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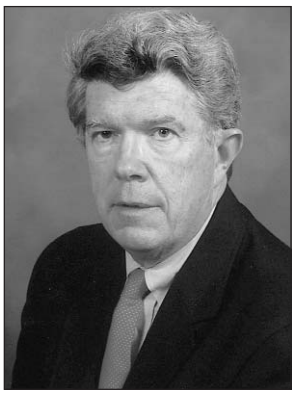
ONEONONE

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

A Message from the Outgoing Chair



Tempus Fugit! Where has the year gone? The General Practice Section over the last twelve months has refocused its activities to concentrate in the areas where the majority of our members practice. The Section sponsored programs in New York City, Melville and Rochester on the Closing or Selling of a Law Practice. Our Summer Meeting in July 2005 in Saratoga looked in statistical terms at the composition of our Section. As a result of this meeting, our committee structure was reorganized in order to be able to provide better services to our members and to encourage more participation in committees of our Section by our members.

The Annual Meeting in January 2006 in New York City was immensely successful. The Section had one of its highest attendances in years. The Pilot Electronic Filing for State Courts provided our Section with the future for civil actions in the State Courts. I know the

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A Message from the Incoming Chair

I am delighted to be able to write to you as incoming Chair of the Section. I practice in a 7-person firm on Long Island and do primarily commercial litigation, but with enough other work, past and present, in business transactions, real estate, land use, professional discipline, education, and labor and employment law, it's only fair to say I'm a general practitioner. Those of us who describe ourselves thusly are the majority of lawyers practicing in this state. It's both a pleasure and honor to take the helm for such an important segment of our Bar.

The past year has been a busy one for me and the Section in terms of surveying our membership so we can re-focus our efforts to meet your needs. Almost ninety percent of our members practice alone or in firms of 20 or fewer lawyers. Most do a significant amount of work in at least one of four areas: real estate, trusts and

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Inside

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

General Practice Section will be in the forefront of developments in this area.

Our Section has been active in providing answers to legal questions which have been passed to our Section through the State Bar Association. This endeavor, under the leadership of Paul J. O'Neill, has received wide praise from not only the State Bar but also from local newspapers, especially in the upstate area. I congratulate Paul on his hard work and initiative.

The Section has expressed its opinion on a variety of proposals initiated either by the State Bar directly or by various sections of the Bar. We will continue this effort in order to promote legislation which is not only in the best interest of the general public, but also which will protect the general practitioner. The Section will continue to remain vigilant in advancing proposals that will promote the best interests of the general public, rather than a particular group. The Section will continue to focus on providing meaningful educational programs for its members.

As the practice of law becomes more specialized and more complex, the role of the general practitioner will become more difficult. The Section will work to assist its members in maintaining and upgrading their legal skills. We need your active involvement to continue to serve the interests of its members.

It has been my honor to serve as your Chairman over the last year. I thank the members of the Executive Committee and officers of the Section for their assistance, comments and pearls of wisdom. I also express my thanks to our liaisons at the State Bar Association, namely, Terry Brooks, Kim McHargue and Pam McDevitt. Your helping hands during the last twelve months have been greatly appreciated.

I congratulate and extend my best wishes to Linda Margolin, the incoming Chair, who will bring her knowledge, management skills and energy to lead the Section during the next year. My best to the other new officers of the Section, Harriette Steinberg, Chair-Elect; Martin Minkowitz, Treasurer; and Paul J. O'Neill, Secretary.

Thomas J. Mitchell

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

estates, elder law and family law, as well as some mix of criminal law, personal injury, business and employment law and civil litigation and trial work. Almost two-thirds of you belong to at least one other section of NYSBA. And many of you must be computer and Internet savvy, because you have indicated to us that you expect us to have an informative web page and look forward to e-mail updates. Overwhelmingly, you told us that information is the most important product we have to offer you.

But survey responses can take you only so far. So, we also used our combined insight as small firm practitioners ourselves to conclude that serving you also means:

- staying on the lookout for changes and challenges in the legal environment that particularly affect solos and small firms, or affect them in ways different from larger firms, and speaking out for you to those who affect or regulate the way we practice;
- recognizing that the area-specific information and education we offer needs to complement materials you already have access to in the areas where you concentrate your practice; and
- making our educational programs a mix of the practical and the aspirational.

We began our "new and improved" effort at the January meeting (the program included "hot tips," a segment on ethics, and a preview of electronic filing for litigation in the state court system). The new roster of committees is up and running, and we are looking into planning a series of brief, topical call-in CLE programs for the Fall.

On the "we want to be heard" front, we are also increasingly active. I have been serving for the past year as our Section's appointee to the State Bar's e-filing task force, and two of our members have been appointed to a State Bar task force that will respond to a recent report issued by the court system on solo and small firm practice. GP's Regulation of the Profession Committee keeps an ear to the ground so it can report back to us on new regulations that affect lawyers, and on the Model Code, as the different sections come before the House of Delegates.

And finally, I am issuing a call to our members with technical skills and vision who have some time to help us out to improve and update the General Practice Section website and its monthly electronic newsletter, *WEBrief*. Send an e-mail (what else) detailing your abilities and interest to: pmcdevitt@nysba.org.

Linda Margolin

From the Editor

This summer, we say goodbye to our past Chair, Thomas Mitchell, who has performed so well over the past year and welcome our new Chair, Linda Margolin. Their remarks open this edition of *One on One*. We look forward to working with Linda in the coming year. We are including a number of new contributors and working in areas we have not focused on before. I wish to thank our contributors for their time and effort in helping us put together this edition and bringing new perspectives and thoughts to our membership.

We are continuing the inclusion of the State Bar's recent Ethics Opinions and, in this edition, we are also including the most recent New York County Lawyers' Association's Ethics Committee Opinion.

We of course look forward to having more of our membership participate in this publication and to that end I extend an offer to forward to me proposed articles for inclusion in our next edition. We also welcome comments on what you believe should or should not be included in the next publication. We hope you find this edition to be informative and we wish you a good summer.

Martin Minkowitz

A Case for a National Health Care System: One Doctor's Perspective

By Stanley A. August, M.D, J.D.

A recent headline on the front page of the *New York Times* read as follows: "The Doctor Is In—and You Wish He Wasn't." It went on to describe the growing dissatisfaction the American people are developing with their medical care. The dissatisfaction includes complaints such as "my doctor doesn't talk to me" to "my doctor spends very little time with me" to "I wait a long time in his office till he calls me" to "he just doesn't seem interested." They don't understand what the cause is that is fueling this marked change in the medical system of the country and the change in physicians' attitudes.

"Every time a doctor violates his advocacy obligation his liability potential increases and malpractice claims may follow."

The cause is easy to elucidate: Congress in its inability to develop a health care program for the nation coupled with the desire to cut costs has relied on the insurance industry to oversee the program. The goal of insurance companies is also to cut costs, but at whose expense? Are they achieving their goal by withholding coverage from their membership in order to decrease expenses? While I agree that decreasing the cost of medical care is a prime interest of the government, I don't believe that it wants to achieve this at the expense of the health care of the population.

The medical system of the United States consists of two parts; part one is the knowledge that is contained within the system. For the past 50 years, the physicians in the United States have had the luxury of having available the most up-to-date information. During this time, they have wiped out such diseases as Measles, Mumps and Rubella (German Measles) and have seen Polio, the nightmare of mothers in the 1950s go the way of the Dodo. Transplantation of organs such as liver, kidney and heart, once the realm of science fiction, are now routine. Tests that are routinely ordered today did not exist when I was in medical school in the 1960s. We now stand on the frontier of potentially fabulous gene therapy, which offers hope to so many people. It is both safe and accurate to say that the state of medical knowledge in the United States has never been greater.

The problem that exists is with the second part of the system, the delivery of services and it is in this area that we are experiencing a meltdown. The insurance industry has drastically affected the reimbursement rate of doctors, hospitals and pharmacies. Additionally, the insurance companies limit the coverage allowed the patient, which has the effect of delaying and perhaps preventing the patient from receiving the appropriate care with potentially disastrous results. Little has been done to force the insurance industry to provide the necessary coverage. This has led to new causes of action for malpractice claims against the doctor adding to the negative spiraling effect on the delivery of health care.

The following example illustrates this point. It is based on a long-standing legal principle, that the physician is the patient's advocate. Under this principle, the physician must exert all effort on behalf of his patient so that the patient receives the maximum care available. As the insurance industry continues to refuse coverage for a variety of illnesses, the physician finds himself spending more and more time on the telephone arguing with the insurance companies and finally giving up. By not getting his patient the appropriate approval and ceasing to act further, the physician may be considered to have committed malfeasance. The doctor, by not getting his patient the care the physician deems necessary, violates his legal duty of being the patient's advocate and depending on the situation, the malfeasance may lead to a malpractice claim against the physician.

Such a situation could exist with the birth of a newborn infant in the hospital. Most pediatricians would prefer to keep this newborn in the nursery for 72 hours to see if any problems arise. The insurance company, however, insists that the child be discharged at 36 hours after birth in order to save money. The doctor generally acquiesces to this insurance fiat. If the newborn develops any problem at home after discharge, the doctor will be held liable for malpractice because he has "missed something." Every time a doctor violates his advocacy obligation his liability potential increases and malpractice claims may follow.

In order to protect themselves, the insurance companies usually place a "hold harmless" clause in the contracts they require the doctors to sign. They claim that they are insurance companies only and that they do not practice medicine, leaving the medical decisions to the physicians. However, by denying a physician the ability to obtain the necessary procedures for his

patient, they are in essence practicing medicine and placing doctors in a "Catch-22" position. As a result of the interference by the insurance companies in the physicians' deliverance of care to their patients, physicians are no longer independent. Their medical decisions are often influenced by the coverage allowed by the companies. Therefore, optimum medical care is limited or not available as it was before this present system evolved.

Additionally, government interference has had its negative effect both at the Federal and State levels. For example, CLIA (Clinical Laboratory Improvement Act), passed in 1988 and implemented in 1992, was supposed to force physicians to upgrade the maintenance of their office laboratories. It allowed for a "compliance fee" (a form of "tax") based on the office's laboratory volume and was supposed to be self-funding. What happened was that doctors closed their office laboratories and began to send their patients to outside clinical laboratories, thus creating an imposition on patients, especially the elderly. Furthermore, the recent implementation of the privacy act, HIPPA, has added tremendous stress and cost to physicians' practices (not to mention other professions and businesses).

In New York State, the section 405 rules of the Public Health Law limit the number of hours a resident can be on duty during a week to 80 hours. This has forced hospitals to hire physicians at a salary of up to 2-3 times that of a resident, creating a financial burden on the hospital.

These changes that have been imposed on the physicians have had the reverse effect of raising health care costs instead of the intended lowering of costs. The average health care policy for a family of four generally ranges from $8,000-$10,000 a year depending upon the type of coverage that was purchased from the company. Medications have become astronomical in price and the cost of laboratory tests and radiological diagnostic procedures have become far too high. As a result of this and other reasons almost 15% of the population of the United States has no coverage. This means that between 40 and 50 million people are uninsured. Many of them make up what is called the "working poor" and include large numbers of women and children. This is because the United States is the only western nation without a health plan for its citizens.

A further example of government interference in doctors' practices in New York State is the recent addition to the State's Public Health Law, which as of April 2006 requires physicians to obtain their general office prescriptions from the state. Further, the state will not, at least initially, charge them for the printing and the mailing. Doctors in New York State are no longer allowed to print up their own prescriptions; rather, they will now be dependent upon government mail order. Governor Pataki, in explaining the need for this change, stated that it would aid the Department of Health in combating medical fraud. At the same time, Pataki was calling for a new agency to deal with Medicaid fraud because the Department of Health was unable to perform its assigned task.

The response by physicians to this attack on their profession has been varied. The effect of the doctors' response has in general been negative with respect to the care of the patient. For one thing, their attitudes toward the practice of medicine have changed. They don't seem interested in what they are doing in their practices, and are more likely to commit errors in medical judgment. Many physicians are now considering taking early retirement as an alternative. Patients often complain of lack of physicians' personal attention during a visit. This is caused by the physician needing to increase his volume in order to recoup the loss of income caused by the decrease in insurance reimbursements. A recent *New York Times* article stated that the New York City Health and Hospitals Corporation released figures showing that the number of malpractice claims filed against the city has increased since the previous year of 2004.

Many physicians have ceased accepting any insurance coverage. Instead, they are asking the patients to pay cash for treatment. It has become more difficult in certain geographical areas for patients to find a doctor willing to accept the patient's insurance. This drastically impacts on the medical concept of "continuity of care" in which the physician has cared for a patient for a long time and knows him very well. Today, many physicians are complete strangers to their patients, treating them only because they accept the patient's insurance.

As a result of not accepting insurance and requiring the patient to pay in cash, the doctor may leave himself open to a charge of abandonment of his patient. It is well documented that a doctor may cause a patient to leave his practice, i.e., to get rid of the patient For example, the patient may be non-compliant by not following the doctor's directions for care. Additionally, the patient and doctor may have personality conflicts, which prohibit the continuance of care by the physician. If the physician decides to leave an insurance panel, another physician must be identified to treat that patient. The preceding physician must continue to see the patient until another doctor is found to assure continuity of treatment.

A charge of abandonment by a patient against a physician may have serious consequences. Initially, an investigation by the Discipline Committee of New York State may lead to sanctions against the physician or

eventual suspension or loss of his license. Furthermore, an abandonment charge may prove to be a cause of action for malpractice litigation against the physician. Although it is rare for such a case to be initiated, it may be more prevalent in the future with the changes in the method in which the physician chooses to be paid by the patient. It is possible that in certain circumstances, such as a patient dying as a result of "abandonment," a physician could be charged with criminally negligent homicide as stated in the New York State Penal Code, § 125.10.

"The pressure of needing to make a profit cannot tinge and affect the health care plan that should be developed."

It is evident that the medical system of the country is in great difficulty. If nothing is done to correct this collapse, medical care for many of the populace may be unavailable. One solution to this problem is the establishment of a National Health Care Plan. The term "national" does not refer to socialized medicine. Such plans have been tried in the past and have failed. One just needs to look at England's socialized health program and realize that such a system could not operate in the United States. This must be a completely new system, not just a financial reorganization of the Medicare and Medicaid systems with insurance companies participating in their usual manner. If that situation were to occur, the health care system of the nation would stay the same, but the delivery of services to patients would cost even more than it does today.

Certain elements of the present system must be reevaluated, such as the continuation of Medicaid and Medicare. This plan cannot include the participation of insurance companies who are only interested in making the most profit that they can. The pressure of needing to make a profit cannot tinge and affect the health care plan that should be developed. The catastrophe of Hillary Clinton's 1993 Jackson Hole medical plan cannot be repeated. The plan must offer coverage to all Americans at the same level of care, but unlike the English and Canadian systems should not be free. The cost of the plan should be shared among the populace and the government. The percentages would be determined after careful study of data.

Other elements of health care, which contribute to the high cost, will have to be addressed. These include medical malpractice, the cost of medications and the poor distribution of the physician availability pool across the nation. The astronomical cost of becoming a doctor should also be evaluated if the best and the brightest candidates are to continue to populate our medical schools.

Such an all-encompassing change in the health care system is, I believe, possible and necessary if we are to continue to have the best health care system in the world. I truly believe that such a plan can be achieved. It would take a lot of work, but it can be done.

Sources

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Dr. Stanley A. August is a graduate of the State University of New York at Syracuse. Additionally he is a graduate of Brooklyn Law School. He is a board certified pediatrician, an Associate Attending at Maimonides Medical Center located in Brooklyn, N.Y., and a member of the New York State Bar. He is located in Brooklyn.

Mortgage Foreclosures for the General Practitioner

By Bruce J. Bergman

Introduction—Why Read On?

A reader's first reaction to the title of this piece might be, "It isn't for me no matter what;" an unsurprising sentiment. Mortgage foreclosure is recognized as arcane and obscure, usually pursued only by specialists (and some malpractice actions against generalists who took the plunge can cool the ardor of even the boldest). Highlighting the point, foreclosures are addressed by RPAPL Article 13, a reading of which confirms all the trepidation—one certainly could not readily prosecute a foreclosure action relying on the verbiage there. Finally, this writer's three-volume treatise on the subject (which may we immodestly suggest *does* tell you how to do it) is well more than 3,000 pages in length, underscoring that there is indeed vast material to digest in this arena.

But there really are good reasons to launch into this excursion. First, demystifying the topic can render it generally more approachable. Second, even if counsel will not take on a foreclosure case, being able to sagely advise a client at the inception has considerable value. Finally, on most occasions readers encounter foreclosures where their client is a defendant: the property owner or a judgment creditor, junior mortgagee or other lienor whose interest attaches to the property burdened by a mortgage in default. Understanding how to effectively counsel them is certainly worthwhile.

So, what helpful basics can be so *briefly* imparted? We give it a try.

What Is a Foreclosure About (And What Does It Do)?

For most mortgage lenders, two decisions are involved in making the loan—one business, the other legal. Use as an example the elemental situation of a borrower buying a $500,000 house with $100,000 to invest. (It would be essentially the same concept for an entrepreneur who had $10,000,000 and needed $40,000,000 to buy a shopping center worth $50,000,000.) The lender asks, if the borrower fails to pay (defaults on the mortgage), will someone come to a foreclosure sale and pay $400,000 to buy a $500,000 house? The answer is "yes" and so the business inquiry is disposed of.

Next, for that business conclusion to always be "yes" in the future, the lender must know the *priority* of its mortgage. Assume the lender proceeds on the assumption that its position is a *first* mortgage. A required title search will confirm this. (If other liens exist on the property they must be disposed of as a condition of the loan, either to be satisfied or subordinated.)

Once the mortgage is recorded (and except for real estate taxes and a few other uncommon super liens) it is senior to all subsequent mortgages, judgments, etc. In turn, this means that in order to maintain the business/legal status which pertained at the moment the mortgage was executed and then recorded, in any foreclosure action our lender will name in the caption and serve process upon (obtain jurisdiction over) all interest holders later in time to the mortgage.

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In that way, anyone who buys at the ultimate foreclosure sale will take title free and clear of all those subsequent liens because those interests will be extinguished by the foreclosure sale. The borrower-owner's title is conveyed (by a referee appointed in the action) and all liens are wiped out to fulfill the expectation that someone would indeed pay $400,000 for the house worth $500,000. All this explains why the person in your office named in the foreclosure has come to you for counsel.

The Right to Redeem

Once the lender declares due the balance of a mortgage, then to proceed to foreclosure (discussed *infra*), it is typically too late to cure the default. It is not too late, though, to redeem, that is, pay off the mortgage in full. That sacred right is available until the moment the property is struck down at the foreclosure sale. Although this concept is usually most vital to the bor-

rower-owner, the right to redeem is available to anyone with an interest in the property.

Steps in and Duration of the Foreclosure

Unlike litigation generally (likely to follow pleading, discovery and judgment after motion or trial) mortgage foreclosures are ritualized with specific plateaus, each of which must be achieved in order. It is possible to have a better sense of what foreclosures are about with those steps in mind:

- Collection procedures: Various calls and letters from lender to borrower seeking a cure of arrears or whatever the mortgage breach may have been.
- Acceleration: This is critical to the process. In our example, the $400,000 is payable over the life of the mortgage (perhaps 30 years). But if the borrower defaults—fails to remit monthly installments—the mortgage will invariably authorize the lender to declare the balance due now—to accelerate—so that the monetary obligation which would have been payable over 30 years is due today. Although some mortgages as a matter of contract may allow a reinstatement of the arrears before the foreclosure judgment issues (the Fannie Mae/Freddie Mac uniform instrument for residential loans is a prime example), the law in New York is clear that absent such an agreement, after acceleration it is too late to reinstate. While lenders usually prefer to accept a cure, they are not obliged to do so, and if the borrower has been a chronic defaulter, they may choose to be rid of him.
- Foreclosure search: In order to know who those subsequent junior parties to be cut off in the action are, a search is necessary. (This allows the goal of the foreclosure to be achieved.)
- Summons, complaint and notice of pendency (lis pendens): These are the initial pleadings in a foreclosure. Properly drafting the complaint is a subject unto itself, but short comment upon the lis pendens here is meaningful. The lis pendens serves to bind all subsequent interest holders to the foreclosure as if they had been named and served in the action. So, if after filing the lis pendens the borrower sells the property, the grantee will lose the title through foreclosure even though the plaintiff knew nothing of his existence and vice versa. This applies also to all later encumbrancers.
- Default appearance or answer: Both a default and a general notice of appearance (or a notice of appearance and waiver) allow the foreclosure action to proceed through the stages without interruptions. The notice of appearance requires a notice of motion for later stages; the notice of appearance and waiver permits progress *ex parte*. The answer, of course, raises a supposed issue and must be disposed of for the foreclosure to move forward.
- Order to appoint referee (if default) or motion for summary judgment, or trial, if contested by submission of an answer.
- Referee's computation of sum due on mortgage (*ex parte* if in default); hearing if contested.
- Judgment of foreclosure and sale: This is the stage, which finally authorizes a judicial sale of the mortgaged premises, to be advertised in a newspaper selected by the court.
- Foreclosure sale: an actual auction sale conducted by a referee appointed by the court in the judgment of foreclosure and sale, held (depending on the county) either on the steps of the supreme courthouse, in a designated room in the courthouse or on the steps of the town hall.
- Closing: If purchased by an outside bidder, usually 30 days after the auction. If bid in by plaintiff, referee signs the various papers either at the auction sale or soon thereafter, typically without necessity for a sit-down closing.

If uncontested, in Upstate New York this process consumes approximately seven to eight months. Downstate—the New York Metropolitan area—the time frames are nine to twelve months and often considerably longer. The need to publish the summons (another separate topic), a contested case, bankruptcy filings, appeals, and eve of sale (or earlier) orders to show cause can add months or years to the process.

All this leads to two practical messages. First, when the pleadings are served in a foreclosure, loss of title is hardly immediate. The defendant client should be very concerned, but should not panic about time. There is plenty more to come. Second—and unlike most other litigation—summary judgment does not end the case. It only eliminates the answer and allows the case to go on to further stages. The knee-jerk compulsion to resist summary judgment may not be necessary at all.

Senior Interests

When the lender addressed the business and the legal decision at mortgage inception, it could have elected to take a second mortgage. For example, if there was a $300,000 mortgage on the $500,000 house, and the owner wanted to borrow $100,000, the security for this

latter sum would be a junior, subordinate (in this instance, second) mortgage. But in a foreclosure upon the second mortgage the scenario of relationships is the same. Will someone pay $100,000, and the obligation to pay the continuing paramount $300,000 (totaling, of course, $400,000) to buy a $500,000 house? The answer remains in the affirmative.

All this leads also to the point that holders of interests *senior* to the mortgage to be foreclosed are not proper parties to the foreclosure (unless their apparent seniority or the extent of that priority is being challenged). So, for counsel prosecuting a foreclosure, do not name senior encumbrances as party's defendant. If counsel represents a senior lienholder named in a foreclosure of a junior mortgage, consider a motion to dismiss.

The Critical Concepts of Deficiency and Surplus

In a mortgage transaction, the borrower executes and delivers two basic documents: the mortgage note, which is a promise to pay the debt, and a mortgage, which is the pledge of real property as security for that debt.

Because the borrower signed the note, he is personally liable for the debt and this presents dual concepts to observe. First, the lender could choose to simply sue the borrower for the debt and refrain from foreclosing the mortgage. (Generally, both an action at law on the debt and an action in equity to foreclose cannot simultaneously be prosecuted because it is an election of remedies. This is another thorny subject too long to explore here.) Second, if a foreclosure is the chosen route, if after the foreclosure sale the lender suffers a loss, the borrower could be liable for the shortfall. This is pursued in a post-foreclosure motion per RPAPL § 1371 which delineates the formula to measure the loss. It also imposes a time limit of 90 days to serve the deficiency motion, measured from the time the referee's deed is delivered.

Surplus is the happier reverse of the deficiency. A foreclosing lender is entitled to receive only what is due it pursuant to the judgment of foreclosure and sale (which in turn adopts—or changes—the earlier referee's computation of the sum due). So in our example, if $400,000 was due the lender, but the house went up in value to $600,000 so that perhaps $550,000 was bid at the foreclosure sale, $150,000 is "left over." That is the "surplus," pursued in a post-foreclosure surplus money proceeding (again another separate subject). All liens cut off by the foreclosure then claim that surplus in order of their respective priority, with the owner the last in line. (If there were no liens, the now former owner takes the entire surplus.)

This recitation of deficiency and surplus leads to two more exigent lessons. First, and rather obviously, it explains a borrower's liability, which is always important. Second, it says something truly compelling about the depth of a foreclosure defense.

With interest on the mortgage accruing daily, the longer the foreclosure action, the greater the quantum of debt. So, slowing up a foreclosure for the sake of delay alone has significant consequences. The growth of interest and legal fees added to the debt inexorably increase the likelihood of a deficiency and decrease the likelihood of a surplus.

Although these undesirable results may be more apparent for the borrower (who is personally liable for the debt), the idea applies to lienors as well. When representing a defendant in an action, an attorney's first instinct is to submit an answer. Make them prove their case. But if a junior judgment creditor, mechanic's lienor, or mortgagee has no genuine defense, imposing time onto the foreclosure merely diminishes (through accrual of interest and legal fees) the amount of possible surplus against which the lienor will claim when the foreclosure concludes. It may seem counterintuitive, but many foreclosure defendants may have a vested interest in assuring that the action proceeds as quickly as possible.

What Is the Mortgage Debt?

From the plaintiff's side, knowing how much to pursue and collect is an integral component of the foreclosure. From the borrowers' perspective, what their potential liability will be (especially in relation to the value of the mortgaged premises) or what surplus may emerge is equally as important. These things, in turn, are dependent not only upon the value of the property, but the amount of the obligation due on the mortgage.

In addition to principal, here is a short list (there are others, not mentioned) of possible (and often likely) elements of the mortgage debt:

- Interest: From the moment of default until acceleration, interest is at the note rate. After acceleration the rate becomes 9%, unless the mortgage provides for a different rate (i.e., default rate) which it typically does. In part because a default rate cannot be usurious, such percentages can be quite high, sometimes up to 24%—all very meaningful when considering duration of the action.
- Late charges: 2% for each late installment for residential property, usually 5% in commercial cases. Accrual stops with acceleration.
- Legal fees: If the mortgage provides for legal fee reimbursement to the plaintiff in the event of

foreclosure (and most mortgages will) the clause is enforceable. (Legal fees are assessed by the court—not the referee—at the judgment stage, based upon reasonableness.) The more vigorous the defense, the greater are the legal fees incurred by the plaintiff.

- Taxes, insurance, advances: If real estate taxes are unpaid, the property could be taken by the taxing authority and so the mortgagee plaintiff will pay those sooner or later with the sum added to the debt. The lender will also pay for hazard insurance if the borrower allows the policy to lapse. Such payment is made to protect the value of the improvements. If a second or more junior mortgage is the subject of a foreclosure, a senior foreclosure threatens the junior so the subordinate lender may need to reinstate or satisfy the prior mortgage—another expenditure added to the debt. Interest on all these sums accrues at 9% unless the mortgage specifies a higher rate (such as the default rate).

Conclusion

Although the danger of a brief overview exposes the daunting breadth of the subject,[1] experience suggests that understanding the goals and basics of foreclosure genuinely enables a non-specialist to play a meaningful role. This explanation may serve that function.

Endnote

1. That there is exceptional nuance to all this should be obvious. In lieu of digesting an entire text of more detail, attention is invited to a lengthier overview in 1 Bergman on New York Mortgage Foreclosures, Chap. 2, Matthew Bender & Co., Inc. (rev. 2006).

Bruce J. Bergman, author of the three-volume treatise *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (rev. 2006), is a member of Berkman, Henoch, Peterson & Peddy, PC, Garden City, N.Y., and an adjunct associate professor of real estate with New York University's Real Estate Institute. He is also a member of the American College of Real Estate Lawyers, the American College of Mortgage Attorneys, and the USFN.

What Constitutes Wages?

By Martin Minkowitz

The primary benefits an injured worker is entitled to under the State Workers' Compensation Law are payment for medical care[1] and treatment and wage replacement.[2] Medical care and treatment, for obvious reasons, commence immediately and there is a right to payment for medical expenses from the first day of disability. Wage replacement, on the other hand, does not commence until seven days after the injury. This avoids minor injuries or disabilities being included in the system. However, wage replacement for the first seven days will be picked up if the disability continues for more than fourteen calendar days.[3]

How much a claimant will be awarded depends in part on his or her average weekly wage. There is a formula to compute the weekly wage basis for the payment of compensation.[4] It is the average weekly wage of the injured employee at the time of the injury, which is used as the basis to compute compensation for an injury, or for death benefits if it is a result of a compensable injury; one, which arose out of, or in the course of, the employment.

In any event, and what has been law for more than a decade, no injured employee, or one entitled to receive benefits if there is a death, is entitled to a wage replacement award in excess of $400 a week. In the past several years, the Governor and the state Legislature have considered increasing the maximum cap of $400 per week to an amount ranging from 20% to 60% higher. No such legislation has been successful, however, and the Governor again this year has proposed raising the wage replacement rate to a maximum of $500 per week. That legislation is still pending.

In order to determine what constitutes the weekly wage to establish the wage benefit, the Board will consider not just the cash payment (salary) to the insured employee, but other forms of compensation as well.

The definition in the statute[5] states that, "wages means the money rate at which the service rendered is recompensed . . . including the reasonable value of board, rent, housing, lodging or similar advantage received from the employer." Therefore, in computing what constitutes wages the Board can include any benefits or other consideration which is given to an employee by the employer for the services rendered.[6] It has included such items the employer has given as commissions and bonuses paid to the employee in the year preceding the injury.

Recently, the Board has considered whether the value of tuition provided by the employer should be included in the calculation of the injured worker's average weekly wage. Normally, the value of tuition is compensation to the employee for services provided and it should be considered wages under the definition

"[I]n computing what constitutes wages the Board can include any benefits or other consideration which is given to an employee by the employer for the services rendered."

of wages in the statute.[7] However, if the Board determines that the claimant's payment of wages is unaffected by whether his children attended a school, it may conclude that the tuition is not a part of a wage and therefore should not be considered as a part of the average weekly wage or computation of the award of lost wages.[8] In that case, the court, in affirming the Board's exclusion of the tuition remission, concluded that the employer considered the tuition remission, to be an additional benefit akin to health benefits, and indicated that the Internal Revenue Service has ruled that tuition remission is not a taxable benefit. It therefore affirmed the Board's exclusion of the tuition remission as part of wages within the meaning of Workers' Compensation Law § 2(9).[9]

What constitutes wages is generally a question of fact for the Board to determine. As such, if their decision is supported by substantial evidence, an appellate court will not change it on an appeal.

Endnotes

1. *See* § 13 WCL.
2. *See* §§ 15–16 WCL.
3. *See* § 12 WCL.
4. *See* § 14 WCL.
5. § 2, Sub. Div. 9 WCL.
6. *See O'Neil v. Randolph Dairy Farms*, 65 A.D.2d 907 (1978).
7. *See Deer Kill Day Camp*, 95 NYW CLR 1089 (1995).
8. *See Blackwelder v. Faith Heritage School et al.*, __ A.D.3d __ (2006).
9. *See Blackwelder, supra*.

Martin Minkowitz is a partner at the Law Firm of Stroock & Stroock & Lavan, LLP.

Hart-Scott-Rodino Thresholds to Increase

By Madelaine R. Berg and Richard Madris

Overview

As of February 17, 2006, certain dollar thresholds for filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "Act") increased. The increases were pursuant to the 2000 amendments to the Act, which require the Federal Trade Commission ("FTC") to revise the jurisdictional thresholds annually, based upon the change in the gross national product. That was the second annual adjustment. The first such increase occurred in 2005.

Under the Act, a Hart-Scott-Rodino filing is necessary only if a transaction meets certain qualifying tests, commonly known as the "size of transaction" and "size of person" tests.

New Thresholds for "Size of Transaction" Test

The "size of transaction" test measures the value of the acquired person's voting securities or assets (or a combination of the two) that the acquiring person will hold as a result of the transaction, typically aggregating both the voting securities and/or assets being acquired with the previous holdings of the acquired person. The "size of transaction" threshold for filings under the Act, which is currently set at $53.1 million, increased to $56.7 million.

New Thresholds for "Size of Person" Test

The "size of person" test considers the size of the parties to the transaction. This test currently requires, in general, that one side of the transaction have net sales or total assets in excess of $106.2 million, and the other have net sales or total assets in excess of $10.7 million.

These thresholds will be increased to $113.4 million and $11.3 million, respectively. It is not necessary for the acquiring person to be the larger party. Currently, acquisitions that will result in the acquiring person holding in excess of $212.3 million of voting securities and/or assets of the acquired person are reportable regardless of the size of the persons involved. That $212.3 million threshold increased to $226.8 million.

New Thresholds for "Filing Fees"

Finally, the thresholds at which the three levels of filing fees attach were similarly increased, although the filing fees themselves remained the same. Thus, the fee for transactions valued at less than $113.4 million (previously $106.2 million) is $45,000; transactions valued between $113.4 million (previously $106.2 million) and $567 million (previously $530.1 million) have a fee of $125,000; and transactions of $567 million (previously $530.1 million) or more have a $280,000 fee.

Effective Date

These changes apply to all transactions that closed on or after the effective date, February 17, 2006.

Other Recent Amendments

Two other recent amendments to the Hart-Scott-Rodino Rules significantly affect the nature of the information to be reported on the Hart-Scott-Rodino Notification and Report Form.

The first amendment is a change to the "base year" used to report revenue data. The Rules require that filing persons report revenue data organized according to North American Industry Classification System codes for the most recent year as well as a stated "base year." Since 2001, the base year has been 1997. The FTC has now amended the Rules to make 2002 the base year for this revenue data.

The second recent amendment to the Rules is intended to relieve filers of the burden of providing paper copies of required documents such as 10-Ks, annual reports, annual audit reports, and regularly prepared balance sheets, by allowing them to provide instead a direct, operational Internet link to these documents. This alternative may be used as long as the documents can be accessed through an Internet address linking directly to the documents, and the Internet link does not require payment for access. If the Internet link submitted becomes inoperative or the linked document is incomplete, the filer must provide paper copies by 5 p.m. on the business day following any request by the FTC or the Department of Justice.

Madelaine R. Berg is a special counsel in the Mergers, Acquisitions and Joint Ventures Practice Group of Stroock & Stroock & Lavan LLP, and Richard Madris is a partner in Stroock's Mergers, Acquisitions and Joint Ventures Practice Group.

For further information regarding Hart-Scott-Rodino or the changes described above, please contact Madelaine R. Berg at mberg@stroock.com.

How Alternative Dispute Resolution Can Help You

By Irwin Kahn

As practicing attorneys we all know that most of our civil cases are ultimately settled before coming to trial.

Because of the multitude of matters waiting to be aired before our Courts a great deal of time usually elapses between the date of occurrence to the date of trial. As well as being time consuming, the litigation process can also be quite costly. Therefore it is common for both sides of a matter to attempt to negotiate a settlement on behalf of their clients. Unfortunately, it is not uncommon for both sides to reach an impasse in negotiations. When an impasse occurs, rather than wait for trial, more and more litigants are turning to Alternative Dispute Resolution to dispose of cases.

Alternative Dispute Resolution offers litigants the promise of a means to move their cases faster than the Court system can offer and at a cost advantage as well.

If opting to submit a matter to Arbitration, which in effect is a mini-trial before a trained Neutral, cases are disposed of fairly, quickly, cost effectively, and the outcome is binding. Attorneys have put their case on a fast track, have cut expenses and have benefited their clients at the same time.

The other option under the Alternative Dispute Resolution umbrella is Mediation. Here a trained Neutral helps the parties to negotiate and to overcome the impasse the parties may have reached on their own. The Neutral offers an impartial view of the occurrence and often can point out factors not readily seen by the involved parties. Mediation is consensual, private, quick, cost effective, and if an agreement is reached, final. It helps both sides take a more objective view of the injuries, liability, and relevant economic factors of the occurrence and often speeds a settlement. It offers the additional benefits of early Neutral evaluation, early fact and/or coverage determination, and offers the parties an opportunity to approach their case more creatively than they may have if Mediation was not a factor. In addition, if Mediation does not result in a settlement, the parties may agree to a high-low arbitration before another Neutral.

To be ready for Alternative Dispute Resolution the attorneys on both sides should evaluate beforehand the liability, damages, and the potential sustainable verdict in the venue where the action is pending. Preparing a concise memorandum setting forth liability, damages and value will be greatly beneficial in educating both your opponent and the Neutral. Reports from experts and Jury Verdict Reports of similar fact patterns should be included as part of the package submitted to the Mediator or Arbitrator. Whenever possible, your client should be present at the Alternative Dispute Resolution session, but if this is not possible you should be able to reach your client immediately should this become necessary. Good preparation leads to the likelihood of a satisfactory conclusion to the Alternative Dispute Resolution session.

Alternative Dispute Resolution is being used as a means of resolving issues in many areas and industries. With regard to the Securities Industry, the New York Stock Exchange and the National Association of Securities Dealers both have well established Arbitration and Mediation programs. The American Arbitration Association also has Mediation and Arbitration programs in the commercial and securities areas.

Both the Federal and State Courts have Alternative Dispute Resolution programs. The New York State Office of Alternative Dispute Resolution Programs is led by Daniel M. Weitz, Esq. New York County Lawyers Commercial Division has been in existence for almost ten years. Upstate also has Commercial Division Alternative Dispute Resolution programs. New York County has an early neutral evaluation program in the Matrimonial Part. In the tort area, New York County has a successful Court Annexed Mediation Program. In the Federal area, both the Eastern and Southern Districts have Alternative Dispute Resolution programs. George O'Malley, Esq. is in charge of the Southern District and Gerald P. Lepp, Esq. is in charge of the Eastern District. Both the Eastern and Southern District Bankruptcy Courts have Mediation Programs.

There are a number of Commercial providers who supply skilled Neutrals at a reasonable cost. These providers usually aid the parties in agreeing to participate, deciding on which of the Alternative Dispute Resolution modalities to utilize and scheduling the session at a convenient location before a well-qualified Neutral.

In summary, utilizing Alternative Dispute Resolution as a case management tool in your practice can potentially speed up the turnover of your caseload and enhance the chances of a satisfactory and cost effective resolution of your cases.

Irwin Kahn is a principal of the New York City law firm of Kahn & Horwitz, P.C. He is the Chairman of the Arbitration Committee of the General Practice Section of the New York State Bar Association; a past Chair of the Alternative Dispute Resolution Committee of the New York County Lawyers' Association; and a member of the New York State Bar Alternative Dispute Resolution Committee.

General Practice Session: Hot Tips January 4, 2006

Elder Law and the Deficit Reduction Act of 2005

By Frank G. D'Angelo

The Deficit Reduction Act (DRA), signed February 6, 2006, by President George Bush, represents the most comprehensive overhaul of Medicare and Medicaid since 1993. This article will highlight some of the changes in Medicaid, Medicare, and banking as it pertains to the elderly.

It is important to remember that New York has not yet implemented changes for Medicaid; therefore we do not yet know how the changes will be implemented and what the cutoff date will be. The cutoff date may ultimately be February 6, 2006, when the actual legislation was signed by President Bush, or a later date if the New York Legislature deems it appropriate.

Nevertheless the following summarizes the changes:

Medicare:

1. Part B premiums for the high income beneficiary, that is an individual with $80,000 or a couple with $160,000 filing jointly, reduces the phase-in of 20% per year on the premium. Previously the reduction was to be phased in over five (5) years, 20% each year. DRA changes this by reducing the phase-in to 33% in 2007, 67% in 2008, and 100% in 2009.
2. Therapy caps under Medicare: The moratorium on therapy caps has been lifted under the DRA. The Secretary of Health has been directed to establish a procedure for identifying exceptions. Beneficiaries may request exceptions when it is determined that they are being subjected to dollar limits, if the criterion for such exception is medical necessity.
3. Preventative Care Coverage: DRA now covers screening for abdominal aortic aneurysms, as of January 1, 2007. The Part B deductible has been eliminated with respect to position payments. The DRA limits deductible for colon rectal screenings.

Medicaid:

Medicaid has been changed in the following ways:

1. Change in look-back period;
2. New methodology for determining the start of a penalty period created by transfers;
3. New treatment of annuities;
4. Revision of treatment of reverse mortgages;
5. Clarification of treatment of continuing care retirement entrance deposits; and
6. Renewed encouragement of state/long-term care insurance partnership plans.

1. Look-Back Period

Old Rule: The old rule was a 36-month look-back period for straight transfers and a 60 month look-back period for trusts.

New Rule: The new rule provides for a 60-month look-back period for all transfers.

2. The Start of the Penalty Period

Old Rule: Penalty period begins the first day of the month after the transfer is made.

New Rule: Penalty begins on the date of transfer or date the applicant would be entitled to receive Medicaid, whichever is later. For example, Mrs. Jones gives $60,000 to her alma mater on February 18, 2006. She keeps $60,000 in her bank account. On February 18, 2008, Mrs. Jones enters a nursing home. Note the entry into the nursing home is two (2) years after the transfer of assets has been made. Mrs. Jones now pays privately for 10 months at $6,000 per month, from February 2008 to November 2008. She then applies for Medicaid. Under DRA, the penalty on the transfer of assets begins at the point of spend-down; therefore the penalty period begins in December 2008. The penalty period is determined by taking the $60,000 gift dividing by $6,000 (monthly cost of the nursing home) for 10 months, running from December 2008 through October 2009. Mrs. Jones is ineligible for Medicaid in a nursing home until October 2009.

Rounding-Down

Individuals may no longer round-down, or disregard transfers of less than one (1) month. For example, a transfer of $5,000 if the monthly cost was $6,000 was disregarded in the past. It is no longer so. Also multiple

transfers of less than monthly costs will be aggregated, i.e., four (4) $5,000 transfers would result in a $20,000 transfer period for the year.

3. Annuities

The purchase of an annuity as a transfer of asset for less than fair market value will create a penalty unless:

- The State is the Remainder Beneficiary in the first position for at least the full amount of the Medicaid received by the Medicaid recipient; or
- The State is the second beneficiary behind the spouse or disabled or minor child. Note, balloon payment annuities are no longer permitted.

An annuity is included as an asset as it pertains to transfer of assets unless:

It falls under I.R.C. § 408(b) or (g); or

Is purchased with the proceeds from a trust or account under I.R.C. § 408(a)(c) or (p), a simplified employee pension or a Roth IRA, or is irrevocable and non-assignable and actuarially sound using actuarial publications of the Office of SSA Chief Actuary, and provides payment in equal amounts during the annuity term. "There can be no deferred annuities or annuities with balloon payments."

Additionally, the term "asset" now includes funds used to purchase a life estate in another person's home, unless the buyer resides in the home for at least one (1) year after the purchase.

Undue Hardship Waivers

The facility where the institutionalized individual resides may file an undue hardship waiver for that person, with that person's consent or the consent of the person's representative. While the undue hardship waiver application is pending and if the application meets criteria specified by HHS, the State may pay the facility for 30 days of care in order to hold the bed for the resident.

4. Home Equity

The family home is no longer an unqualified exempt asset. Home equity in excess of $500,000, and the State may elect to increase it $750,000, will be treated as an available resource. The $500,000 amount will be increased every year, starting in 2011, based on the Consumer Price Index, and rounded to the nearest $1,000. This Section does not apply if the individual spouse, or child under 21, or disabled, resides in the home. The individual may use a home equity loan or reverse mortgage to reduce the equity. This provision can also be waived in cases of demonstrated hardship. Note: It appears New York will use the $750,000 limit in equity.

Continuing Care Retirement Communities Entrance Fees

Entrance fees for a Continuing Care Retirement Community are considered an available resource to the individual residing in the CCRC to the extent that the individual is able to use the entrance fee, or if the contract allows the entrance fee to be used to pay for the individual's care if her income and other resources are insufficient, and the individual is eligible for a refund of the remainder of the entrance fee on the individual's death or termination of the contract, or departure from the CCRC, and if the fee does not grant an ownership interest in the CCRC.

If a nursing facility is part of the CCRC, residents may be required to spend their resources on their care before applying for Medicaid.

Income First Rule

If a request is made to increase community spouse resource allowance, the State must apply the Income First Rule to bring the community spouse's income up to the minimum monthly maintenance needs allowance. Therefore, the rule now is that income must be first factored into eligibility. The excess resource can bring the income up to the minimum monthly resource allowance.

5. State Long-Term Care Partnership Programs

Under New York State's Long-Term Care Partnership Program, an individual who purchases an approved policy may apply for Medicaid when the policy runs out without having to transfer his or her assets. **Note, despite this fact it is advisable to consider doing comprehensive estate planning for catastrophic illness in conjunction with the purchase of a Partnership Plan**.

The criteria for determining whether or not a person meets the qualifications are as follows:

1. The insured must be a resident of the State at the time the coverage first becomes effective;
2. The policy must be a qualified long-term care insurance policy as defined in I.R.C. § 7702(b) sub b;
3. The policy must meet nine (9) specified sections of the Long-Term Care Insurance Model Act, and 19 specified sections of the Model Regulations of the National Association of Insurance Commissioners;
4. The policy must provide for compound annual and inflation protection for persons under age 61

as of the purchase date and must also provide some level of inflation protection for persons between the ages of 61 and 75, and from age 76 on, inflation protection is optional;

5. The State Medicaid Agency must provide information and technical assistance to the State Insurance Department to make sure that the agents selling long-term care insurance receive training and demonstrate understanding of the Partnership Long-Term Care Insurance policies and how they relate to other private and public coverage of long-term care;
6. The insurer must provide regular reports to the Secretary of the HHS regarding the performance of the program; and
7. The State may not impose requirements on partnership policies that are not imposed on all long-term care policies.

Other Medicaid Provisions

The DRA now requires that to determine eligibility it is required that applicants demonstrate that they are United States citizens and nationals by producing satisfactory documentation, including a valid passport, state insured driver's license or other documents evidencing citizenship or permanent legal residency. A hardship waiver process has also been built into this process under the DRA.

Other Provisions Affecting the Elderly

DRA 2005 increases the amount of FDIC insurance which is currently $100,000 effective no later than April 1, 2010, and every five (5) years thereafter. FDIC coverage will be inflation-adjusted for price increases that have occurred over the previous five (5) years. Under DRA 2005 there is an immediate increase of insurance coverage on individuals' account plans such as IRAs, 401(k)s. The current protection amount has been increased to $250,000 and will be adjusted for inflation every five (5) years.

Back Due SSI Benefits

Under DRA 2005 there is a reduction from 12 months to three (3) months for the amount of back due SSI benefits owed to a beneficiary. The SSA may now pay these back-due amounts in up to three (3) installations up to six (6) months apart, instead of paying the complete back due amount in one lump sum.

The Constitutionality of the DRA

1. There have been questions raised about the constitutionality of the DRA since the Bill passed in the Senate does not exactly match the House version of the Bill. Legal scholars have argued that the law requires that the Bill emanating both from the Senate and the House must be exactly the same before signed by the President.
2. New York has not enacted legislation and until it does so the rules are not applicable in New York State.

Planning Options

1. Planning between spouses still maintains no transfer prohibition, and the old rules will be just as applicable between spouses.
2. Planning for disabled children. No prohibitions; the planning remains the same as under the old rules. It is advisable that people who do not fall into these two (2) categories begin to think about planning further in advance, at least five (5) years, and perhaps fund various trusts to accomplish this.
3. It is also advisable that people now consider purchasing long-term care insurance, ideally a Partnership-approved plan in conjunction with planning involving trusts or divestments.
4. Allocated funds in excess of the $500,000 equity in the home to pay for care. Consider reverse mortgages on the excess or equity lines of credit to pay for care and to reduce the equity in the home to $500,000 or $750,000 depending on the rule that the New York State Legislature enacts.

As the legal issues become clarified and the regulations governing implementation are promulgated, additional information regarding this ever changing area of the law will be published in *One on One*.

NYCLA Committee on Professional Ethics Formal Opinion No. 735

Topic: Law firm titles and compensation arrangements between attorneys.

Digest: A lawyer who is the sole partner and owner of a law firm must be sufficiently involved in a law firm's practice in order for the lawyer's name to appear in the law firm's title; Trade names may not be used as the title of a law firm; Names of attorneys on the letterhead of a law firm must correctly state the role of the lawyer at the law firm.

Code: DR 1-102, DR 1-104, DR 2-102.

Questions

1. Whether a foreign lawyer admitted to practice in New York may be employed by another lawyer in a non-partner role at a law firm and list the foreign lawyer's name in the firm's title if the foreign lawyer would be doing all or most of the work for the firm.
2. Whether the foreign lawyer's compensation may be structured as if the lawyer was a partner of the firm although the lawyer is in fact an employee.
3. Whether an attorney's name must appear as part of the firm's title, or may the firm title reflect the type of law practiced at the firm, such as the name "Labor Law Rights."
4. Whether the foreign lawyer's status as an employee of the firm prevents the lawyer from being (i) listed on the firm's letterhead solely and/or with the partner and (ii) the ultimate "beneficiary" with the partner of the law firm's income.

Opinion[1]

The Committee received an inquiry from a foreign lawyer (the "Foreign Lawyer") who holds a H1B work visa and is licensed to practice in New York. The Foreign Lawyer is employed by a small law firm that provides legal services in the labor and employment law areas. The Foreign Lawyer asserts that because of certain immigration requirements regarding the H1B work visa that the lawyer needs to "incorporate" with a U.S. citizen if the Foreign Lawyer wishes to establish his own law firm. A New York licensed attorney (who is an American citizen) is willing to do so ("the U.S. Lawyer"). The U.S. Lawyer would be the sole partner and owner of the new firm where the Foreign Lawyer would practice.

1. *Whether a foreign lawyer admitted to practice in New York may be employed by another lawyer in a non-partner role at a law firm and list the foreign lawyer's name in the firm's name if the foreign lawyer would be doing all or most of the work for the firm.*

Disciplinary Rule (the "DR") 2-102(B) of the New York Lawyer's Code of Professional Responsibility (the "Code") provides that a lawyer shall not practice under "a name that is misleading as to the identify of the lawyer or lawyers practicing under such name." The test for how much work the U.S. Lawyer must contribute in order for his name to be ethically included in the law firm's name is not numerical, but qualitative, namely: Is the U.S. Lawyer sufficiently involved to provide the supervision required of the law firm collectively (see DR 1-104(A) and (C)) and himself individually as a manager of the law firm and partner (see DR 1-104(B))? If the U.S. Lawyer was not in fact practicing with the firm, then the name of the firm that includes the U.S. Lawyer would seem to violate DR 2-102(B).

The Foreign Lawyer's question also raises the issue of whether his name may be included in the firm's title if the Foreign Lawyer will not be a partner due to legal constraints. The Committee believes DR 2-102(C) is applicable in this instance, which states that "[a] lawyer shall not hold himself . . . out as having a partnership" unless the lawyer is in fact a partner. Listing an attorney's name in a firm title, without further clarification, will generally convey that such attorney is a partner. Thus, the Foreign Lawyer could not hold himself out as a partner of a law firm unless he was in fact one.

2. *Whether the foreign lawyer's compensation may be structured as if the lawyer was a partner of the firm although the lawyer is in fact an employee.*

The Committee cannot address the question of the legality of such an arrangement, but the Committee believes DR 1-102(A)(4) is instructive, as "conduct involving dishonesty, fraud, deceit, or misrepresentation" is proscribed by the rule. If the effect or intent of such an arrangement was to deceive a person or governmental agency, it would violate the Code.

3. *Whether an attorney's name must appear as part of the firm's title, or may the firm title reflect the type of law practiced at the firm, such as the name "Labor Law Rights."*

DR 2-102(B) does not require that all lawyers' names be included in the firm title, only, by implication, a minimum of one. The U.S Lawyer, as the sole partner and owner of the law firm, would appear in the firm's title.

"Labor Law Rights" appears to be a trade name. Trade names are prohibited under DR 2-102(B), which provides that a firm "shall not practice under a trade name," and requires that the appropriate legal suffix (e.g., P.C., L.L.C., or L.L.P.) be included if "permitted by law."

4. *Whether the foreign lawyer's status as an employee of the firm prevents the lawyer from being (i) listed on the firm's letterhead solely and/or with the partner, and (ii) the ultimate "beneficiary" with the partner of the law firm's income.*

With respect to (i) if the Foreign Lawyer is not legally a partner of the firm, the Committee is of the view that the firm's letterhead should clarify that the U.S. Lawyer is a partner and the role performed by the Foreign Lawyer at the firm. With respect to (ii) while the Committee does not believe that a specific ethical issue is apparent, if such an arrangement should prove illegal, it would be a violation of DR 1-102(A)(3) (lawyer shall not engage in "illegal conduct").

Endnote

1. The Committee is limited in jurisdiction to interpreting the New York Lawyer's Code of Professional Responsibility. Therefore, the Committee opines only upon ethical, as opposed to legal, questions.

Ethics Opinion No. 795

Committee on Professional Ethics of the New York State Bar Association
(4/19/06)

Topic: Medical doctor/lawyer advertising for malpractice claimants.

Digest: A medical doctor admitted to the New York Bar whose business plan is to advertise for patients to assess the merits of prospective malpractice claims for referral to other lawyers must disclose in advertising that he or she is a lawyer and may not split fees with the other lawyers without obtaining client consent, ensuring that the overall fee is reasonable and taking joint responsibility for the matter.

Code: DR 1-102(A), DR 2-101, DR 2-103(A)(2)(e), DR 2-103(B), DR 2-107, DR 7-109(C).

Question

1. May a medical doctor who is a member of the New York Bar advertise his or her availability as a doctor to assess the viability of medical malpractice claims, and his or her availability to refer viable claimants to lawyers, without disclosing the doctor's membership in the bar or intention to share in any contingency fee recovered by the lawyer to whom the client is referred?

Background

2. A medical doctor who is also a member of the New York Bar currently performs expert medical services for other lawyers in connection with medical malpractice matters, including identifying claims as meritorious, assisting counsel in pretrial proceedings on medical issues, and locating appropriate testifying experts for trial in medical malpractice actions. The inquirer believes that a substantial number of potential malpractice claimants who are unwilling to consult a lawyer, at least initially, about injuries that may give rise to medical malpractice claims may be willing to consult with a physician on that subject. Accordingly, to attract this clientele, the inquirer proposes to advertise the inquirer's medical credentials to the public, offering to ascertain at no cost whether such possible claimants, in the inquirer's judgment, have claims sufficiently meritorious to warrant referral to a lawyer.

3. The inquirer's advertising would state that the purpose of the cost-free physical examination is to determine whether in a medical doctor's judgment a viable legal claim exists, and the inquirer's willingness to refer such viable claims to a lawyer. The inquirer would not refer any claimant to a lawyer without the claimant's advance consent. The advertising would not disclose that the doctor is also a lawyer, nor the inquirer's expectation and intention of being paid a fee by the lawyer to whom the claimant would be referred. In all cases, the inquirer would act solely as a medical consultant, and not represent the claimant as counsel in a malpractice action. In consideration of these services, the inquirer intends to receive a portion of the contingency fee, if any, earned by the lawyer to whom the matter is referred.

Opinion

4. At the threshold, we mark the limits of our opinion. We offer no view on the rules governing advertising by the medical profession for services unrelated to the practice of law. Assuming the law and rules of the medical profession permit it, we know of no reason why a physician who happens to have a law degree may not advertise for patients without reference to the law degree as long as the advertiser is offering and actually providing only medical (or for that matter other non-legal) services to the patient. As far as we are concerned, the term "medical" or other "non-legal" services includes offering solely a medical opinion about whether specific medical care may be responsible for an alleged injury.

5. That does not end the inquiry, though, because to us the question is whether a doctor/lawyer occupied in assessing injuries as legal claims is engaged in the practice of law. No easy line unambiguously divides a purely medical opinion about the sources and causes of an injury and a legal opinion on the viability of a medical malpractice claim. The line has consequences for law and ethics, for the non-lawyer/doctor and for the lawyer/doctor. For instance, it may be that, solely as medical practitioners (not experts), non-lawyer/doctors may evaluate the viability of medical malpractice claims without thereby engaging in the unauthorized practice of law—an issue of law on which we do not opine. Likewise, it may be that lawyer/doctors may advertise their ability to evaluate, for medical malpractice cases, the standard of care employed and the extent to which any shortfall in that case resulted in injury, without thereby subjecting the lawyer/doctor to rules governing lawyer advertising.

6. Here, though, we have a doctor/lawyer whose practice consists of considering the viability of a medical malpractice claim for referral to a lawyer. In this context, we believe that the doctor/lawyer is engaged in the practice of law. In N.Y. State 678 (1996), considering a similar question in the context of a lawyer acting as a divorce mediator, we said:

> [A]uthorities have disagreed as to whether to conceptualize divorce mediations as a legal or nonlegal service when provided by lawyers. Our judgment is that, on the present state of facts about how lawyers function as mediators,

> lawyers who serve as mediators should be presumed to be rendering a legal service. Presumably a lawyer who serves as a mediator outside of the law office, gives no legal advice or opinions, and does not draw up the agreement is not acting in any legal capacity, and is not then governed by the lawyer's code. *This would, however, be a rare case*.

N.Y. State 678 (citations omitted)(emphasis in original).

7. We think that this conclusion is even more true here, where the inquirer intends to consider not only medical issues of causation but also the legal issues of the viability of a claim, which may include questions such as the timeliness of the claim, whether the potential damages warrant pursuit of the claim, and the likelihood of success on the merits. Although instances may occur in which the inquirer might defer such questions to independent counsel, we believe that such instances are likely to be the exception, not the rule. It follows that, because the services being advertised are legal services, the inquirer's advertising must comply with the rules on lawyer advertising. Among other things, this means that advertising that omits the inquirer's legal background would be "false, deceptive or misleading" in violation of DR 2-101.

8. If the inquirer discloses his or her legal background, however, a separate concern arises, and that is the omission from advertising of the inquirer's intention to refer all matters to other lawyers for a share of a fee. Whether a lawyer must disclose in advertising an intention to enlist the aid of other counsel depends on the circumstances of a matter or practice area. We believe, however, that a lawyer holding himself or herself out as a medical malpractice lawyer, with the present intention of never practicing as such but instead referring all such cases to others, would be engaged in false and misleading advertising in violation of DR 2-101. *Cf.* DR 2-103(A)(2)(e) (a lawyer may not solicit professional employment from a prospective client by written or recorded communication if the lawyer "intends or expects, but does not disclose, that the legal services necessary to handle the matter competently will be performed primarily by another lawyer who is not affiliated with the soliciting lawyer as a partner, associate or of counsel").

9. Even if we assume the exceptional case—one in which the doctor/lawyer is fully able to separate the medical from the legal—we still conclude that ethical issues infect the inquirer's business plan. In such circumstances, the principal difficulties with the inquirer's plan lie not with the proposed advertising, but with the proposed arrangements between the inquirer and the lawyers who would take the matters. Even if the inquirer was not a lawyer or resigned from the Bar tomorrow, the Code forbids the proposed arrangements, whether with a doctor or anyone else.

10. DR 2-103(B) prohibits payments for legal referrals except in certain circumstances, none of which apply here. Here, the lawyer to whom the inquirer refers the matter would be compensating the inquirer for having made a recommendation resulting in employment by a client, a clear violation of that rule. A lawyer may not violate a Disciplinary Rule, nor circumvent one through the actions of another. DR 1-102(A). We believe that this Rule necessarily means that a lawyer may not aid or abet another lawyer in violating a Disciplinary Rule. Thus, this referral-for-a-fee program is impermissible, even for one acting solely as a doctor, because as a lawyer the inquirer would be aiding the violation of a Disciplinary Rule by another lawyer.

11. That is not all. DR 2-107 proscribes dividing legal fees with a lawyer who is not a partner or associate of the lawyer's firm except where the other lawyer acts as a lawyer for the client, assumes joint responsibility for the matter (or performs services in proportion to the fee received), and receives a fee with the client's consent that, together with the other lawyer's fee, is reasonable in the aggregate. Because the inquirer does not intend to act as counsel nor advise the client of participation in any fee arrangement, the proposed course of action would violate this rule. *See also* N.Y. State 698 (1998) (lawyer may not accept a medical malpractice case from a medical consultant if consultant requires the attorney's agreement to a contingent consultant fee as a precondition).

12. To the extent that the inquirer may seek to accommodate his or her conduct to the requirements of DR 2-107—that is, by assuming joint responsibility for the representation as a lawyer who receives a portion of a reasonable contingent fee with client consent—the inquirer clearly could not do so without full compliance with the lawyer advertising rules, including disclosure in advertising of membership in the Bar.

Conclusion

13. We end with the same caveat with which we began. We offer no opinion whether a medical doctor may advertise the doctor's availability to provide medical opinions to patients on whether a breach of a reasonable standard of medical care caused a patient's injury. If a medical doctor may do so, we know of no reason why that same medical doctor may not thereafter be paid a fixed (not a contingent) fee by a lawyer as a consulting or testifying expert in a medical malpractice action. See DR 7-109(C) (lawyer may not pay a witness contingent on the outcome of a case). In our view, however, a member of the New York Bar who holds a medical degree, and who purports to act only as a medical doctor with patients visiting the doctor solely as a doctor, may not establish an impermissible referral service for lawyers, split fees with those lawyers, and conceal these arrangements from prospective clients in advertising or otherwise.

(32-05)

Ethics Opinion No. 796

Committee on Professional Ethics of the New York State Bar Association
(4/24/06)

Topic: Obligation to inform third parties of potential claims.

Digest: A lawyer who represents the administrator of an estate has no ethical obligation to contact creditors holding claims who have failed to file claims in the estate proceeding to advise them that they should do so.

Code: DR 7-102(A)(5).

Question

1. If a lawyer who represents the administrator of an estate has advised the attorney for a creditor of the decedent's death, and the creditor's attorney subsequently withdraws a court action on the claim in the apparent but erroneous belief that the estate has no assets, must the lawyer for the administrator contact the creditor's attorney to advise the creditor's attorney that the estate has assets and that the creditor should file a claim?

Opinion

2. An attorney who represents the administrator of an estate discovered shortly after having been retained that the decedent was the defendant in a litigated matter in which the decedent had defaulted, leading to a default judgment on the merits with a hearing still to be held on damages. As soon as the attorney for the administrator became aware of this litigation, the attorney notified the plaintiff's attorney by letter that the decedent had died, and that the matter was therefore stayed. The attorney for the administrator received no response to his letter or any other inquiry from the plaintiff's attorney.

3. About one year later, when the administrator's attorney was prepared to distribute the proceeds from the sale of the estate's assets, the administrator's attorney checked on the litigation. In so doing, the administrator's attorney discovered that approximately three months after the letters of administration were issued and at least six months after the petition for appointment of the administrator in Surrogate's Court, the attorney for the plaintiff in the litigation sent a letter to the court where the litigation was pending, stating that the plaintiff's attorney was closing the file and that the court could close its file as well. The plaintiff's attorney also advised that the defendant had died and, wrongly, that there was no estate proceeding pending.

4. At the time the attorney sent the court this letter, a search of the Surrogate's Court records would have revealed that a petition had been filed for letters of administration, which petition noted the value of the estate and that the letters had been issued.

5. Assuming that the law imposes no affirmative obligation on the attorney for the administrator to notify potential creditors, where no misrepresentation has been made regarding the assets of a pending estate and the information is properly on file with the Surrogate's Court, the attorney for the estate has no ethical obligation to notify an attorney in a litigation involving the decedent of the fact that the letters of administration have been issued in the estate and/or that the estate does have some assets.

6. Statements made by lawyers to third parties can become a matter of ethical concern. A lawyer may not "[k]nowingly make a false statement of law or fact." DR 7-102(A)(5). The conduct of the attorney for the administrator here does not approach violation of this standard. At no time, whether directly or by implication, did the administrator's attorney indicate that the estate was insolvent. In fact, the implication of the insistence that the lawsuit be stayed pending issuance of letters of administration is to the contrary, that is, it implied that the estate did have assets that would be affected by this claim. The attorney representing the plaintiff did not make further inquiry, and apparently did not check the public record, which would have disclosed the existence of assets in the estate, nor did that attorney file a claim in the estate proceeding.

Conclusion

7. The Committee finds that absent representation to the contrary, an attorney for the administrator of an estate has no ethical obligation to notify the creditor of an estate that the estate has assets and that the creditor should therefore file a claim. We do not opine on whether the administrator's attorney *could* reveal this to the plaintiff's attorney.

(3-06)

Ethics Opinion No. 797

Clarifies: N.Y. State 674 (1995)
N.Y. State 781 (2004)

Committee on Professional Ethics of the New York State Bar Association
(4/26/06)

Topic: Client fraud/misstatements.

Digest: Under DR 7-102(B), if a lawyer determines that a client has made false representations to the court in an affidavit, the lawyer must call upon the client to correct the information in the affidavit, and, if the client refuses, the lawyer must withdraw any misstatements the lawyer made in certifying the client's statements. The lawyer must also consider whether the lawyer is required or permitted to withdraw from the representation under DR 2-110(B) or (C).

Code: DR 2-110(A); 2-110(B); 2-110(B)(2); 2-110(C); 2-110(C)(1)(g); DR 4-101; 4-101(A); 4-101(C); 4-101(C)(3), (5); DR 7-101(A)(1); DR 7-102(A)(2), (3), (4), (5), (7); 7-102(B); 7-102(B)(1); EC 1-1; 1-9; 5-1; 7-10.

Question

1. A lawyer has filed a probate petition that sought the issuance of letters testamentary to a person who was ineligible to receive them by reason of that person's prior conviction of a felony. The lawyer did not know of these facts when the lawyer filed the petition, but learned them later. What are the lawyer's ethical obligations?

Opinion

2. A lawyer represents a client who was named the executor under a decedent's will and is the sole beneficiary named in the will and the decedent's only heir at law. The lawyer files the client's oath, required to seek appointment as executor, with the Surrogate's Court. In order to file the papers with the court, the lawyer also signs the form, which constitutes a certification that to the best of the lawyer's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the form contains no material misstatements of fact.[1] The court issues letters testamentary. Subsequently, the client informs the lawyer that the client is a convicted felon. As such, under SCPA 707(1)(d), the client is ineligible to receive letters testamentary. The estate remains unsettled.

3. Does the lawyer have any obligations to the Surrogate's Court and other potentially interested third parties? Is the information about the client's felony conviction protected as a confidence? Must the lawyer withdraw if the client refuses voluntarily to disclose the client's status as a felon?

DR 7-102(B)(1): Authority to Disclose Fraud on Person or Tribunal

4. DR 7-102(B)(1) of the Lawyer's Code of Professional Responsibility (the "Code") states that a lawyer who receives information clearly establishing that the client has, in the course of the representation, perpetrated a fraud upon a person or tribunal

> shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected person or tribunal, except when the information is protected as a confidence or secret.

5. Whether the client has committed fraud on the court is a legal question beyond the jurisdiction of this Committee. The answer will depend upon whether the client knew that he or she was misstating information or omitting information in the Executor's oath. *See* Code, Definition 9 (fraud includes knowing failure to correct misrepresentations which can be reasonably expected to induce detrimental reliance by another). If the lawyer concludes that the client has committed a fraud, the lawyer must call upon the client to disclose to the court that the client was not eligible to receive letters testamentary. If the client refuses to make or authorize the correction, as noted above, DR 7-102(B)(1) instructs the lawyer to reveal the fraud "*except when the information is protected as a confidence or secret*" (emphasis supplied).

Exception for Information Protected as a Confidence or Secret

6. The extent to which the lawyer may disclose the client's fraud thus depends upon whether the information that would be disclosed is protected as a confidence or secret. Under DR 4-101(A), a confidence is information protected by the attorney-client privilege under applicable law. Determining whether information is protected by the attorney-client privilege is a

question of law that is beyond the scope of our jurisdiction. *See* CPLR 4503.

7. A secret is any information gained by the lawyer in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. Whatever the conclusion with respect to the attorney-client privilege, either the fact of the felony conviction or the fact that the client has committed perjury would qualify as "secrets" under the Code.

Exceptions to Protection as Confidences and Secrets: DR 4-101(C)(3)

8. DR 4-101(C) contains a number of exceptions to the lawyer's duty of confidentiality, including DR 4-101(C)(3) and (5). DR 4-101(C)(3) permits a lawyer to reveal the client's intention to commit a crime and the information necessary to prevent the crime. It does not specifically apply to frauds, unless the fraud itself constitutes a crime. It appears that, because the lawyer did not know of the client's intention to misrepresent the client's status, but only learned of it after its occurrence, the client's fraud is now a past fraud and DR 4-101(C)(3) is inapplicable.[2]

Exceptions to Protection as Confidences and Secrets: DR 4-101(C)(5)

9. Until 1990, the rule in New York was that if the client refused to correct a fraud or to authorize the lawyer to do so, the lawyer was prohibited from disclosing the fraud, and was required either to stand by silently or to withdraw from the representation under DR 2-110(C)(1)(g) (lawyer may [but is not required] to withdraw when the client has used the lawyer's services to perpetrate a crime or fraud).

10. In 1990, DR 4-101(C)(5) was added to the Code. Under DR 4-101(C)(5), a lawyer may reveal confidences or secrets of the client to the extent "implicit in withdrawing a written or oral opinion or representation previously given by the lawyer and believed by the lawyer still to be relied upon by a third person where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud."

11. By signing the client's papers in accordance with Part 130, the lawyer has made a representation to the Surrogate's Court. We have considered whether the Surrogate's Court is a person within the meaning of DR 4-101(C)(5). The term "person" is defined in Definition 3 of the Code as *including* "a corporation, an association, a trust, a partnership, and any other organization or legal entity." DR 7-102(B) clearly distinguishes between a "person" and a "tribunal," indicating that the intent of the drafters may have been to exclude tribunals from the ambit of the term "person." In addition, many Code provisions that use the term "person" or "third person" clearly are referring to clients, potential clients, witnesses and other participants in the legal process. *See*, *e.g.*, EC 1-1; EC 1-9. On the other hand, there are several Code provisions where a tribunal logically could be included within the ambit of the term. *See*, *e.g.*, EC 5-1; EC 7-10; DR 7-101(A)(1). We do not believe that the drafters of DR 4-101(C)(5) intended to exclude tribunals from the scope of the term "person" as used in this rule, and thus give lawyers less discretion to correct fraudulent acts toward tribunals than toward others. Accordingly, we believe that DR 4-101(C)(5) gives discretion to a lawyer to withdraw the lawyer's representation under Part 130, which requires the withdrawal of the client's affidavit. The lawyer is not authorized by DR 4-101(C)(5) to explain the reasons for the withdrawal of the affidavit, since that section authorizes the disclosure of client confidences and secrets only to the extent *implicit* in withdrawing the representation.

12. Our opinion in N.Y. State 781 (2004) implicitly reaches a similar conclusion that a tribunal is a third "person" within the meaning of DR 4-105(C). In that opinion, we discussed a matrimonial lawyer who learned that a financial statement submitted by the lawyer to family court contained a material omission. In order to submit the financial statement on behalf of the client, the lawyer had certified the accuracy of the statement to the court. We therefore found that the lawyer had made a misrepresentation to the court, and that DR 4-101(C)(5), permitting disclosure to the extent implicit in withdrawing such a certification, was applicable.

13. In N.Y. State 781, we went on to state that, since the lawyer was permitted to reveal the information under DR 4-101(C)(5), the information was not "protected as a confidence or secret" within the meaning of DR 7-102(B)(1), and the lawyer therefore was required to reveal the information to the court to the extent implicit in withdrawing the financial statement, if the client refused to do so. This conclusion was based on our opinion in N.Y. State 674 (1995), which also addressed which information is "protected" as a confidence or secret within the meaning of the last clause of DR 7-102(B)(1), and interpreted the phrase as meaning those confidences and secrets that must be preserved by DR 4-101. We therefore concluded that "where the lawyer is *permitted* to reveal a confidence or secret under DR 4-101(C), disclosure of the fraud is *mandatory* under DR 7-102(B)" (emphasis in original).[3]

14. We clarify that this broad language, which was quoted in N.Y. State 781, means only that the lawyer must reveal the fraud to the extent permitted by DR 4-101(C). DR 4-101(C)(5) authorizes disclosure of the

client's fraud only to the extent implicit in withdrawing the lawyer's representation under Part 130. Consequently, the facts surrounding the client's conduct are still protected as a confidence or secret. Since DR 7-102(B)(1) requires the lawyer to reveal the fraud "except when the information is protected as a confidence or secret," the lawyer cannot reveal the facts underlying the fraud, but only do what the lawyer is permitted to do—withdraw the lawyer's own certification.

15. In the case at hand, DR 4-101(C)(5) authorizes the lawyer, and therefore the lawyer is required, to withdraw the lawyer's certification. Because the lawyer is not authorized to disclose the nature of the falsehood, the lawyer is not authorized further to disclose the client's secret and therefore is not required to disclose it under DR 7-102(B)(1).

16. The fact that the client is the sole beneficiary named in the will and the decedent's only heir at law should not, in our opinion, affect the lawyer's decision in this matter. The executor has a responsibility to pay creditors of the estate, as well as estate taxes, if any. Consequently, the executor's duties are not only to the beneficiary. Public policy in this state has determined that faithful execution of the duties of executor should not be entrusted to a person convicted of a felony.

17. After withdrawing his or her certification, the lawyer must consider whether the lawyer must withdraw from representing the client. Withdrawal would be mandatory if the lawyer knows that continued employment would result in violation of a Disciplinary Rule. DR 2-110(B)(2). Such rules might include DR 7-102(A)(2), (3), (4), (5) or (7). In a matter before a tribunal, court permission may be required for withdrawal. DR 2-110(A).

Conclusion

18. Under DR 7-102(B), if a lawyer determines that a client has made false representations to the court in an affidavit, the lawyer must call upon the client to correct the information in the affidavit, and, if the client refuses, the lawyer must consider what additional steps to take. Where the lawyer has made a representation to the court regarding an affidavit or other filing, the lawyer must withdraw the representation. However, the lawyer is not authorized to disclose the client's confidences and secrets except to the extent implicit in such withdrawal. The client's disclosures to the lawyer do not lose their protection as confidences or secrets simply because the withdrawal of the lawyer's representation may imply to a court that there is a problem with the filing. The lawyer should also consider whether he or she may or must withdraw from representing the client under DR 2-110(B) or (C).

(9-05)

Endnotes

1. The oath of an executor includes the statement, "I am not ineligible to receive letters [testamentary]." Under the Rules of the Chief Administrator (22 N.Y.C.R.R. § 130-1.1A(b), by signing a paper, an attorney certifies that, to the best of the attorney's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the paper or the contentions therein are not frivolous as defined in Part 130. Under that Part, a paper is "frivolous" if, among other things, it asserts material factual statements that are false. In determining whether the conduct was frivolous, a court will consider whether or not the conduct was continued when its lack of factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party. 22 N.Y.C.R.R. § 130-1.1(c).
2. Academics and others have suggested that, even if a client's criminal or fraudulent conduct occurred in the past, it might constitute a continuing crime or fraud, and, thus, not constitute past conduct for purposes of DR 4-101(C)(3). Some have suggested that a fraud should be deemed continuing where it has future consequences. Some have suggested that the mere continuation of the harmful effect of an otherwise completed client wrong should not affect the determination of whether the client's conduct is past conduct, especially when disclosure of the future consequences necessarily would involve disclosure of the past conduct. Finally, others suggest a distinction based on whether the client disclosed the wrongful conduct for the purposes of seeking legal advice with respect to the conduct. *See generally* N.Y. City 2002-1.
3. N.Y. State 781 quoting N.Y. State 674. In N.Y. State 674, the information "protected" was the information that the client had committed perjury in an arbitration proceeding. We concluded that this information was a past fraud and that it could not be characterized as continuing or ongoing for purposes of the future crimes exception in DR 4-101(C)(3). Consequently, we held that, if the client refused to recant the perjury, the lawyer was not authorized to disclose it under DR 4-101(C)(3) and therefore was not required to disclose it under DR 7-102(B)(1). Nassau County 2003-1 is to a similar effect. In that opinion, a lawyer learned that his client had misrepresented indigence in order to obtain the lawyer's representation through an indigent lawyer program. Because the lawyer had not made any representations to the court, the Nassau County Bar Association Ethics Committee concluded that, if the client refused to rectify the fraud, the information was protected as a secret and the lawyer could not disclose it to the court. (Since continued representation, however, would result in a fraud on the program, the opinion went on to conclude that the lawyer must withdraw from the representation.)

Section Committees & Chairs

Committee on Business Law
Jeffrey M. Fetter
507 Plum Street, Suite 300
Syracuse, NY 13204

Committee on Family Law
Willard H. DaSilva
585 Stewart Avenue
Garden City, NY 11530

Committee on Membership and Member Service Issues
Frank G. D'Angelo
999 Franklin Avenue, Suite 100
Garden City, NY 11530

Committee on Professional Issues and Standards
Frank R. Rosiny
345 West 58th Street
New York, NY 10019

Committee on Proposed State Legislation
Thomas J. Mitchell
88 Pine Street
New York, NY 10005

Committee on Publications
Frank G. D'Angelo
999 Franklin Avenue, Suite 100
Garden City, NY 11530

Martin Minkowitz
180 Maiden Lane
New York, NY 10038

Committee on Real Estate Issues
Joel E. Abramson
60 East 42nd Street, Suite 953
New York, NY 10165

Vinson J. Friedman
100 Garden City Plaza
Garden City, NY 11530

Committee on Regulation of the Profession
Frank R. Rosiny
345 West 58th Street
New York, NY 10019

Committee on Trusts and Estates Law
Lynne S. Hilowitz
120 North Main Street, 4th Floor
New City, NY 10956

Paul J. O'Neill, Jr.
1065 Lexington Avenue
New York, NY 10021

Request for Articles

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

Martin Minkowitz, Esq.
180 Maiden Lane
New York, NY 10038
mminkowitz@stroock.com

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Editor

Martin Minkowitz
180 Maiden Lane
New York, NY 10038

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Section Officers

Chair
Linda U. Margolin
One Suffolk Square, Suite 300
Islandia, NY 11749

Chair-Elect
Harriette M. Steinberg
1400 Old Country Road, Suite 416
Westbury, NY 11590

Secretary
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1065 Lexington Avenue
New York, NY 10021

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Martin Minkowitz
180 Maiden Lane
New York, NY 10038

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NYSBA

General Practice Section
New York State Bar Association
One Elk Street
Albany, NY 12207-1002

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