests, the lawyer concludes that there is no significant risk to the lawyer's independent professional judgment in representing a fellow employee in a real estate transaction, then Rule 1.7(a) (2) does not apply and the inquirer may accept the representation without obtaining the client's consent. If the lawyer concludes there is a significant risk, then the lawyer may not accept or continue the representation absent compliance with Rule 1.7(b).

Conclusion

12. A lawyer who belongs to a union (1) may be a lawyer on the panel of a union-sponsored plan that reimburses legal fees, and (2) may represent a fellow employee in a real estate transaction where the client will ask the plan to reimburse the employee for the lawyer's fees.

(29-12)

Ethics Opinion 927

Committee on Professional Ethics of the New York State Bar Association (8/2/12)

Topic: Referrals by Non-Lawyer; Attorney Fees Paid by Third Party.

Digest: Lawyer may not ethically enter into arrangement with a non-lawyer to accept referrals for a fixed monthly fee for each case referred where case has been obtained by telephonic solicitation.

Rules: 1.0(j),1.5(a) and (b), 1.8(f), 5.3(b), 5.4(a), 7.2(b), 7.3(a)(1), 8.4(a)

Question

1. May a lawyer enter into an arrangement to (a) accept referrals of mortgage foreclosure cases from a non-lawyer who will pay the lawyer a monthly fee and (b) have the lawyer's legal fees paid by a third party that referred the client to the lawyer?

Facts

2. A corporation (the "Corporation") that is not a law firm intends on a non-exclusive basis to refer clients to the lawyer which clients are in the process of having their residences in New York foreclosed. The legal services would include matters related to loan defaults, mortgage foreclosures and bankruptcies. The lawyer will bill the Corporation a flat fee of $300 each month for each referral regardless of how many or how few hours the lawyer must devote to the matter. The Corporation will pay the lawyer from funds paid to the Corporation each month by the Client. Upon conclusion of the matter the Corporation will retain the balance of the funds for its role in obtaining the Client. The Corporation has no obligation to refer any clients to the lawyer and the lawyer has no obligation to accept any client. Before accepting any client the lawyer will run a conflict check. The Corporation obtained the potential clients by checking public records and contacting the individuals by telephone. The clients enter into an agreement with the Corporation to pay something each month in excess of the amount paid to the lawyer. The lawyer is not advised how much in excess is paid by the client to the Corporation. The Corporation promises prospective clients that it has lawyers in the client's geographical area that are competent to handle the matter and refers their matter to such lawyer. The agreement is between the client and the Corporation, not between the client and the lawyer.

3. The lawyer has not and will not pay the Corporation anything of value for the referrals.

Applicable Rules

4. The answer to the question based upon the facts implicates a number of provisions of the Rules of Professional Conduct (the "Rules") including the following:

   (a) Rule 1.5(a) prohibits a lawyer from charging an excessive or illegal fee.

   (b) Rule 1.5(b) and 22 N.Y.C.R.R §1215.1 require a lawyer to furnish a client with an engagement letter or retainer agreement at the outset of the representation.

   (c) Rule 1.8(f) prohibits third party payment of legal fees unless the client gives informed consent.

   (d) Rule 5.3(b) makes a lawyer responsible for conduct of a non-lawyer associated with the lawyer that would be a violation of the Rules if engaged in by the lawyer.

   (e) Rule 5.4(a) prohibits a lawyer from sharing a legal fee with a non-lawyer.

   (f) Rule 7.2 (b) provides that a lawyer may be recommended, employed or paid by a legal aid office, a public defender office or a bar association sponsored lawyer referral service.

   (g) Rule 7.3(a)(1) prohibits a lawyer from solicitation by in-person or telephone contact.

   (h) Rule 8.4((a) prohibits a lawyer from violating a Rule through the acts of another.

Opinion

Question of Law

5. This inquiry raises a substantial question of law which is beyond the jurisdiction of this Committee to resolve. Would the Corporation by solicitation of clients from public records of current foreclosures and referring the matter to an attorney be engaged in actions in violation of Judiciary Law §479 (soliciting business on behalf of an attorney), §482 (employment by attorney of person to aid, assist or abet in the solicitation of business or the procurement through solicitation of a retainer to perform legal services) or §495(1)(d) (prohibiting corporations from furnishing attorneys)? Apart from the law, the proposed arrangement is ethically flawed in numerous respects and accordingly, a New York lawyer should not enter into the proposal.

Fee Not to be Excessive

6. While flat or fixed fees are not prohibited by Rule 1.5(a) as such, Simon's New York Rules of Professional Conduct 111 (2012 ed.), the fee cannot be excessive. Rule 1.5(a); Restatement Third, The Law Governing Lawyers §34 (2000). This is so even though the parties agreed to the fee. Restatement Third, The Law Governing Lawyers §34, com. *a* (2000). Here there is to be a charge by the lawyer of $300 each month for the entire length of the matter whether or not legal services are performed that month. This is more akin to a monthly retainer which, depending upon the circumstances, may be permissible. N.Y. State 599 (1989). For the purposes of this opinion we need not distinguish between the classical or general retainer, advance refundable payment, minimum non-refundable payment or fixed fee. Whether or not the fee described in the proposed arrangement would be excessive cannot be determined based upon the facts given in this inquiry; but there is a rebuttable presumption that a flat or fixed fee unrelated to the service performed for a lengthy period at some point becomes excessive. Retainer or fixed fees agreed to by unsophisticated clients should be more closely scrutinized to ensure that they are no greater than is reasonable. On top of the fee charged by the lawyer, the Corporation here adds its monthly fee. The two combined are presumptively excessive for lack of a stated justification.

7. As stated in N.Y. State 599 (1989), paralleling the Code (now the Rules) provisions are legal standards applicable to a lawyer's fee. "[A]s a matter of public policy, courts pay particular attention to fee arrangements between attorneys and their clients…. An attorney has the burden of showing that a fee contract is fair, reasonable, and fully known and understood by the client…." *Jacobson v. Sassower*, 66 N.Y.2d 991, 993 (1985). "A client may always discharge his attorney, with or without cause, and in the absence of a contract providing otherwise an attorney discharged without cause is entitled to be compensated in quantum meruit." *Id.* citing *Martin v. Camp*, 219 N.Y. 170 (1916); *see also, e.g., Rubenstein v. Rubenstein*, 137 A.D.2d 514 (2d Dep't 1988) (fairness and reasonableness of fee); *J.M. Heinike Associates v. Liberty National Bank*, 142 A.D. 2d 929, 930 (4th Dep't 1988) (unconscionability of retaining prepaid fee following withdrawal from employment in absence of good cause). *Cf.*, Brickman & Cunningham, *Nonrefundable Retainers: Impermissible Under Fiduciary, Statutory and Contract Law*, 57 Fordham L.Rev. 149 (1988).

Notice to Client

8. Both the Rules [Rule 1.5(b)] and the law where the fees are expected to exceed $3,000 (22 N.Y.C.R.R. §1215.1) require that the lawyer at the commencement of the representation or a reasonable time thereafter advise the client of the scope of the representation and the basis or rate of the fee unless the client has been regularly represented and the services are of the same general kind as previously rendered. Under the facts of the matter before us, this was not done. The proposed arrangement thus does not comply with the Rule and possibly the regulation.

Telephone Solicitation

9. The Corporation's telephonic solicitation of the client if done by the lawyer would be in violation of Rule 7.3(a)(1) and its predecessor DR 2-103 (A) of the Code of Professional Responsibility (the "Code") prohibiting such solicitation. Because Rule 5.3(a) and its predecessor DR 1-104(D)(1) of the Code makes a lawyer responsible for conduct of a non-lawyer associated with the lawyer that would be a violation of the Rules if engaged in by the lawyer, the lawyer would be in violation of the Rules as the lawyer is associated with the Corporation in the proposed arrangement. N.Y. State 694 (1997); N.Y. State 828 (2009). We do not address First Amendment considerations discussed in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) upholding a ban on in person solicitation, *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466 (1988) permitting direct mail solicitation, *In re von Wiegen*, 63 N.Y. 2d 163 (1984) permitting direct mail solicitation or *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) upholding a ban on mail solicitation to accident victims as these are questions of law beyond the jurisdiction of this Committee.

Division of Legal Fees

10. It has long been established in New York that a lawyer may not share a legal fee with a non-lawyer. Rule 5.4(a) and its predecessors, DR 3-102 of the Code and Canon 34 of the Canons of Professional Ethics; N.Y. State 889 (2011); N.Y. State 906 (2012); N.Y. State 911 (2012). Here the fee paid by the client to the Corporation includes the lawyer's fee for legal services. In substance the lawyer is sharing a legal fee with a non-lawyer. This is no different than the lawyer billing the client and remitting a portion of the fee to the Corporation. The lawyer cannot do indirectly what the lawyer cannot do directly. Rule 8.4(a). N.Y. State 860 (2011). The arrangement would violate these Rules.

11. Notwithstanding the foregoing, we recognize that it may be ethically possible for a client separately to engage the services of the lawyer and the non-lawyer at the same time and that the non-lawyer may be paid directly by the client and the lawyer also be paid directly by the client. *See Blumenberg v. Neubecker*, 12 N.Y.2d 456 (1963). Notably, *Blumenberg* centered around the anti-fee splitting with non-lawyers prohibition contained in Judiciary Law §491 and did not address the ethical issues of fee splitting with non-lawyers contained in Canons 34 of the Canons of Professional Ethics in effect at the time of the decision. The application of Judiciary Law §491 is a question of law beyond the jurisdiction of this Committee. Without reference to *Blumenberg* or to Judiciary Law §491 this Committee concluded in N.Y. State 875 (2011) that there "is no ethical barrier to a lawyer entering into a contingent fee arrangement with a client where the client already has retained a non-testifying expert to work on the same case on a contingent fee basis." That is not the case here. Here the client pays a single fee directly to the non-lawyer, a portion of which is then paid to the lawyer. What is happening is that the non-lawyer Corporation is acting as a referral agent for a fee. However, the Corporation is not one of the entities permitted to be a referral agent under Rule 7.2(b). N.Y. State 597 (1989). Accordingly, these Rules would be violated.

Third Party Payor of Legal Fees

12. There is nothing *per se* ethically improper if a third party pays the lawyer's legal fee provided that the client is fully informed of the arrangement, including the amount to be paid to the lawyer, and the client gives informed consent as defined by Rule 1.0(j) and provided the third party does not interfere with the representation. Rule 1.8(f); N.Y. State 825 (2008); Restatement Third, The Law Governing Lawyers §134(1) and com. *c* (2000). In the arrangement described in the facts there is no indication that the client has fully been informed of the arrangement and has given informed consent. Thus, the arrangement would also violate these provisions of the Rules.

Conclusion

13. A lawyer may not ethically enter an arrangement with a non-lawyer to accept referrals for a fixed monthly fee for each case referred by the non-lawyer where the client has been obtained by the non-lawyer by telephonic solicitation and receives a fee from the client that includes the lawyer's fee.

(41-12)

Ethics Opinion 928

Committee on Professional Ethics of the New York State Bar Association (8/9/12)

Topic: Use of the term "Project" or "Law Center" in the name of a qualified legal assistance organization.

Digest: A qualified legal assistance organization can use the terms "Project" and "Law Center" in its name as long as, in the case of the term "Project," the term is associated with words indicating the organization's law-related activity.

Rules: 1.0(p), 7.5(b)

Facts

1. The inquirer is interested in starting a non-profit legal services organization and has asked if the terms "Project" and "Law Center" could be used in its name.

Question

2. The inquirer has asked two related questions:

   A: Can the word "Project" be used in the organization's name, even if the term "legal" or "law" is not?

   B: Does the use of the phrase "Law Center" comply with the Rules of Professional Conduct?

Opinion

3. This question is governed by Rule 7.5(b) of the New York Rules of Professional Conduct, which provides in part that:

> A lawyer in private practice shall not practice under a trade name [or] a name that is misleading as to the identity of the lawyer or lawyers practicing under such name…. Such terms as "legal clinic," "legal aid," "legal service office," "legal assistance office," "defender office" and the like may be used only by qualified legal assistance organizations, except that the term "legal clinic" may be used by any lawyer or law firm provided the name of a participating lawyer or firm is incorporated therein.

4. Rule 1.0(p) states that the term "'[q]ualified legal assistance organization' means an office or organization of one of the four types listed in Rule 7.2(b)(1)-(4) that meets all of the requirements thereof." The four types, each with its own requirements, include "a legal aid office or public defender office" operated or sponsored by, among others, a bona fide, non-profit community organization, and a "bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries." We will assume that the contemplated organization would comply with relevant aspects of Rule 7.2(b) and so would be a "qualified legal assistance organization." This opinion does not apply to private law firms that are not "qualified legal assistance organizations," and they are governed by entirely different considerations.[1]

5. In our view, a qualified legal assistance organization would be able to use the name "Project," provided that the name, like all the other terms set forth in Rule 7.5(b), were to indicate in some way the law-related nature of the group's activity (and provided the name was not otherwise misleading). In *Paskowski v. DiBenedetto*, 184 Misc. 2d 34, 38, 705 N.Y.S.2d 521, 524-25 (Fam. Ct. Rockland Co. 2000), the court found that the term "Domestic Violence Law Project" was "sufficiently similar to the listed terms to be covered by the reference in the Disciplinary Rule [DR 2-102(B), which was identical to current Rule 7.5(b)] to 'and the like.'" We agree. We do not think that the only permissible ways to indicate the law-related nature of the work are use of the terms "legal" or "law." One of the terms listed in the Rule is, for example, "defender office." But in our view a term such as "Poverty Project" would not, without more, be sufficiently similar to the terms listed in Rule 7.5(b) to qualify.

6. The term "Law Center" can be used by a qualified legal assistance program, provided it is not otherwise misleading, as it is, in our view, similar to terms such as "Legal Clinic" or "Legal Service Office."

Conclusion

7. A qualified legal assistance organization may use the term "Project" or "Law Center" in its name, provided that the name is not otherwise misleading and provided, in the case of the term "Project," that the name otherwise indicates the law-related nature of the group's activity.

Endnote

1. *See, e.g.*, N.Y. State 740 (2001) ("Using a name that is not the legal name of one or more partners or former partners in the law firm constitutes use of a trade name"); N.Y. State 732 (2000) (use of X Group was permissible, where X was the name of the attorney in the firm and the firm included a number of associates); N.Y. State 445 (1976) ("Community Law Office" would be unacceptably misleading for a private law office).

(42-12)

Ethics Opinion 929

Committee on Professional Ethics of the New York State Bar Association (8/8/12)

Topic: Designation of Patent Attorney on Business Card; Inactive Status and Designation of Specialty.

Digest: An attorney whose registration / admission status before the United States Patent and Trademark Office is "inactive" may not use the designation patent attorney on his business card unless he notes that he is on administrative leave and as such is unable to prosecute matters for others before the USPTO.

Rules: Rule 7.1 a and b, 7.4(b), 7.5 (a), and 8.4(c)

Facts

1. The Inquirer, who is admitted to practice in patent matters before the United States Patent and Trademark Office ("USPTO"), has accepted a position as a patent examiner for the USPTO. Once the Inquirer begins working as a patent examiner for the USPTO, the inquirer's name will remain on the official USPTO register, but his registration status will be changed to "on administrative leave."

2. During the period of his employment with the USPTO, the Inquirer will not be able to represent, or prosecute patent applications, for others or otherwise engage in patent practice before the USPTO.

3. The Inquirer has advised that as a federal government employee he is prohibited from practicing as an attorney for others before any federal agency.

Question

4. May an attorney, who is admitted to practice before the USPTO continue to use the designation "Patent Attorney" on his business cards when his USPTO admission status changes to "administrative leave"?

Opinion

5. According to Federal Law, an attorney who has fulfilled the requirements for admission to practice before the USPTO is deemed to be registered as a patent attorney. A patent attorney is able to represent applicants in the preparation and prosecution of patent applications and to practice before the USPTO in patent matters. See 37 C.F.R. §§ 11.5, 11.6 (a) (1).

6. Rule 7.4 of the New York Rules of Professional Conduct (the "Rules") instructs lawyers who wish to identify themselves and their practices in terms of their respective specialties. According to Comment [2] of Rule 7.4, "Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office."

7. Rule 7.4 (b) states as follows:

   (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or substantially similar designation.

8. Rule 7.5 addresses attorneys' use of professional cards and professional announcement cards, and permits an attorney to use such cards. Rule 7.5 provides:

   (a) A lawyer or law firm may use internet web sites, professional cards, professional announcement cards, office signs, letterheads or similar professional notices or devices, provided the same do not violate any statute or court rule and are in accordance with Rule 7.1, including the following:

      (1) a professional card of a lawyer identifying the lawyer by name and as a lawyer, and giving addresses, telephone numbers, the name of the law firm, and any information permitted under Rule 7.1(b) or Rule 7.4.

9. In the instant situation, the Inquirer has advised that while serving as a patent examiner for the USPTO, he will be an employee of the Federal Government. Federal Government employees may not accept private clients or represent clients other than their agency before the USPTO. See 18 U.S.C. § 205; 37 CFR § 11.10(d) and (e) (an employee of the USPTO is prohibited "from prosecuting or aiding in any manner in the prosecution of a patent application for another"). In the instant matter, the Inquirer may not represent others before the USPTO.

10. In the instant scenario because the Inquirer is unable to represent others before the USPTO while employed by the USPTO, Rule 7.1 is instructive

in determining what information the Inquirer may include on his business card.

11. Rule 7.1 (b) states in part:

    (b) Subject to the provisions of paragraph (a), an advertisement may include information as to:

    (1) legal and non-legal education, degrees and other scholastic distinctions, dates of admission to any bar; areas or the law in which the lawyer or law firm practices, as authorized by these Rules; public offices and teaching positions held; publications or law related matters authored by the lawyer; memberships in bar associations or others professional societies or organizations, including offices and committee assignments therein; foreign language fluency; and bona fide professional ratings;

12. Rule 7.1(a) (1) and (2) prohibits a lawyer from using or disseminating any advertisement that "contains statements or claims that are false, deceptive or misleading; or violates a Rule."

13. Comment [6] of Rule 7.1 states "…all communications by lawyers, whether subject to the special rules governing lawyer advertising or not are governed by the general rule that lawyers not engage in conduct involving dishonesty, fraud, deceit or misrepresentation, or knowingly make a material false statement of fact or law."

14. In addition the lawyer must comply with Rule 8.4(c), which provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

15. Therefore, it would be misleading for the Inquirer, without further explanation, to maintain the designation "patent attorney" on his business card when the attorney is currently unable to represent others or prepare / prosecute patent applications for submission to and / or presented before the USPTO.

16. The Inquirer may attempt to prevent any ethical issues from arising when including the patent attorney designation on his business cards by also inserting language that notes that he is currently on administrative leave and is unable to represent others in patent matters before the USPTO.

17. This conclusion is consistent with prior opinions concerning information to be disclosed on attorneys' business cards.

18. In N.Y. State 704 (1998), we concluded that business cards must fairly disclose jurisdictional limitations on practice of named attorneys. In that opinion, we also remarked on the purpose of the contents on letterhead and business cards and noted that "the contents of letterhead and business cards should enhance the public's ability to recognize the need for counsel and to choose the most appropriate counsel, and should not contain any statement or representation that is false, deceptive or misleading" and the "contents should not violate any statute or court rule."

19. In N.Y. State 863 (2011) we concluded that a lawyer not admitted to practice in New York, who is engaged in immigration matters in New York, should "note on…her business cards that she is admitted to practice only in Texas and her practice in New York is limited solely to immigration matters."

20. Similarly, in the present inquiry, once the attorney becomes administratively inactive and is unable to practice before the USPTO, it would be misleading to use the designation patent attorney on business cards because it implies that he is able to prosecute patent applications and / or otherwise represent others before the USPTO, when in fact, he is not.

Conclusion

21. It is misleading for an attorney employed as a patent examiner, whose registration status before the USPTO is administratively inactive, to use the designation patent attorney on his business cards during the leave period without inclusion of his status on the USPTO register. The attorney should include on his business card that he is on administrative leave and / or inactive status before the USPTO and is unable to prosecute patent applications and / or otherwise represent others before the USPTO.

(17-12)

Ethics Opinion 930

Committee on Professional Ethics of the New York State Bar Association (8/8/12)

Topic: Arrangement between Law Firm and Non-Legal Service Provider.

Digest: A lawyer may not enter into a contractual arrangement with an insurance agency whereby the agency would offer its customers both legal and non-legal services, even if the agency and lawyer are separately paid and do not share in each other's fees.

Rules: 1.7, 5.7, 5.8(a), 5.8(c), 7.1, 7.2, 7.3

Question

1. The inquiring lawyer asks whether a lawyer may enter into an exclusive arrangement with an insurance agency whereby the agency would offer its clients a service requiring legal review, and, as part of the same offer, would recommend that its clients use the legal services of the inquiring lawyer.

Background

2. Federal law—specifically the Employee Retirement Income Security Act, or "ERISA," 29 U.S.C. 1002, *et seq.*—requires administrators of benefit plans to provide plan participants in writing the most important facts they need to know about their retirement and health benefits. These facts include plan rules, financial information, and documents on the operation and management of the plan. Some of these facts must be automatically provided by plan administrators; others must be available on request. Among the documents that plan administrators must always supply all plan participants is a summary of the plan, widely called a Summary Plan Description, or "SPD." *See* http://www.dol.gov/dol/topic/health-plans/planinformation.htm.

3. The inquirer concentrates in employment and labor law, including benefit plans that ERISA regulates. According to the inquirer, both insurance companies and insurance agents commonly charge a fee for preparing an SPD for their customers, the plan administrators. The inquirer proposes to enter into an arrangement whereby an insurance agency will offer the agency's services, together with the inquiring lawyer's services, to the agency's customers to prepare an SPD. The lawyer does not pay the insurance agency for this arrangement, nor does one share in the fees payable to the other.

4. In a proposed communication with its customer plan administrators, the insurance agency would indicate that the agency will provide an SPD for a lump sum price that includes both the agency's documentation of the SPD plus the inquiring lawyer's review. Of the lump sum price, 87% would be paid directly to the lawyer by the client plan administrator pursuant to a written engagement letter between the plan administrator and the lawyer; the balance would be paid directly to the insurance agency. The proposed communication notes that other providers of this service charge a fee higher than the proposed lump sum while disclaiming liability for legal review of the SPD. The proposed communication also contains a flattering description of the inquiring lawyer's abilities in employee benefit matters.

5. The inquiring lawyer states that the inquirer is prepared to conduct the legal review of the SPD for a flat or fixed fee. The lawyer estimates that such review will typically consume X number of hours, and that 87% of the lump sum price equates to X times the lawyer's customary hourly rate. The lawyer (or the lawyer's firm) would be the exclusive legal service provider that the insurance agency would offer to its plan administrator customers under the arrangement for preparing SPDs.

Opinion

6. We conclude that Rule 5.8 of the New York Rules of Professional Conduct (the "Rules") prohibits the arrangement as the inquirer proposes to structure it, because the structure would constitute an improper multidisciplinary practice. The term "multidisciplinary practice" means a venture that offers both legal and non-legal services to the public. In April 2000, the New York State Bar Association Special Committee on the Law Governing Structure and Operation released the "MacCrate Report," officially titled *Preserving the Core Values of the American Legal Profession: The Place of Multidisciplinary Practice in the Law Governing Lawyers.* "On July 23, 2001, the Appellate Divisions adopted new rules on multidisciplinary practice, effective November 1, 2001." N.Y. 755 (2002). There were two new Disciplinary Rules: DR 1-106 and DR 1-107 of the Code of Professional Responsibility (which was then in effect in New York). Each new DR

substantially implemented the recommendations of the MacCrate Report. DR 1-106 concerned ancillary non-legal businesses that a law firm owned or controlled; DR 1-107 concerned business relationships between law firms and third-party non-legal service providers. In 2009, when the Appellate Divisions adopted the format of the Model Rules of Professional Conduct, DR 1-106 and DR 1-107 became, respectively, Rules 5.7 and 5.8 of the Rules, with the language unchanged.

7. The MacCrate Report, and the rules the Appellate Divisions adopted in its wake, embraced a more cautious view of multidisciplinary practice than some other jurisdictions. *See, e.g.,* D.C. Rule. 5.4(b) (permitting non-lawyer equity interests in law firms). New York's Rule 5.8(a) begins with a preamble on the core values of the legal profession, declaring that "[m]ulti-disciplinary practice between lawyers and non-lawyers is incompatible with the core values of the legal profession and, therefore, a strict division between services provided by lawyers and those provided by non-lawyers is essential to protect those values."

8. The proposed arrangement here is a species of multidisciplinary practice, in this instance implicating Rule 5.8 as a business relationship between a lawyer and a third-party non-lawyer service provider. The proposed conduct consists of an exclusive contractual arrangement between a lawyer and non-legal professional service provider offering to the public, on a systematic and ongoing basis, both legal services (by the inquiring lawyer) and services by a non-legal professional service provider (an insurance agency). The proposed arrangement contemplates that the agency and the lawyer will regularly offer to the agency's clients the service of drafting SPDs and reviewing them for compatibility with ERISA and other applicable laws.

9. Rule 5.8(a) says that a lawyer may form an ongoing business relationship with a non-lawyer service provider if each of three requirements set forth there is met. The first of these, set out in Rule 5.8(a)(1), provides that a lawyer or a law firm (with our emphasis)

> *may* enter into and maintain a contractual relationship with a nonlegal professional or nonlegal professional service firm for the purpose of offering to the public, on a systematic and continuing basis, legal services performed by the lawyer or law firm as well as other nonlegal professional services, notwithstanding the provisions of Rule 1.7(a) [requiring advance client consent], *provided that*:
>
> [1] the profession of the nonlegal professional or nonlegal professional service firm is included in a list jointly established and maintained by the Appellate Divisions pursuant to Section 1205.3 of the Joint Appellate Division Rules;…

10. We may aptly stop there, because the proposed arrangement does not satisfy the first of the three requirements of Rule 5.8(a), each of which the Rule mandates for systematic and ongoing cooperative arrangements offering both legal and non-legal services. Insurance agencies are not among the types of non-legal professional service providers firms listed pursuant to Section 1205.3. *See* 22 NYCRR §§ 1205.3, 1205.5; *see* N.Y. State 885 (2011) (lawyer may not enter into agreement with a tax reduction service). Accordingly, the proposed cooperative arrangement is impermissible under Rule 5.8(a)(1). There may be permissible ways for inquirer to structure a relationship with an insurance agency, *cf.* Rule 5.8(c) (rule on cooperative business arrangements does not apply to "relationships consisting solely of non-exclusive reciprocal referral arrangements"), but we address only the structure outlined in the inquiry before us.

11. In so opining, we necessarily conclude that the language of rule 5.8(a) is mandatory, not permissive. Thus, only those non-legal professional service providers that the Appellate Divisions lists in § 1205 may be parties to an ongoing cooperative practice arrangement. In our view, the plain language of the Rule so indicates. The Rule says that a lawyer "may" enter into such an arrangement "provided" that the lawyer satisfies the three requirements in Rule 5.8(a), the first of which is appearance on the Appellate Divisions' list. We read this language to mean that a lawyer may not enter into such an arrangement unless each of the requirements is met. *See Webster's Unabridged Dictionary* 1450 (2d ed. 1979) (defining "provided" as "on condition; this being understood; conceded, or established; if").

12. Comment [5] accompanying Rule 5.8 supports this result. The Comment says, in relevant part:

[5] To ensure that only appropriate professional services are involved, a contractual relationship for the provision of services is permitted under paragraph (a) ***only if*** the nonlegal party thereto is a professional or professional service firm meeting appropriate standards regarding ethics, education, training and licensing. The Appellate Divisions maintain a public list of eligible professions at 22 NYCRR § 1205.5…. [Emphasis added.]

On at least three prior occasions, we have expressly said as much, two of them within the past year. *See* N.Y. State 888 (2011) ("Rule 5.8(a) *specifically limits* the non-legal professionals with whom a lawyer may contract) (emphasis added); N.Y. State 885 (2011) ("attorney may enter into a cooperative business arrangement *only* where the profession of the non-legal professional is included in a list jointly maintained by the Appellate Divisions") (emphasis added); N.Y. 765 (2003) (DR 1-107(A), the forerunner of Rule 5.8(a), "*limits* the professions with which lawyers can so contract to those professions on a list designated by the Appellate Divisions") (emphasis added). Others uniformly agree. N.Y. County 733 (2004) ("Since financial advisors are not Designated Professionals [on the § 1205 list], an attorney may not enter into a contractual relationship with a financial advisor that would offer continuous and systematic services to the public."); Roy Simon, *Simon's New York Rules of Professional Conduct Annotated* 993 (2012 ed.) ("lawyers are permitted to enter into a full-fledged contractual relationship with nonlegal professionals *only if* the nonlegal professionals are on the special list of approved professions established and maintained by the Appellate Divisions") (emphasis added).

13. In our view, these comments and opinions keep faith with the origins of Rule 5.8(a). In advancing the language of its forerunner DR 1-107(a), which the Appellate Divisions adopted not once but twice, the MacCrate Report said (footnotes omitted and emphasis added):

> …[T]he Committee is concerned that lawyers and law firms not be permitted to join alliances with non-lawyers whose standards of ethics and professionalism could dilute the lawyers duties to clients…. Accordingly, the determination whether lawyers should be permitted to enter into systematic and continuous inter-professional arrangements *is best determined on a profession-by-profession basis, taking into account the intrinsic nature of each profession and assuring that affiliation with it will not impair lawyer professional standards to any extent.*

14. Based on these considerations, the MacCrate Report recommended that the courts retain control over the types of professions with which a lawyer may properly form an ongoing cooperative business arrangement. The Appellate Divisions' enactment of the MacCrate Report's recommendations evinces the courts' determination to maintain control over this form of multidisciplinary practice in New York.

15. Thus, the plain language of Rule 5.8(a), the comments accompanying it, the prior views of this and other committees and commentators, and the history animating the Rule, potently support the conclusion that the intention of Rule 5.8(a) is to limit this type of multidisciplinary practice to combinations with professionals that the Appellate Divisions have blessed in § 1205.

16. That the lawyer and the agency intend separately to bill for the services does not alter this conclusion. The focus of our attention is the arrangement between the lawyer and the nonlawyer service provider, and the continuing and systematic offer of their services to the public. The inquirer and the insurance agency are engaged in what amounts to a joint venture to provide a service for the public. This falls squarely within the ambit of multidisciplinary practice governed by Rule 5.8(a).

17. Even if the arrangement were permissible, the proposed announcement of the arrangement, which promotes the inquiring lawyer's qualities and is directed to a specific group of recipients, could well be considered both lawyer advertising and solicitation, and hence subject to Rules 7.1 and 7.3. Without resolving the matter on this inquiry, we note, too, that the proposed arrangement could raise issues under Rule 7.2, which regulates payments for referrals. Although the inquirer is not compensating the agency for including the lawyer in its promotion, and is apparently prepared to accept a flat fee for the service being rendered to the agency's clients, a serious question could arise if the inquirer is providing a benefit to the agency—and therefore consideration for a referral—if the lawyer charges a higher rate to review SPDs to the firm clients that retain the firm outside the context of the insurance agency's promotion. That would be the functional equivalent of the discount that troubled this Committee in N.Y. State 885.

18. Finally, the lawyer must consider the edicts of Rule 1.7(a)(2), as qualified by Rule 1.7(b), to determine whether the lawyer's personal and financial interest in the arrangement complicates the inquirer's representation of the insurance agency's clients. These same considerations animated the MacCrate Report's recommendations ("[T]he current Code does not adequately deal with…the risk that the non-lawyer professional service firm may be the dominant participant in the alliance and may possess—and, by possessing, exert—economic influence of a kind not adequately anticipated or prevented by DR 5-101(A)," the forerunner of Rule 1.7(a)(2)) and prompted the Appellate Divisions to adopt Rule 5.8.

Conclusion

19. A lawyer may not enter into and maintain a contractual arrangement with an insurance agency in which agency offers both legal and nonlegal services on an ongoing basis to the agency's customers.

(21-12)

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